DAVID PARSON,

Grievant,

v. **DOCKET NO. 97-27-115**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, David Parson, filed a grievance stating:

> I am a member of the asbestos team. Having more seniority than other members of the team, I have been denied the opportunity for extra duty assignments. Violation of WV Code 18A-4-16.

As relief, he seeks "[t]o be utilized when the team is assigned, and back pay for the jobs for which I should have been assigned."

The grievance was denied at the lower levels, and was submitted for a decision at Level IV on the record developed below. The record includes a transcript of the Level II hearing, and exhibits submitted at that hearing, as well as the grievance forms and decisions submitted at all levels. (See footnote 1)

ISSUES

1. Did the asbestos removal work performed by Grievant and the asbestos removal "team" constitute extra-duty assignments?
2. Was Respondent obligated to assign asbestos removal work on a rotating seniority basis?
3. Was Grievant entitled to perform the asbestos removal work at issue?

FINDINGS OF FACT

1 1. Grievant has been employed by Respondent for over sixteen years as a Plumber. (Tr. pp. 4-5.)

2 2. Grievant and four other service employees in various job titles are certified to perform asbestos removal duties. This group of five employees is known as the Asbestos Removal Team. Mr. Melvin Gregg is the supervising member of the Team. (Tr. pp. 5-7; 25-26.)

3 3. Respondent typically has two to three asbestos removal jobs per year, each requiring the services of two to three certified employees. During school year 1996-1997, all team members received overtime pay performing asbestos removal work when all were called out for roofing-related jobs. (Tr. pp. 5-6, and 15.)

4 4. Respondent has a bus in which asbestos removal equipment is stored and transported. One must possess a valid Commercial Driver's License (CDL) to drive the bus. (Tr. pp 13, 26-27.) Grievant is the only member of the asbestos removal team who does not have a valid CDL.

5 5. Randall MacMillan is employed by Respondent as a Sanitation Plant Operator and General Maintenance worker, and is a member of the Asbestos Removal Team. Mr. MacMillan has a valid CDL. Mr. MacMillan has less seniority than Grievant, and has been on the Respondent's Asbestos Removal Team for a shorter time than Grievant. (Tr. pp. 5-8.)

6 6. Respondent has no separate agreements or contracts with asbestos team members for their asbestos removal work. However, team members get paid their regular rate of pay, plus additionalhazardous duty pay, for their asbestos removal work. In addition, they get overtime pay for work in excess of their normal hours. (Tr. p 14-20; 23-24.)

7 7. During the 1996-1997 school year, an asbestos removal job came up at Spanishburg High School (Spanishburg). Mr. Charles E. (Eddie) Davis, Director of Maintenance, called Mr. Gregg to inform him of the need for asbestos removal. Mr. Gregg then unilaterally chose Mr. MacMillan to accompany him to Spanishburg on the bus to remove the asbestos. Mr. Gregg and Mr. MacMillan worked removing asbestos from 11:30 a.m. to sometime that same night. (Tr. p. 8.)

8 8. Grievant went to Spanishburg to inquire why he had not been offered the work. Mr. Gregg told him that Mr. MacMillan did not have other regular work to perform at the time, and that Mr. MacMillan had a CDL. (Tr. pp. 7 and 13.)

9 9. When the Maintenance Department has any extra duty assignments, Mr. Davis assigns the work by referring to a list of different "zones," determining who is working in that "zone," and what type of work is required. The jobs are not rotated on the basis of seniority. Similarly, asbestos removal work is not assigned on a rotating seniority basis, but assignments are left to Mr. Gregg's discretion. Asbestos removal work is never the subject of a job posting. (Tr. pp. 28-29.)

10 10. W. Va. Code §18A-4-8 sets forth the class titles of service personnel. There is no class title pertaining to asbestos removal.

DISCUSSION

The Level II decision correctly finds the asbestos removalwork at issue here is not covered by any extracurricular contract. (See footnote 2) However, Grievant argues that the asbestos removal work constitutes "extra-duty," which should be assigned on a rotational basis under W. Va. Code §18A-4-8b. Respondent counters that the asbestos removal work is within the duties of the regular class title. Respondent further argues that even the overtime work here is not "extra-duty" work.

W. Va. Code §18A-4-8b, paragraph six, defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." Asbestos removal work which is performed during employees' regularly scheduled work day may appear to constitute "extra-duty," because it is different from each employee's typical tasks, it requires special training and certification, and Respondent provides hazardous duty pay for the work. However, the issue does not turn on the fact that asbestos removal is clearly specialized work distinct from each employee's everyday tasks. "In order to find that a task involves an extra-duty assignment per §18A-4-8b, the name (or nature) of thetask is not nearly as important as the time in which the work is performed." Broughman v. Tyler County Bd. of Educ., Docket No. 94- 48-068 (Jan. 20, 1995) at 6, aff'd Cir. Ct. Kanawha County No. 95- AA-54 (Nov. 6, 1995). Accord Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997).

Broughman found that occasionally driving students on field trips during the bus driver's normal work day hours did not constitute "extra-duty" requiring additional compensation. There, the employer had a long-standing practice and a written policy requiring such work of all drivers, on a rotating basis. The additional driving became part of the bus operator's work day on those occasions when it was performed, and additional compensation was not required.

Broughman applies to the facts in this case. The asbestos removal work is a specialized duty, but it is still a part of the employee's regular employment. W. Va. Code §18A-4-8a(9) clearly allows Respondent to pay each member of the asbestos removal team his regular daily rate of pay. Additional compensation is not statutorily required, although Respondent here provides it in the form of hazardous duty pay. Thus, where asbestos removal work is performed during the employee's required work day, it does not constitute an "extra-duty" assignment.

To the extent that Respondent argues the overtime associated with asbestos removal work is not

"extra-duty," this argument is rejected. Any overtime work which is irregular, occurs periodically or occasionally, and is not governed by an extracurricular contract is an extra-duty assignment. Galloway v.Raleigh County Bd. of Educ., Docket No. 41-87-043-4 (June 24, 1987). The work performed removing asbestos is not regularly scheduled, but arises occasionally and somewhat unpredictably. The work is not governed by an extracurricular contract, in this instance. Cf. Jeffers v. Mason County Bd. of Educ., Docket No. 95- 26-553 (Aug. 22, 1996). The overtime asbestos removal work thus clearly meets the Galloway standard, as well as the statutory definition of "extra-duty assignment."

Respondent asserts that a valid CDL is required to perform asbestos removal work, as driving the bus is an integral part of the job. Thus, it argues, assigning the work according to ability to drive the bus is appropriate. Respondent also implies that it may assign asbestos removal work on the basis of each employee's regular class title, depending on the type of removal work to be performed. Grievant asserts that the job of asbestos removal is unrelated to driving a vehicle. Alternatively, Grievant asserts that the asbestos removal equipment could be transported in a truck, which Grievant could drive.

The rationale of using a team member who did not have much regular work pending at the time the Spanishburg project arose, and who could drive the bus as well as perform asbestos removal work is obvious. However, Respondent did not prove that such a CDL requirement has ever been a part of asbestos removal certification, or of one's eligibility to be part of Respondent's Asbestos Removal Team. As Grievant continues to be a member of the Asbestos RemovalTeam without a CDL, the "requirement" obviously does not exist. (See footnote 3)

Respondent's assertion that it may assign overtime asbestos removal work on the basis of the employee's regular job title must similarly be rejected. Respondent did not show that any special skills (other than asbestos removal certification) were required on the Spanishburg project, or indeed on any asbestos removal project. Even if it could prove that some specialized skills are desirable, Respondent simply may not choose to assign a Plumber in some instances, and a Carpenter in others. Extra-duty assignments are to made as follows:

> an employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments.

W. Va. Code §18A-4-8b. An alternative procedure may be utilized if it is approved by both the county board of education and two thirds of the employees within the particular classification category of employment. Id.

"The statute makes no provision for the allocation of overtime assignments which depend on an employee's site or job location. Rather[,] it states that seniority within a particular category of employment shall determine who receives first priority." Yoho v. Marshall County Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986) (employer unilaterally excluded a maintenance employee from county- wide extra-duty assignments, where he was not multiclassified likeother maintenance employees, and the employer believed that employee had a site-based maintenance employment). The same rationale applies here. Absent some alternative arrangement agreed to by a majority of the affected employees, Respondent is not free to use judgment, good or otherwise, in selecting among team members for performance of these jobs. As the overtime work is extra-duty work, Respondent is mandated to offer overtime in order of seniority, on a rotating basis, to the employees on the Asbestos Removal Team. (See footnote 4)

Grievant has failed to prove entitlement to any back pay, in this instance. He showed that he was more senior than Mr. MacMillan, who performed the Spanishburg work. However, he did not prove that he was more senior than any other member of the Asbestos Removal Team, or that he would have been entitled to the work on a rotating schedule. As he had already received some overtime work during the employment term, it may have been another employee's "turn" to take the overtime, had Respondent followed proper procedure. Consequently, Grievant's request for back pay must be denied as too speculative.

CONCLUSIONS OF LAW

1 1. W. Va. Code §18A-4-8b, paragraph six, defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

2 2. In determining whether work constitutes an "extra-duty assignment," "the name (or nature) of the task is not nearly as important as the time in which the work is performed." Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995) at 6, aff'd Cir. Ct. Kanawha County No. 95-AA-54 (Nov. 6, 1995). Accord Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29- 334

(Apr. 22, 1997).

3 3. Asbestos removal work performed for this Respondent during an employee's regularly required work hours does not constitute an "extra-duty" assignment.

4 4. Overtime work which is irregular, occurs periodically or occasionally, and is not governed by an extracurricular contract is an extra-duty assignment. Galloway v. Raleigh County Bd. of Educ., Docket No. 41-87-043-4 (June 24, 1987).

5 5. Extra-duty assignments are to be made as follows:

> an employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments.

W. Va. Code §18A-4-8b. An alternative procedure may be utilized if it is approved by both the county board of education and two thirds of the employees within the particular classification category of employment. Id.

6 6. No alternative procedure has been approved for assigningRespondent's overtime asbestos removal work.

7 7. Respondent may not assign overtime asbestos removal work on the basis of qualifications other than asbestos removal certification and rotating seniority. Whether the employee possesses a valid CDL or has any special expertise is irrelevant for these purposes. See Yoho v. Marshall County Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986).

8 8. Grievant failed to show that he was entitled to perform the overtime work on the Spanishburg project, on a rotating seniority basis.

Accordingly, this Grievance is **GRANTED IN PART**. The Respondent is hereby **ORDERED** to assign overtime asbestos removal work on a rotating seniority basis, in accordance with W. Va. Code §18A-4-8b.

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

Dated: August 26, 1997 _____

JENNIFER J. MEEKS, Administrative Law Judge

Footnote: 1

The matter became mature for decision on April 16, 1997, the deadline for the parties' submissions of proposed findings of fact and conclusions of law. It was reassigned for administrative reasons on August 6, 1997.

Footnote: 2

Extracurricular assignments include "any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. W. Va. Code §18A-4- 16a. Such positions must be posted and filled competitively in accordance with W. Va. Code §18A-4-8b. Browning, et al. v. Logan County Bd. of Educ., Docket No. 96-23-127 (May 28, 1997). An extracurricular assignment must be predicated upon a mutual agreement between the parties as to terms, hours and compensation, and must be a formal, written contract. Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-553 (Aug. 22, 1996); Miller v. Mason County Bd. of Educ., Docket No. 94-26-1106 (May 15, 1995.) A grievant has the right to refuse an extracurricular assignment without repercussion. W. Va. Code §18A-4-16(4).

Footnote: 3

Should Respondent choose to alter the requirements for eligibility for asbestos removal work, it must follow proper procedure in so doing.

Footnote: 4

Although Respondent did not explicitly argue the point, I find that, under the circumstances presented here, the Asbestos Removal Team must be viewed as constituting the "classification category of employment." Respondent here has created an Asbestos Removal Team consisting of members of several different class titles. The statutory provisions pertaining to paying service employees engaged in asbestos removal indicate that these employees may be treated specially, and as a group. The statutory language regarding extra-duty work and the precedent clearly mandate that the overtime work here be assigned as if it were performed under one classification category.