**SCOTT LEISHMAN,**

**Grievant,**

**v. Docket No. 04-30-127**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

**Scott Leishman ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a custodian, filed a level one grievance on October 4, 2003, after he was not selected for a position of Truck Driver/Inventory Supervisor. For relief, Grievant seeks instatement with back pay, benefits, seniority, and interest, effective the date the position was filled. The grievance was denied at levels one and two. MCBE waived consideration at level three, and appeal was made to level four on April 2, 2004. A level four hearing was conducted at the Grievance Board's Westover office on June 28, 2003, to supplement the level two record. Grievant was represented by John E. Roush, Esq., of West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before July 29, 2004.**

**The following facts are derived from a preponderance of the evidence made part of the record.**

## Findings of Fact

**1. Grievant has been regularly employed by MCBE for approximately three years, and has held the position of Custodian III at South Middle School at all times pertinent to this decision. 2. In September 2003, MCBE posted a notice of vacancy for the position of Truck Driver/Inventory Supervisor. Qualifications for the position were passing the service personnel competency test for Inventory Supervisor, and a Commercial Drivers License (CDL).**

**3. The State Department of Education does not have a competency test for the classification of Truck Driver, but requires a CDL license to qualify for the position.**

**4. Grievant was the most senior applicant for the position. He had passed the competency test for Inventory Supervisor, but did not hold a CDL license.**

**5. The position was awarded to a substitute employee who met both qualifications for the position.**

**Discussion**

**As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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 relies upon W. Va. Code § 18A-4-8b(g) in support of his argument that MCBE cannot require a CDL licence for the position in question because MCBE does not currently own, or plan to purchase, any vehicles which require that licensure. In the alternative, Grievant argues that as the most senior applicant, he should have been awarded the position conditionally, allowing him the opportunity to obtain the CDL. MCBEasserts that it appropriately included the CDL requirement, pursuant to West Virginia State Board of Education criteria.**

**W. Va. Code §18A-4-8b provides, regarding the filling of school service personnel positions, that:**

**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, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.**

**Qualifications shall mean that the applicant holds a 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, article four of this chapter, that relates to the promotion or vacancy.**

**The Grievance Board has previously ruled that the position in question was properly awarded to the only applicant who had passed the competency test and held a CDL. Ammons**

**v. Monongalia County Bd. of Educ., Docket No. 04-30-006 (Feb. 23, 2004). As stated in Ammons, although W. Va. Code § 18A-4-8 does not include the CDL requirement in its definition of "truck driver," a board of education's authority to establish a job-related qualification for school service personnel position exceeding the minimum requirements for that classification title has been upheld both by this Grievance Board and the State Supreme Court. 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 Bowman v. Marion County Bd. of Educ., Docket Nos. 95-24-003/007 (Oct. 10, 1995), rev'd, Circuit Court of Kanawha County, Nos. 95-AA-257/277 (July 17, 1996). Grievant's reliance on the provision of W. Va. Code § 18A-4-8b(g) that "[j]ob postings may not require criteria which are not necessary for the successful performance of the job. . . ", is misplaced in this instance because it has been recognized that a board of education may require a CDL as a qualification for such positions, in order to comply with the federal Commercial Vehicle Safety Act of 1986 and W. Va. Code § 17E-1-1, et seq. See Grose/Adkins v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997). Finally, the State Department of Education requires CDL certification for the position of Truck Driver in lieu of a competency test for that classification.**

**Neither is Grievant entitled to the position conditionally upon obtaining the CDL. The Grievance Board has previously held that, because a CDL was a prerequisite to applying for the position of truck driver, the board of education correctly awarded the position to the only applicant who possessed the CDL, and it had no duty to allow other applicants the opportunity to obtain the license. Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993). Similarly, in Cyphers v. Marion County Board of Education, Docket No. 94-24-134 (Oct. 31, 1994), the grievant was the only applicant who had passed the required competency tests mandated under W. Va. Code §18A-4-8e and had a journeyman electrician license issued by the State Fire Marshall. The school board did not fill the position within twenty days after the posting, allowing the most senior applicant an opportunity to take and pass the state's first journeyman electrician test. Cyphers concluded that the school board violated 18A-4-8b in these circumstances. In accordance with the preceding discussion, the undersigned finds that MCBE correctly placed the only qualified applicant in the position**

**at issue, and it had no obligation to allow Grievant the opportunity to obtain a CDL in order to qualify for the position.**

**Consistent with the foregoing, the following conclusions of law are made.**

**Conclusions of Law**

**1. In a non-disciplinary matter, Grievant has the burden of proving his grievance 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. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code §18A-4-8b.**

**3. A commercial driver's license is required by the State Department of Education in lieu of a competency test for a position in the classification of Truck Driver, and a board of education is not obligated to allow applicants the opportunity to obtain such a license prior to filling a vacant position. See Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993); Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994).**

**4. Grievant did not have a commercial driver's license at the time the position at issue was filled, so he was not qualified to be selected.**

**Accordingly, this grievance is DENIED . Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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.**

**DATE: AUGUST 31, 2004** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**