LINDA MEADE,

Grievant,

v. **Docket No. 99-29-394**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

DONNIE BAISDEN,

Intervenor.

D E C I S I O N

Linda Meade (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 select her for the Custodian III position at Dingess Grade School (DGS). Intervenor Donnie Baisden (Intervenor) was selected for the position. This grievance was denied at Level I on August 19, 1999. Following a Level II hearing on September 2, 1999, the grievance was denied by the Superintendent's designee, William C. Totten, on September 17, 1999. At Level II, Grievant was represented by Sidney Fragale of the West Virginia Federation of Teachers, MCBE was represented by Administrative Assistant David Temple, and Intervenor was represented by Anita Mitter of the West Virginia Education Association. Grievant apparently waived Level III as authorized by W. Va. Code § 18-29- 4(c). The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels. The parties were given until October 29, 1999, tosubmit proposed findings of fact and conclusions of law, (See footnote 1) MCBE did so, and this grievance became mature for decision

on that date. The facts in this matter are undisputed. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is a Custodian III employed by MCBE.

2. 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 Custodians assigned to DGS were required to have such a certificate. Due to an illness in her family, Grievant could not attend this course.

3. DGS obtains its water from its own well, rather than from a public water utility. Therefore, DGS is considered to be operating a public water system under W. Va. Code § 16-1-7.

4. The West Virginia Department of Health and Human Resources categorizes the water system at DGS as a Class 1D public water supply.

5. Such a system requires an operator with a Class 1D certificate.

6. On July 23, 1999, MCBE posted a vacant service personnel position for a Custodian III at DGS. The posting erroneously failed to specify “Water Certification Required."

7. Grievant, who has more seniority than Intervenor, but who did not hold watercertification, applied for the position.

8. On August 10, 1999, MCBE reposted the vacant DGS Custodian III position, correctly specifying “Water Certification Required."

9. Grievant and Intervenor timely applied for the position. Intervenor held a current Class 1D certificate as a Public Water Supply Operator.

10. MCBE selected Intervenor to fill the position.

DISCUSSION

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

Grievant contests the failure of MCBE to select her for the Custodian III position at DGS. As relief, she seeks instatement to the position and reimbursement for mileage costs she would not have incurred had she received the position. However, DGS's water supply system requires an operator with a Class 1D certificate, and Grievant did not hold such a certificate. Legislative Rules of the W. Va. Div. of Health, 64 C.S.R. 4 §§ 1 et seq. (1989).

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 position because 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 Grievant's claim appears to be that MCBE improperly added a certificate 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 III position which adds to the requirements contained in the classification title. Skills required by a board of education for an applicant to qualify for a position must be included in the posting. Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990); Wall v. Putnam County Bd. of Educ., Docket No. 89-40-664 (July 10, 1990). Although the purpose of job posting requirements is undermined if a board of education imposes unreasonable requirements, Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 22, 1990), it is clear to the undersigned that did not happen here.

W. Va. Code § 18A-4-8 provides that a "Custodian III" is a person "employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs."

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." Accordingly, unless MCBE was authorized to expand the requirements for Custodian III at DGS by requiring thesuccessful applicant to possess a Class 1D public water supply operator's certificate, Grievant is entitled to the position at issue because of her

greater seniority, 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). 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. Hancock County Bd. of Educ. v. Hawken, No. 25818 (July 12, 1999); 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).

In the light of this authority, the undersigned concludes that the operation of DGS's water plant is generally consistent with the definition for Custodian III in W. Va. Code §18A-4-8; that MCBE presented convincing evidence that a Class 1D certificate is required by law to operate such a plant; and that MCBE established that the rural location of DGS makes substitute Custodians hard to secure, so that each of its Custodians must be prepared to operate its water system. Thus, in the circumstances presented in this grievance, MCBE had a reasonable basis for requiring a Custodian III at DGS to hold a Class 1D public water supply operator's certificate. Snell v. Mingo County Bd. of Educ., Docket No. 97-29-154 (August 13, 1997).

The posting at issue contained a requirement that the successful applicant have the required certificate at the time he or she entered into the duties of the position. Although MCBE could have posted the position to permit 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). It is also noted that, although MCBE was not required to provide Grievant notice of the opportunity to take training to obtain certification, or advance notice that the minimum qualifications for certain Custodian positions would require certification, it did so. See Rose v. Braxton County Bd. of Educ., Docket No. 95-04-521 (Sept. 30, 1996).

Accordingly, Grievant has failed to prove, by a preponderance of the evidence, that MCBE's selection of Intervenor for the Custodian III position at DGS was arbitrary andcapricious, Dillon, supra, or in violation of any law, rule or regulation.

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 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 III 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 III position as of the time the posting closed, MCBE did not abuse its discretion by awarding the position to Intervenor, a less senior 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 III position at Dingess Grade 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 and State Employees Grievance Board nor any of its Administrative Law Judges is a party to 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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated November 16, 1999

Footnote: 1

This grievance was transferred, for administrative purposes, to the undersigned administrative law judge, on October 14, 1999.