**CHARLES GORDON,**

**Grievant,**

**v.** **Docket No. 01-34-502**

**NICHOLAS COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**BERNARD LINDSEY,**

**Intervenor.**

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

Grievant, Charles Gordon, filed this grievance against his employer, the Nicholas County Board of Education ("NBOE") on or about July 11, 2001. The statement of grievance reads:

> Grievant, a regularly employed custodian/general maintenance employee, applied to fill a posted long term vacancy for a “Director of Maintenance”. Bernard Lindsey, the successful applicant, was placed into the position without passing the appropriate state competency test. Grievant contends that Respondent made the following errors: (a) the position was improperly posted as “Director of Maintenance” rather than “Supervisor of Maintenance” in violation of West Virginia Code §§18A-2-5, 18A-4-8 & 18A-4-8b; (b) Respondent failed to require Mr. Lindsey to take the competency test and failed to offer Grievant the opportunity to take said test in violation of West Virginia Code §18A-4-8e.

As relief Grievant sought:

> (a) the opportunity for all applicants for the position in question to have the opportunity to take the “Supervisor of Maintenance” test; (b) if Grievant is the most senior applicant to pass the test he seeks instatement into the position; (c) compensation for any and all wages, seniority, and all benefits (pecuniary or non-pecuniary) lost as a result of the failure of Respondent to employ Grievant retroactive to the date Mr. Lindsey assumed the position; and (d) interest on any sums to which he is entitled. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at the Level II hearing, and the stipulations of fact agreed to by the parties at Level IV.

## FINDINGS OF FACT

1. Grievant is employed by NBOE in the Custodian III/General Maintenance classification. He has been an employee since August 28, 1980. He has not acted as a supervisor during his employment with NBOE.

2. NBOE's Director of Maintenance took a medical leave of absence in 2001.

3. On June 19, 2001, NBOE posted the Director of Maintenance position as a long-term temporary position. A job description was attached to the posting. The job description lists the responsibilities of the position as:

LEADERSHIP:

1 1. Keeps superintendent and his designee informed of preventive maintenance and repairs.

2 2. Keeps informed of new maintenance techniques.

3 3. Assists in recruitment and assignment of maintenance employees.

4 4. Organizes and conducts custodial in-service.

5 5. Performs other duties and responsibilities as assigned by Superintendent.

6 6. Attends meetings, conferences and other programs for the purpose of acquiring new information concerning products, procedures and technology that will

benefit local maintenance efforts.

PRODUCTION:

1 1. Inventories and requisitions maintenance and repair supplies.

2 2. Delivers and unloads supplies, fuel and equipment as assigned.

3 3. Performs general labor duties when assigned (electrical, mechanical, carpentry, masonry, plumbing, etc.)

4 4. Maintains all records: work orders, purchases, contracted services, time sheets and other documents generated within the department.

5 5. Coordinates bidding, quotations, contract prices and development of related specifications for maintenance and custodial supplies.

6 6. Assists in Maintenance Department budget development.

SUPERVISION:

1 1. Directs the upkeep of buildings, grounds and shops.

2 2.
Issues instructions to subordinates and supervise[s] duties relating to cleaning, repairs and maintenance of all structures, grounds, mechanical and electrical equipment.

3 3.
Works cooperatively with school personnel.

4 4.
Considers health and safety of students and personnel when performing duties.

5 5.
Is aware of fire, health and safety factors that affect the educational program.

6 6.
Works cooperatively with administrators, supervisors and other personnel.

7 7.
Coordinates in-service training programs for maintenance and custodial personnel.

8 8.
Monitors monthly financial statement for Maintenance Department.

4. Bernard Lindsey and Grievant applied for the position, as did two other employees, and one non-employee.

5. Mr. Lindsey has been employed by NBOE as the Director of Transportation since he began his employment on July 10, 1980. He has more seniority with NBOE than Grievant, and he has never held the “Supervisor of Maintenance” title. 6. NBOE did not offer any of the applicants the opportunity to take the state competency test for Director or Coordinator, or for Supervisor of Maintenance.

7. Mr. Lindsey was the successful applicant for the position, and began serving in the position on July 3, 2001.

8. In his position as Director of Transportation, Mr. Lindsey supervised all county bus operators and mechanics, and one secretary. Mr. Lindsey has organized and conducted in-service training for the bus operators, and administered tests. He attended meetings, conferences, and other programs for the purpose of acquiring new information concerning the products, procedures and technology related to transportation. He was responsible for inventory, requisitioning supplies, for maintaining all records in the Transportation Department, and assisting in preparing the budget for the department. He coordinated bidding and developed specifications for materials and supplies.

9. Grievant has had good evaluations of his performance with NBOE for three years. Mr. Lindsey's evaluations have been satisfactory and above.

10. Grievant is a high school graduate. He served in the United States Navy for 20 years, where he was a chief electronics technician. While in the Navy he graduated from the Electronics Technician School, Naval instructor training, and the air conditioning and refrigeration school. He was a Naval instructor at the air conditioning and refrigeration school for two years, and he acted as a supervisor.

11. Prior to the posting of the position which gave rise to the grievance, Grievant passed the state competency test in the classification categories of plumber and heating and air conditioning mechanic.

## DISCUSSION

Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996). W. Va. Code §18A-4-8b requires school service personnel positions to be filled on the basis of seniority, evaluations and qualifications. That Code § states:

> Qualifications shall mean that the applicant holds the 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 [§ 18A-4-8] of this article, that relates to the promotion or vacancy.

Intervenor held the title Director of Transportation. The posted position was Director of Maintenance.

Neither of these job titles is listed in the Code; rather, the Code defines "Director or coordinator of services," as "personnel who are assigned to direct a department or division." W. Va. Code §18A-4-8. Respondent argued Intervenor held the title, and as the most senior applicant holding the title, with satisfactory evaluations, was entitled to be placed in the position.

Grievant argued the posted position was not truly a "Director" position, but rather was a "Supervisor of Maintenance," and should have been posted as such. Thus, according to Grievant's theory, Intervenor did not hold the title, and a state competency test should have been administered to the applicants. Grievant made it clear that he was not arguing his qualifications for the job were better than Intervenor's.

W. Va. Code § 18A-4-8 defines "Supervisor of maintenance" as:

> skilled personnel not defined as professional personnel or professional educators as in section one [§ 18A-1-1], article one of this chapter. The responsibilities would include directing the upkeep of buildings and shops, issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures and mechanical and electrical equipment of a board;

The Director of Maintenance job description specifically lists the duties found above. However, it also lists recruitment of personnel, working with the superintendent and keeping him informed, organizing and conducting in-service training, attending meetings and conferences to stay current, maintaining inventory, maintaining department records, coordinating bidding and developing specifications, and budgetary and financial monitoringduties. Respondent did not offer any explanation for its conclusion that the position was a "Director" position, rather than a "Supervisor" position. The undersigned concludes that the posted position is more than a supervisor position which would direct upkeep of buildings and tell subordinates what to do on a daily basis. The posted position, while including supervisory functions, includes the broader, more responsible task of "direct[ing] a department or division," and is properly classified as a "Director of Maintenance." (See footnote 2) To hold otherwise would be to ignore the statutory definition of "Director," and could well serve to penalize employees in smaller counties which do not need, and perhaps cannot afford, both a Director of the maintenance department and a Supervisor of Maintenance, and have included Supervisor duties in the department Director position.

Grievant also appears to argue that, even if the posted position is a "Director" position, Intervenor

was not a Director of Maintenance, and should not have been deemed qualified for that position. This Grievance Board has already addressed this issue and rejected Grievant's argument.

> W.Va. Code §18A-4-8b is clear in its mandate that applicants for a school service personnel position who hold the pertinent classification must be given preference in the selection process by which the position is filled. A Director/Coordinator of Services must be afforded the preference regardless of the area of "Services" in which he is or she is then engaged.

Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995).

The following Conclusions of Law support the Decision reached.

**CONCLUSIONS OF LAW**

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996). 2. "'Director or coordinator of services' means personnel who are assigned to direct a department or division." W. Va. Code §18A-4-8.

3. W. Va. Code § 18A-4-8 defines “Supervisor of maintenance” as:

> skilled personnel not defined as professional personnel or professional educators as in section one [§ 18A-1-1], article one of this chapter. The responsibilities would include directing the upkeep of buildings and shops, issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures and mechanical and electrical equipment of a board;

4. NBOE properly posted the position at issue as a Director of Maintenance, as the position is responsible for directing the department.

5.

> W.Va. Code §18A-4-8b is clear in its mandate that applicants for a school service personnel position who hold the pertinent classification must be given preference in the selection process by which the position is filled. A Director/Coordinator of Services must be afforded the preference regardless of the area of "Services" in which he is or she is then engaged.

Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: January 9, 2002**

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*Footnote: 1*

*The grievance was denied at Level I on July 23, 2001, and Grievant appealed to Level II on July 26, 2001. A Level II hearing was held on August 13, 2001, and a decision denying the grievance was issued on September 5, 2001. Grievant waived Level III, appealing to Level IV on September 13, 2001. This grievance was set for hearing in the Grievance Board's Beckley office for October 25, 2001. Grievant and Respondent appeared for the hearing, and the parties then agreed to submit this grievance for decision based upon the record developed at Level II, supplemented by stipulations of fact agreed to by Grievant and Respondent on the record as being factually correct, although Respondent objected to two of the stipulations as being irrelevant. Intervenor's representative was contacted by telephone and agreed to the stipulations as being factual as well, but also questioned the relevancy of two of these. Grievant was represented by John Everett Roush, Esquire, Respondent was represented by Erwin L. Conrad, Esquire, and Intervenor was represented by John Estep at Level II and Rosemary Jenkins at Level IV. This matter became mature for decision on November 28, 2001, upon receipt of the last of the parties' written arguments.*

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*Footnote: 2*

*This case may be distinguished from Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-010 (May 29, 1998), where the administrative law judge found the primary responsibilities of the "Director of Transportation," to be "almost identical" to those listed in the "Supervisor of Transportation" definition.*