RON DEMPSEY,

Grievant,

v.

DOCKET NO. 98-10-357

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ron Dempsey, filed the following grievance against his employer, the Fayette County Board of Education ("Board"), on April 1, 1998:

> Grievant, a regularly employed custodian alleges that the use of professional employees and/or volunteers to perform custodial assignments violates West Virginia Code §18A-4-8 and §18A-4-8b. Grievant requests the utilization of regular custodians to perform such work as an extraduty assignment.

The grievance was denied by Grievant's immediate supervisor, Charles Garvin, on April 1, 1998, and a level two hearing was conducted on June 1, 1998. The grievance was again denied by Ray Carson, Grievance Evaluator, by decision dated June 12, 1998. Grievant appealed to level three, and a hearing was held on August 18, 1998. The Board denied the grievance by decision dated September 8, 1998. Grievant appealed to level four on September 17, 1998, and the parties agreed to submit the grievance on the record developed at the lower levels. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. The Board was represented by DouglasL. Kincaid, Director of Personnel, at levels two and three, and represented at level four by Erwin Conrad, Esq., Conrad & Clay.

SUMMARY OF EVIDENCE

Level Two Joint Exhibit

Ex. 1 - Grievance documents.

Level Two Board Exhibits

Ex. 1 -

Fayette County Board of Education Application for Facilities Use, dated March 13, 1998.

Ex. 2 -

Fayette County Board of Education Policy I-1: Use of School Facilities, revised December 23, 1987.

Level Three Joint Exhibits

Exs. 1-6 -

Grievance documents.

Level Three Board Exhibits

Ex. 1 -

August 14, 1998 memorandum from Ronald D. Wood, Director of Accounting, to Douglas L. Kincaid, Director of Personnel.

Ex. 2 -

Fayette County Board of Education Policy I-1: Use of School Facilities, revised December 23, 1987.

Ex. 3 -

Fayette County Board of Education Application for Facilities Use, dated March 13, 1998.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of Charles L. Garvin, III, and Terry Wayne Sizemore.

FINDINGS OF FACT

The material facts of this grievance are not in dispute. Grievant is a Custodian III assigned to Fayetteville High School, along with two other custodians. On March 13, 1998, Fayetteville High School Principal Charles L. Garvin, III, authorized the use of the school's gymnasium and auditorium by Cub Scout Pack 149 on Saturday March 14, 1998, from3:00 p.m. to 9:00 p.m. LII R. Ex. 2; LIII R. Ex. 3. As provided by Board Policy I-1 on Use of School Facilities, the Principal determined that custodial help would not be needed for that function. Terry Sizemore, a teacher, who is also a parent of a Cub Scout, was responsible for the building, and he and several other parents, including Pat Payne, who is a maintenance employee of the Board, cleaned up after the Cub Scout banquet on March 14, 1998.

For non-school activities that take place during the week, the issue of custodial help does not arise, because a custodian is present in the school on weeknights until 10:00 p.m. On weekends, however, no custodians are normally available. If the non-school group scheduled to use the facilities on a weekend includes an employee of the Board, Principal Garvin does not require custodial help for that function. If no Board employee is included in the non-school group, Principal Garvin will assign custodial help for that function.

DISCUSSION

Grievant alleges that Board Policy I-1 is in violation of W. Va. Code §§ 18A-4-8 and 18A-4-8b, by allowing the Principal to authorize non-custodial employees and/or volunteers to clean up the building after the Cub Scout banquet. Grievant alleges that these Code Sections mandate that custodians must be offered the opportunity, on a rotating basis, to work extra-duty assignments, and requests as relief that the Board Policy be rewritten to conform with the statutes. Grievant does not request any compensation as relief for the missed extra-duty assignment. The Board denies any wrongdoing and stands behind Board Policy I-1.

The Fayette County Board Policy I-1 states,

> If in the judgement of the school principal the services of a custodian are necessary to assist in the care and protection of the property while in use by a non-school group, the principal SHALL: (a) complete a “Non-School Agreement” form with the custodian; (b) secure a check from the sponsoring group (check to be made

> payable to the Fayette County Board of Education) to cover the hours worked times the custodian's current overtime rate plus 8%; and (c) submit a copy of the completed agreement form and the sponsor's check to the Director of Accounting Services, Fayette County Board of Education.

LII Board Ex. 2; LIII Board Ex. 3.

W. Va. Code § 18A-4-8 defines "Custodian III" as "personnel 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, with regard to extra-duty assignments, as follows:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty 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. . . For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

Grievant contends that authorizing an employee of the Board, who is a member of a non-school group, to be responsible for the group and the building, is equivalent to contracting out custodial services to that person and/or the group. Grievant alleges that it is illegal to contract out custodial services to persons or organizations other than Board- employed custodians. Grievant also points to a March 30,1987, State Superintendent's Opinion, which states that a county board of education can not contract with a cleaning company to manage the custodial work done for a county school system. See State Superintendent's Opinion, March 30, 1987. Further, Grievant points to a State Superintendent's Interpretation, dated February 21, 1986, which states that "'an employee of a State or local government may not volunteer to his agency services of the same type the employee is employed to perform.' This is because the employee is an unequal partner with the county board of education in the employment relationship." State Superintendent's Interpretation, February 21, 1986.

Grievant cites all of this authority to support his position that (1) the Board illegally contracted with the Cub Scout Pack to perform custodial duties rather than utilize Board- employed custodians; and in a convoluted argument, that (2) since the parent/employees "volunteered" to perform the custodian work, this was illegal, because it would be illegal for Grievant, a custodian, to "volunteer" to perform that same work.

Both of Grievant's arguments must fail. There is nothing in Code §§ 18A-4-8 or 18A-4-8b which requires a board of education to guarantee overtime work assignments to service personnel, nor is there anything which prevents a board of education from contracting out services. W. Va. Code § 18-5-5; Barnisky/Shafer v. Pocahontas County Bd. of Educ., Docket No. 93-38-027 (Nov. 22, 1993), citing Herald v. Board of Educ., 65 W. Va. 765, 65 S.E. 102 (1909).

Grievant points to the West Virginia Supreme Court of Appeals' holding in State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E.2d 176 (1996), tosupport his position that the Board cannot contract out services. This support is misplaced.
Boner held that the contractual scheme of employment for school personnel does not allow for the hiring of contract employees to perform full-time regular duties of school service personnel. Id. The duties performed by the Cub Scout volunteers were not full-time regular duties of the custodial staff employed by the Board.

This Grievance Board has held it is permissible for a county board of education to contract out services for jobs which could be considered “extra-duty” assignments within the definition of W. Va. Code § 18A-4-8b. Barnisky/Shafer, supra; Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994). In Moody, the board of education permitted volunteers to construct a deck outside a school's science building. The maintenance employees grieved, arguing that, because the work performed was that of a “Carpenter”, their classification, they should have received the assignment as part of their regular duties or as an extra-duty assignment. The Administrative Law Judge (“ALJ”) held that there is nothing in the law which prohibits a board of education from accepting volunteer services from members of the community to complete a project which if undertaken by the Board would have been assigned to service personnel. Further, the ALJ found that “service personnel employees may not compel a board of education to assign them any given project as part of their regular duties or as an extra-duty assignment when the work can be completed with volunteer labor and the service employees are not deprived of their regular work time or wages as a result.” Id. There are no distinguishing facts in this case which would make the above-cited law inapplicable.

CONCLUSIONS OF LAW

1. There is nothing in Code §§ 18A-4-8 or 18A-4-8b which requires a board of education to

guarantee overtime work assignments to service personnel, nor is there anything which prevents a board of education from contracting out services. W. Va. Code § 18-5-5; Barnisky/Shafer v. Pocahontas County Bd. of Educ., Docket No. 93-38-027 (Nov. 22, 1993), citing Herald v. Bd. of Educ., 65 W. Va. 765, 65 S.E. 102 (1909).

2. The contractual scheme of employment for school personnel does not allow for the hiring of contract employees to perform full-time regular duties of school service personnel. State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E. 2d 176 (W. Va. 1996). The duties performed by the Cub Scout volunteers were not full- time regular duties of the custodial staff employed by the Board.

3. This Grievance Board has held it is permissible for a county board of education to contract out services for jobs which could be considered “extra-duty” assignments within the definition of W. Va. Code § 18A-4-8b. Barnisky/Shafer, supra.

4. There is nothing in the law which prohibits a board of education from accepting volunteer services from members of the community to complete a project which if undertaken by the Board would have been assigned to service personnel. “Service personnel employees may not compel a board of education to assign them any given project as part of their regular duties or as an extra-duty assignment when the work can be completed with volunteer labor and the service employees are not deprived of their regular work time or wages as a result.” Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA- 117 (Oct. 7, 1994).

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 8, 1998