MANUEL DAWSON, et al.,

Grievants,

v. Docket No. 97-33-010

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent,

and

RICHARD CRIGGER,

Intervenor.

D E C I S I O N

Grievants, Manuel Dawson, David Hanshaw, and Arnold Hughes, argue the McDowell County Board of Education ("MCBOE") incorrectly posted and filled the position of Director of Transportation ("DOT"). This grievance was denied at Level II and then appealed to Level IV. A Level IV hearing was held on October 8, 1997, in Oak Hill, for the convenience of the parties. (See footnote 1) This case became mature for decision on November 6, 1997, the deadline for the parties' Findings of Fact and Conclusions of Law. (See footnote 2)

Issues

Grievants in this case have similar, but at the same time somewhat different, arguments. All Grievants argue they are qualified for the position, and a non-employee should not be awarded the position. Further, Grievant Hughes avers the position posted as Director of Transportation is in reality a Supervisor of Transportation position, and it should have been correctly posted, as such, and employees allowed to take the qualifying competency test. (See footnote 3) Grievant Hughes argues that if he successfully completes the test, he would then be presumptively qualified, pursuant to W. Va. Code § 18A-4-8e, for the position. Grievant Hughes argues that if he is qualified, W. Va. Code § 18A-4-8b requires he, as the most senior applicant, be placed in the position. Grievant Hughes notes the preference for

regular employees stated in W. Va. Code § 18A-4-8b.

Grievants Hanshaw and Dawson first argue they are the most qualified applicants for the position. In the alternative, they also argue the position is misclassified and should be posted as a Supervisor of Transportation position, the Supervisor of Transportation test should be given, and, if more than one of the regular employees passes the test, the most qualified employee should be placed in the position.

MCBOE avers employees do not have the right to tell it what positions it shall post, the position of Director of Transportation is substantially different from the Supervisor of Transportation position identified in W. Va. Code § 18A-4-8, and none of the Grievants meet the qualifications for the position. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. In the Spring of 1996, Mr. Ernest Mullins resigned as MCBOE's Director of Transportation. The Job Description for this position was rewritten, and the position was posted as a Director of Transportation on July 18,1996.

2. The posting identified the primary responsibilities of the Director of Transportation position as:

1) Plan and supervise a safe, economical and effective system of transportation.

2) Determine qualifications and recommend bus operators for employment.

3) Maintain vehicles in the system.

4) Follow Director of Transportation job description.

L II Admin. Ex. 2.

3. W. Va. Code § 18A-4-8 defines a "Director or coordinator of services" as “personnel who are assigned to direct a department or division.”

4. W. Va. Code § 18A-4-8 defines a "Supervisor of transportation" as “qualified personnel employed to direct school transportation activities, properly and safely, and to supervise the maintenance and repair of vehicles, buses, and other mechanical and mobile

equipment used by the county school system."

5. Both the Supervisor of transportation and Director or coordinator of services titles are in pay grade H. 6. The qualifications listed in the posting for Director of Transportation were: **(See footnote 4)**

1) Valid WV CDL license.

2) Trained as a mechanic.

3) Experience in the evaluation & supervision of employees.

4) Reside in McDowell County if appointed.

5) Negative biannual tuberculin test.

6) Possess the skills necessary to fulfill the duties and responsibilities of the position.

L II Admin. Ex. 2.

7. Numerous MCBOE employees applied for the position. Intervenor Richard Crigger, who was not a MCBOE employee, also applied for the position.

8. Superintendent J. Kenneth Roberts interviewed all of the candidates. He asked all of them the same questions and reviewed all of the materials submitted for consideration. He did not rank the candidates in any way, nor did he keep any kind of matrix of their qualifications. Any notes he took of these interviews were thrown away.

9. Prior to filling the position, Dr. Roberts directed Ron Estep, Vocational Director for McDowell County Schools, to call SDOE and determine if there was a required test for the position of Director of Transportation. There is no test for this position, but there is a test for the Supervisor of Transportation position. (See n. 3, supra).

10. None of the applicants took the Supervisor of Transportation test because MCBOE did not view the position of Director of Transportation to be the same as a Supervisor of Transportation. 11. The qualifications Dr. Roberts thought were essential for the Director of Transportation position were: 1) a CDL license (one of the duties listed in the Job Description was willingness to drive a school bus in the case of an emergency); 2) experience in the evaluation and supervision of employees; 3) training and experience as a mechanic; 4) experience in providing staff development training; 5) experience working cooperatively with a

variety of agencies; including the Department of Highways, State Police, school principals, (See footnote 5) Emergency Services, and medical authorities; 6) knowledge of the county road system; and 7) experience in determining hazardous road conditions. 12. Not all of the qualifications that Dr. Roberts deemed essential were identified in the posting under qualifications.

13. The Job Description for the Director of Transportation is four pages long, and is divided into multiple sections. Dr. Roberts apparently drew what he considered the essential requirements for the position from certain statements in a variety of sections. For example, some of his requirements came from the "Duties" Section, some from the "Knowledge, Skills and Abilities" Section, some from the "Specific Qualifications" Section, and some from the "Areas of Responsibilities and Specific Duties" Section.

14. Although these areas deemed essential by Dr. Roberts are listed in the Job Description for the position of Director of Transportation, most of them are not listed as requiring "experience in" performing a task, but are identified as requiring the "ability to" perform a task. 15. Dr. Roberts found none of the MCBOE employees who applied for the position met the qualifications and recommended MCBOE hire Intervenor Crigger as the only candidate who did meet all the qualifications for the position.

16. At the time of his application, Intervenor Crigger had been employed by the Department of Highways for approximately fifteen years. He had worked as an Equipment Operator I, II, and III ("EO") from 1982-1989, and as a Foreman from 1990-1996. As an EO he had maintained roads in McDowell County by grading ditches, patching asphalt, controlling vegetation, and plowing and salting roads for snow and ice removal. As a Foreman, he led the crew at the Yukon Outpost who performed these duties. He occasionally arranged staff development presentations for his supervisees, such as "Safety at the Worksite" and "Attitudes toward Coworkers." Infrequently, Intervenor Crigger presented topics himself, such as "Safety in Flagging and Traffic Control." (See footnote 6) As a Foreman, he supervised approximately 12 workers during the year, with an additional 13 student employees in the summer months. During his employment with DOH, he occasionally drove workers to the worksite in a bus. In 1969-1971, prior to his work with DOH, Intervenor Crigger received mechanics training in the Army, and worked as an Army mechanic, and as the Specialist in

charge of three other mechanics.

17. Although Intervenor Crigger had a CDL license, he did not have a passenger endorsement and was not licensed to drive a school bus. Intervenor Crigger has no experience in public transportation, school transportation, the inspection of buses or othervehicles, the instruction of bus operators, planning or scheduling bus runs, or experience within any type of school setting.

18. Dr. Roberts knew the information recited in Findings of Fact 17 when he recommended Intervenor Crigger for the position.

19. Grievant Hughes is the most senior Grievant in this case. He has thirty years experience as a bus operator and has made runs over most of the county. He also worked several summers as a Mechanic Assistant. His evaluations are satisfactory. For many years he owned and ran a body shop where he also performed all types of mechanical work on gasoline powered vehicles. In this capacity, he hired, fired, and evaluated his employees and maintained his own financial records. Grievant Hughes has no experience in scheduling bus runs, scheduling or giving staff development presentations, determining road conditions, or working with other agencies in a supervisory capacity.

20. Grievant Dawson has twenty-six years of experience and is the second most senior Grievant. His evaluations are satisfactory, and he has made runs over most of the county. He received a vocational diploma from the McDowell County Vocational School in Auto Mechanics. For the last eight years with MCBOE, he has been a Chief bus operator in the War area, a position which is similar to a combination of two titles in W. Va Code § 18A-4-8: School bus supervisor/Lubrication man. In this position, he performs payroll duties, conducts written evaluations of approximately 12 regular and two substitute bus operators, obtains substitutes, fills extracurricular runs on a rotating basis, makes minor bus repairs, assigns trips, assists with scheduling, and completes multiple reports, such as mileage, gas usage, etc. From 1976 to 1985, Grievant Dawson owned a fleet of five coal trucks and hauled coal all over McDowell County. In his capacity as owner, hehired, fired, and evaluated his employees, as well as mechanically maintaining his fleet of trucks. He kept his own books and calculated his own taxes. Additionally, for approximately eight years, Grievant Dawson bought, priced, and stocked the produce for a market. Grievant Dawson has no experience in scheduling or

giving staff development presentations, determining road conditions, or working with other agencies in a supervisory position.

21. Grievant Hanshaw has 22 years of seniority as a bus operator with MCBOE, his evaluations are satisfactory, and he has made runs over most of the county. At one time, he was also the Parts Inventory Supervisor, but he did not supervise any employees in this position. Additionally, Grievant Hanshaw was trained as a machinist and worked in this position before he was hired by MCBOE. During the summers and on weekends, Grievant Hanshaw works as an EMT and has also received training on advanced life- saving/trauma techniques. Grievant Hanshaw has no experience in scheduling bus runs, scheduling or giving staff development presentations, evaluating and supervising employees, determining road conditions, or working with other agencies in a supervisory position.

22. MCBOE's position of Director of Transportation has never had any other title.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. The first issue to discuss is whether Grievants are correct in arguing the position is incorrectly posted as a Director of Transportation, and instead should be posted as a Supervisor of Transportation position. (See footnote 7) **This issue includes two arguments. First, whether Grievants can grieve the title MCBOE has given the position, and second, whether the position is correctly labeled.**

Contrary to MCBOE's argument, school service employees may contest the classification of another employee or the classification of a vacant position when it appears that they have been directly affected by this action. Hurley v. Mingo County Bd. of Educ.. Docket No. 96-19-265 (Apr. 28, 1997) (citing Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995)); See, e.g., Stevens v. Wayne County Bd. of Educ., Docket No. 50-86-294-1 (May 22, 1987). The position was posted as a Director of Transportation, and if the position were incorrectly posted, Grievants have suffered harm, because they were denied the opportunity

to take the Supervisor of Transportation test and demonstrate they were qualified for the position. Thus, Grievants have a right to grieve the title attached to the posting.

The next question is whether the position is correctly classified and posted. A comparison of the responsibilities identified in the Supervisor of Transportation definition in W. Va. Code § 18a-4-8, with the primary responsibilities of the Director of Transportation, reveals they are almost identical. W. Va. Code § 18A-4-8 defines the duties of a Supervisor of Transportation as "qualified personnel employed to direct schooltransportation activities, properly and safely, and to supervise the maintenance and repair of vehicles, buses, and other mechanical and mobile equipment used by the county school system." Clearly, this Code Section definition contemplates the employee in the position will be in charge of both the transportation of students, including the supervision of bus operators, as well as the repair and maintenance of vehicles. This same section defines a "Director or coordinator of services" as "personnel who are assigned to direct a department or division." The primary responsibilities of MCBOE's Director of Transportation position are to: 1) plan and supervise a safe, economical and effective system of transportation; 2) determine qualifications and recommend bus operators for employment; 3) maintain vehicles in the system; and 4) follow the Director of Transportation Job Description. The Director of Transportation Job Description identifies in more detail the many responsibilities which provide for the orderly, efficient, and safe running of the Transportation Department.

When asked to explain the differences between a Director of Transportation and a Supervisor of Transportation, Superintendent Roberts responded the position of a Supervisor is somewhat limited to a narrow area or a section of a particular department, while a Director looks at an entire department and all the many aspects it covers. Dr. Roberts also stated a supervisor cannot supervise supervisors. In essence, Dr. Roberts indicated that the position of Director of Transportation was much broader than the Supervisor of Transportation position. However, he was unable to identify any duties of the MCBOE Director of Transportation that would be outside the Code definition of Supervisor of Transportation. The American Heritage Dictionary (2d. Ed., 1991), defines a director as "one who supervises, controls, or manages" and a supervisor as "a person in charge of a particular department or unit, as in a governmental agency or a school system." Id. at 400 &

1221. The explanations given by Dr. Roberts, and the definitions cited from the dictionary call to mind the classic "Duck Anecdote". If it looks like a duck, and walks like a duck, and quacks like a duck; it must be a duck. Or as stated in Gosnell, supra, "the Grievance Board has consistently held that W. Va. Code §18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. (See footnote 8) **See, e.g., Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (March 25, 1994)." "Simply stated, the statute requires the board to call the position what it is." Hurley, supra (citing Gosnell, supra). MCBOE's argument that it has always had a Director of Transportation and had never had a Supervisor of Transportation raises form over substance. MCBOE may of course continue to call the position whatever it wants, but on the issue of posting and allowing employees to take the qualifying test, the position must be treated as a Supervisor of Transportation. It is an abuse of a board's discretion to classify a position incorrectly or to call the position by another title for reasons unrelated to the duties of the position. Hurley, supra; Gosnell, supra. The next issue is whether Intervenor Crigger is qualified for the position. The posting and Job Description require a CDL and Grievants pointed out Intervenor Crigger's CDL does not allow him to transport students. Further, the Job Description states the Director of Transportation's duties include a willingness to drive a school bus in an emergency. Thus, it is clear the type of CDL required by the successful applicant is one that allows the holder to drive a school bus.**

Although this requirement for a CDL is not identified or included in the definition of the Supervisor of Transportation, this Grievance Board has held a board of education may expand the qualifications found in the Code, so long as this expansion is consistent with the statutory definition. Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Brewer v. Mercer County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988). Thus, it is an acceptable expansion to require a Supervisor of Transportation to have a CDL as part of the qualifications for the position. However, this requirement must be interpreted in such a way as not to reach an absurd result. Clearly, the type of CDL required in the posting and the Job Description must be one that relates to the position, and one that allows the individual to drive a school bus. Otherwise, this expansion could not be allowed as it would be inconsistent with the statutory definition. See Mayle, supra.

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (W. Va. 1991). The question is whether Dr. Roberts' decision thatIntervenor Crigger was qualified for the Director of Transportation position when he did not possess a CDL that allowed him to drive a school bus was arbitrary and capricious.

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). Given the above-stated standard of review, the undersigned Administrative Law Judge finds Dr. Roberts' decision that Intervenor Crigger was qualified for the Director of Transportation position when he did not possess a CDL that allowed him to drive a school bus, was arbitrary and capricious. Dr. Roberts did not rely on factors that were to be considered and ignored an important aspect or factor that needed to be examined in assessing a Intervenor Crigger's qualifications. Accordingly, the undersigned Administrative Law Judge finds Intervenor Crigger was not qualified for the position as he did not possess the required CDL.

Next, Grievants argue they were qualified to fill the position whether they took or passed a competency test or not. Grievants point to their numerous achievements and duties, both with MCBOE and in other employment, and they argue Dr. Roberts'assessment that none of them were qualified was arbitrary and capricious. This argument requires the undersigned Administrative Law Judge to review the total hiring process, including the posting, interviews

and selection, and then to answer the question of whether it was arbitrary and capricious to find Grievants not qualified and Intervenor Crigger qualified. As the West Virginia Supreme Court of Appeals has stated, the position of Supervisor of Transportation position has a "a special degree of responsibility" as its primary purpose is to protect the welfare of the children the school system transports. Cox v. Bd. of Educ. of the County of Hampshire, 177 S.E.2d 289, 355 S.E.2d 365 (1987). See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995). Additionally, a county board of education has an implicit obligation "to supervise the system in a responsible and efficient manner" and to choose the candidate who, by virtue of experience, is more acquainted with "the administrative and managerial skills necessary to the operation of an efficient transportation system." Cox, supra at 370.

The undersigned Administrative Law Judge finds Dr. Roberts' decision that the Grievants were not qualified to be arbitrary and capricious for the following reasons. The qualifications listed in the posting for Director of Transportation were:

1) **Valid WV CDL license.**
2) **Trained as a mechanic.**
3) **Experience in the evaluation & supervision of employees.**
4) **Reside in McDowell County if appointed.**
5) **Negative biannual tuberculin test.**
6) **Possess the skills necessary to fulfill the duties and responsibilities of the position.**

L II Admin. Ex. 2.

Even a brief review indicates Grievant Hughs and Grievant Dawson possess qualifications 1-5. The sixth factor is more subjective and general, and is the type ofcriteria which can be used to select the most qualified candidate from those who meet the other qualifications. Nothing in Grievants' resumes indicate they did not possess the necessary skills to fulfill the required duties, although they many not have had experience in all areas. The same holds true for Intervenor Crigger. He did not have one of the required qualifications, a CDL, and he had not had experience in all the duties listed in the Job Description, as he had never work in any type of transportation system. These issues must call into question Dr. Roberts' assessment

that Intervenor Crigger was qualified and Grievants were not.

Next it is important to review the specific factors Dr. Roberts used to assess the candidates. The qualifications Dr. Roberts thought were essential for the Director of Transportation position were: 1) a CDL license (one of the duties listed in the Job Description was willingness to drive a school bus in the case of an emergency); 2) experience in the evaluation and supervision of employees; 3) training and experience as a mechanic; 4) experience in providing staff development training; 5) experience working cooperatively with a variety of agencies; including the Department of Highways, State Police, school principals, Emergency Services, and medical authorities; 6) knowledge of the county road system; and 7) experience in determining hazardous road conditions.

It is unclear from the record why Dr. Roberts selected these factors from the Job Description as essential and did not select others such as, (ability to or) experience in: 1) establishing and adjusting bus schedules, 2) assisting principal and bus operator with transportation discipline problems, and 3) planning, and supervising a safe, effective, and economical system of transportation for MCBOE. Although MCBOE has substantial discretion in hiring employees, it is to be guided by the Code definitions and should applyits own Job Description in making its decision. Dr. Roberts' change of the Job Description from "ability to" to "experience in" is a substantial modification and completely changes the requirements and duties of the Job Description. Additionally, Dr. Roberts' failure to include any of the duties relating to school transportation in the required qualifications appears odd. It is also unsettling that no matrix or any other system was devised to evaluate the candidates for the position. Again, although this is not required, it would have been helpful in understanding MCBOE's decision, and would lend support to its decision that none of MCBOE's employees were qualified and Intervenor Crigger was qualified.

Thus, the overall view of the selection process, and the finding that Grievants were not qualified and Intervenor Crigger was, appears arbitrary and capricious. It almost seems as if the school board's employees were playing with a stacked deck. How can none of the employees, including Grievants, be qualified when at least several clearly met the majority of the qualifications, and Intervenor Crigger be qualified when he also met only some of the qualifications? The real question that appeared to confront MCBOE was who was the most

qualified of all the candidates, when no one appeared to possess all the qualifications desired by MCBOE and identified in the Job Description.

Of course, MCBOE has the discretion and responsibility to assess all the candidates and to select the most qualified applicant. See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). However, this responsibility and discretion must be carried out in a way that fairly evaluates all candidates and their abilities utilizing the required qualifications and the Job Description. All applicants must be assessed using the same standards. The undersigned Administrative Law Judge finds MCBOE's decision that all current employeeapplicants were not qualified, vis a vis, the decision that Intervenor Crigger was qualified to be arbitrary and capricious as it did not rely on all the factors intended to be considered, ignored important aspects of the Job Description, and was contrary to the evidence. See Bedford, supra.

The next issue to examine is Grievant Hughes' argument he should be placed in the position pursuant to W. Va. Code § 18-4-8e, if he passes the Supervisor of Transportation test, even if the other two Grievants pass the test as well. This portion of the grievance involves a hypothetical situation, not yet ripe for decision. Any ruling on the merits of this issue would constitute an inappropriate advisory opinion contrary to the Grievance Board's established policy and precedent. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules 156 C.S.R. 1 § 4.20. See e.g., Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35- 229/239 (Nov. 27, 1991); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989); Friend v. Nicholas County Bd. of Educ., Docket No. 35-88-053-4 (Apr. 28, 1988).

However, since it is quite likely that this question will be raised given the above- stated abilities and qualifications of the Grievants, the undersigned Administrative Law Judge directs the parties to review the following cases for guidance: Ohio County Board of Education, 193 W. Va. 600, 457 S.E.2d 537 (1995); Hyre v. Upshur County Board of Education, 412 S.E.2d 265 (W. Va. 1991); Cox v. Board of Education of County of Hampshire, 355 S.E. 2d 365 (W. Va. 1987); Sargent v. Cabell County Board of Education, Docket No. 96-06-090 (May 2, 1996), rev'd Kanawha County Cir. Court. Civil Action No.96-AA-78 (Apr. 24, 1998); and

Bowman v. Marion County Board of Education, Docket No. 95-24-003/007 (Oct. 10, 1995),rev'd, Kanawha County Cir. Court. Civil Action No. 95-AA- 257/277 (July 17, 1997), ref'd W. Va. Supreme Court of Appeals (Feb. 25, 1997). The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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. "The Grievance Board has consistently held that W. Va. Code §18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. See, e.g., Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (March 25, 1994)." Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995).

3. "[W. Va. Code § 18A-4-8] requires the board to call the position what it is." Hurley v. Mingo County Bd. of Educ., Docket No. 96-19-265 (Apr. 28, 1997)(citing Gosnell, supra).

4. It is an abuse of a board's discretion to classify a position incorrectly or to call the position by another title for reasons unrelated to the duties of the position. Gosnell, supra; See W. Va. Code § 18A-4-8. 5. A board may expand the qualifications for a position found in W. Va. Code § 18-4-8, so long as this expansion is consistent with the statutory definition. Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Brewer v. Mercer County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988).

6. MCBOE may require its Supervisor of Transportation to have a CDL as part of the requirements for the position. The type of CDL required in the posting and the Job Description must be one that relates to the Supervisor of Transportation position, and one that allows the individual to drive a school bus. Otherwise, this expansion could not be included as it would be inconsistent with the statutory definition. Mayle, supra.

7. County boards of education have substantial discretion in matters relating to hiring,

assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

8. Dr. Roberts' decision that Intervenor Crigger was qualified when he did not possess a CDL that allowed him to drive a school bus, was arbitrary and capricious.

9. MCBOE's overall decision that all the employee applicants, including Grievants, were not qualified, while at the same time finding Intervenor Crigger was qualified was arbitrary and capricious, given the specific facts of this case.

10. The portion of the grievance involving whether Grievant Hughes should be placed in the position if he passes the test is a hypothetical situation, not yet ripe for decision, thus, any ruling on the merits of this issue would constitute an inappropriateadvisory opinion contrary to our established policy and precedent. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules 156 C.S.R. 1 § 4.18. (1996). See e.g., Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989); Friend v. Nicholas County Bd. of Educ., Docket No. 35-88-053-4 (Apr. 28, 1988).

Accordingly this grievance is GRANTED, in part, and DENIED, in part. MCBOE is directed to give Grievants Hughes, Dawson, and Hanshaw the required eight hour in- service training (See footnote 9) **as discussed in W. Va. Code § 18A-4-8e, and then allow them to take the Supervisor of Transportation test. If only one of the Grievants passes this test, he is to be instated into the position with back pay, interest, seniority, and any other benefits to make him whole. If two or more of Grievants pass this test, MCBOE is to then choose the most qualified candidate from the employees passing the test.**

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 29, 1998

Footnote: 1

At this hearing, Attorney Robert Blair represented MCBOE, Attorney John Roush represented Grievant Hughes, Attorney Dennise Smith represented Grievant Hanshaw, and Attorney Michael Turner represented Grievant Dawson.

Footnote: 2

At one time, there were many more Grievants involved in this case, and due to this large number, scheduling was a problem. Additionally, this case was held in abeyance for a period of time so that Mr. Roush, the majority of the Grievants' attorney at the time, could receive clarification on the issue of representing multiple clients.

Footnote: 3

There is a State Department of Education ("SDOE") test developed for the Supervisor of Transportation, but there is no test for the general category of "Director or coordinator of services" under which this position was posted. See W. Va. Code § 18A-4- 8e.

Footnote: 4

New applicants are required to possess a high school diploma pursuant to W. Va. Code § 18A-2-5, but this requirement was not identified in the posting. In his resume, Intervenor Crigger stated he had a high school diploma, but it was revealed during testimony that he had obtained a GED in the service. Of course, a GED meets the requirement.

Footnote: 5

Although this group is not an agency, Dr. Roberts felt successful interaction with these administrators was essential.

Footnote: 6

This information was gleaned from the evidence presented by Intervenor Crigger at the Level IV hearing. Intervenor Crigger had a difficult time remembering the number, types, and length of the programs he presented

or planned.

Footnote: 7

It does not appear Grievants expect MCBOE to change the job title, only that the position should be viewed as the Supervisor of Transportation Code position, and MCBOE be required to administer the SDOE test.

Footnote: 8

A board of education may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate the position entirely. Hambrick v. Mercer County Bd. of Educ., Docket No. 94-27-293 (Sept. 20, 1994); Cox v. Bd. of Education, 351 S.E.2d 58 (W. Va. 1986). Such actions are typically taken when an employee vacates a post, and the board sees a need to impose additional duties on the position. This newly-defined position is then properly identified per Code §18A-4-8 and posted.

Footnote: 9

The parties are directed to review the case of Quintrell v. Lincoln County Board of Education, Docket No. 95-22-051 (Aug. 31, 1995) to set the appropriate parameters for this in-service training.