NANCY MINNEY,

Grievant,

v. **Docket No. 03-11-305**

GILMER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Nancy Minney ("Grievant") initiated this proceeding on June 30, 2003, alleging she should have been selected to fill the position of Food Service/Transportation Supervisor. She seeks instatement to the position, with back pay, benefits and interest. The grievance was denied at level one on July 7, 2003, and, after a hearing conducted on August 8, 2003, it was denied in a level two decision dated September 8, 2003. Grievant appealed to level four on October 2, 2003. A hearing was held in Elkins, West Virginia, on December 8, 2003. Grievant was represented by John Roush, counsel for the School Service Personnel Association, and Respondent was represented by counsel, Gregory Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 6, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been regularly employed by Respondent Gilmer County Board of Education ("GCBOE") since 1999 as a secretary. 2. In the spring of 2003, Grievant was reduced in force and placed on the preferred recall list.

3. On June 23, 2003, Respondent posted a vacancy for the position "Food Service/Transportation Supervisor with clerical duties for Maintenance." The job duties were described in the posting as:

_ Compile, maintain, and submit all relevant reports

- Responsible for payroll procedures for food service and transportation

- Responsible for clerical duties i.e. purchase orders for food service, transportation and maintenance

- Plan, coordinate, and provide inservice training for all service personnel consulting the service personnel staff development council

- Modified work schedule to assure coverage of transportation schedule w/worksite at the transportation department daily when school is in session from 3-5:30 p.m. and coordinate the work schedule of the mechanics to cover the 6:30-8:30 a.m. schedule for safety reasons

- Any other duties assigned by the Superintendent

4. Grievant applied for the posted position, along with Michael Tice, who had not previously been employed by GCBOE. (See footnote 1)

5. Neither Grievant nor Mr. Tice held any of the classifications set forth in the posting, but they were not given competency testing.

6. Respondent selected Mr. Tice to fill the position, due to advice from the State Department of Education regarding the necessary qualifications for “school nutritiondirector.” Mr. Tice had extensive experience in the private sector in the food service industry.

7. Shortly after Mr. Tice was hired, the State Department advised GCBOE that Mr. Tice was not qualified to fill the position of “school nutrition director,” because he did not have a bachelor's degree. After being advised that he was not qualified to fill the position, Mr. Tice resigned.

8. After Mr. Tice resigned, Respondent elected to divide the duties of the Food Service/Transportation Supervisor position among several other employees. The food service duties

were assigned to a school principal as an extracurricular contract.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 contends that Respondent erred in the selection process for the position in question in several respects. First, it did not allow Grievant or any other applicant the opportunity to qualify for the classifications in the job title through competency testing. Second, Grievant argues that Respondent has confused the service personnel position of “food services supervisor” with the State Department-created position of “school nutrition director.” Accordingly, Grievant believes that GCBOE gave consideration to the wrong set of qualifications, and failed to follow the provisions of W. Va. Code § 18A-4-8b, which it is required to follow when filling service personnel positions. Respondent contends that itproperly considered the applicants' qualifications pursuant to the school nutrition director job description, that Grievant was not qualified, and that the position is no longer available.

The dispositive issue here is the fact that there is no longer a position entitled “Food Service/Transportation Supervisor,” and, even if Grievant were successful in proving her claims regarding alleged improprieties in the selection process, she could not be placed in a position which no longer exists. This case presents a situation similar to that presented in Cox v. Hampshire County Board of Education, 177 W. Va. 576, 355 S.E.2d 365 (1987). In that case, two Hampshire County school service employees challenged the appointment of a non-employee to the county school position of Assistant Transportation Director. However, during the grievance process, the nonemployee resigned as Assistant Transportation Director, and the Hampshire County Board eliminated the position, combining its duties with those of a professional administrator. In upholding the Board's elimination of the position, the Supreme Court emphasized that the management of a county school transportation system is for the welfare of the children, stating "it is within the discretion of the county board of education to place this responsibility with a professional employee who is,

presumably, more acquainted with the administrative and managerial skills necessary to the operation of an efficient transportation system." 177 W. Va. at 581, 355 S.E.2d at 370 (emphasis added).

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). It has been previously recognized by this Grievance Board that, when a position is vacated, it is within the board's discretion to determine whether or not the position is still needed. See Vance v. JeffersonCounty Bd. of Educ., Docket No. 02-19-123 (Sept. 20, 2002); Richardson v. Putnam County Bd. of Educ., Docket No. 97-40-189 (Oct. 15, 1997).

Accordingly, the undersigned finds that, despite any irregularities which may have occurred during the initial selection process for this position, Respondent acted within its discretion when it determined that the position should be divided among other employees. In cases in which an employee is successful in proving that the applicants' qualifications were not properly assessed, the appropriate remedy is to require the Board to reassess their qualifications, and place the appropriately qualified person in the position. See Mount v. Cabell County Bd. of Educ., Docket No. 01-06-028 (Mar. 7, 2001). In the instant case, this Grievance Board would be forced to require the Board to create a position which it has determined it does not need. The position which Grievant seeks no longer exists, so it is not possible to grant the relief requested.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). 3. Respondent did not abuse its discretion

when it determined that it no longer needed the position of Food Services/Transportation Supervisor with clerical duties for maintenance.

Accordingly, this grievance is **DENIED**.

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

Date: February 11, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not indicate whether any other individuals applied for the job.