MALCOLM GOINS,

Grievant,

v. **Docket No. 02-27-317**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Malcolm Goins, filed this grievance against his employer, the Mercer County Board of Education ("MBOE"), on May 20, 2002. The statement of grievance reads:

> Grievant contends that the board of education improperly had an independent contractor to perform school service personnel duties that had previously been performed by substitute warehouse/truck drivers. The work was performed April 5, 8-12, 2002 and May 9-10, 2002. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b and 18A-4-15.

The stated relief sought was "(a) compensation for all lost wages and benefits, pecuniary and nonpecuniary and (b) interest for any sums to which he is entitled."

The following Findings of Fact are made based upon the evidence presented at Level II. (See footnote 1)

FINDINGS OF FACT

1. Grievant is employed by MBOE as a substitute warehouse clerk and truck driver.

2. In the Spring of 2000 and the Spring of 2001, Grievant assisted Delton Sparks, a regular employee of MBOE, and another substitute in moving textbooks from one floor of MBOE's warehouse to another floor.

3. Bill Blackwell's company was hired by MBOE to move textbooks and products in MBOE's warehouse, and install shelving, during spring break of 2002, April 8 through 12, and two days later in the Spring, May 9 and 10, 2002, when additional shelving was received. This required moving

several rows of products to a new location in the warehouse, moving shelves in the warehouse from one location to another, and moving about 5,000 textbooks to the new shelves where the products had been. MBOE needed to have this work performed while schools were closed and the products being moved would not be needed, and there would be no other activity in the warehouse. MBOE had not undertaken a project of this magnitude in prior years. Mr. Blackwell has his own business and is not an employee of MBOE. Grievant was not asked whether he would like to perform this task, but he was available at that time.

4. The spring break project could not be performed by substitute employees without supervision. No supervisor was working during spring break of 2002.

5. Mr. Sparks is classified as a textbook coordinator/inventory supervisor. One of his duties is to move textbooks. The spring break 2002 project was the type of work that would have fallen within Mr. Sparks duties, had it occurred during normal working hours, except that it could not be done by one person. Mr. Sparks was not required by his contract to work during spring break.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued he should have been allowed to retain the job of moving textbooks, as he had performed this task in the past, under W. Va. Code § 18A-4- 8(b)(c). Grievant further argued the job of moving textbooks was an extra-duty assignment, which should have been offered to regular employees in the classification title; and that as no regular employee was available to perform the assignment, it had to be given to a substitute. Finally, Grievant argued that independent contractors may not be used to perform the work of service personnel, citing Jones v. Braxton County Bd. of Educ., Docket No. 00-04-090 (July 28, 2000).

Respondent argued that the work performed by Mr. Blackwell was not work which was part of a regular employee's job, and accordingly, there was no regular employee absent who would have otherwise been performing the work, for whom Grievant could substitute. There was no vacancy. Respondent also argued it could hire independent contractors to perform work, noting it could hire an independent contractor to put a new roof on a building, even though it might have an employee on staff whose duties included roofing tasks.

"'A board of education is a quasi public corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education.' Herald v. Bd. of Educ., 65 W. Va. 765, 65 S.E. 102 (1909). Pursuant to W. Va. Code § 18-5-5 boards of education have the right to enter into contracts." Jones v. Braxton County Bd. of Educ., Docket No. 00-04-090 (July 28, 2000). However, "[t]he contractual scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time, regular dutiesof school service personnel positions. See, [State ex rel. Boner v. Kanawha County Board of Education, 197 W. Va. 176, 475 S.E.2d 176 (1996)]; Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997); Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10-357 (Dec. 8, 1998)." Jones, supra. Grievant admits, however, that in the case at hand, MBOE did not hire an independent contractor to perform duties which would otherwise require the employment of a full-time regular employee, which was the situation addressed in Jones. This was a short term project, completed primarily during spring break, when the regular employee who would have otherwise performed at least some of the work, was off work. Grievant refers to this work as an extra-duty assignment. Had Mr. Sparks been assigned any part of this task during spring break, it would have been overtime for him.

"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)." Dempsey supra. Dempsey specifically found that the holding in Boner supra, did not apply to situations where the work to be performed by the contract employees did not amount to "full-time regular duties of school service personnel." Respondent was not required by law to offer this assignment to its regular or substitute employees, and has presented a sound reason for its decision not to do so.

Given this conclusion, it is not necessary to address whether there is any statutory authority to employ Grievant to perform any extra-duty assignment in his capacity as a substitute employee. In support of his position that a substitute would be entitled to an extra-duty assignment, Grievant relied upon a footnote in Bays v. Putnam County Board of Education, Docket No. 95-40-096 (July 21,

1995). The issue in Bays was whether asubstitute could be placed on the extra-duty assignment rotation during the period he was filling in for a regular employee. Footnote one of that decision says that the issue of whether a substitute may be offered the opportunity to perform an extra-duty assignment if no regular employee is available is not affected by the ruling made in Bays; and indeed, this issue was not before the Administrative Law Judge. Grievant's reliance on Bays is misplaced, and the statutory provision for the employment of substitutes, W. Va. Code § 18A-4-15, does not clearly address this issue; but that issue is best left for another day.

As to Grievant's argument that he should have been allowed to “retain” the job of moving textbooks, pursuant to W. Va. Code § 18A-4-8(b)(c), this was not the same job Grievant had performed in the past, and the undersigned fails to see how any portion of this Code Section would be applicable to a substitute employee who had been employed to move textbooks as needed.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. “'A board of education is a quasi public corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education.' Herald v. Bd. of Educ., 65 W. Va. 765, 65 S.E. 102 (1909). Pursuant to W. Va. Code § 18-5-5 boards of education have the right to enter into contracts.” Jones v. Braxton County Bd. of Educ., Docket No. 00-04-090 (July 28, 2000).

3. “The contractual scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time, regular duties of schoolservice personnel positions. See, [State ex rel. Boner v. Kanawha County Board of Education, 197 W. Va. 176, 475 S.E.2d 176 (1996)]; Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997); Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10-357 (Dec. 8, 1998).” Jones, supra.

4. However, “[t]here 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 [such] 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)." Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10-357 (Dec. 8, 1998). Dempsey specifically found that the holding in Boner supra, did not apply to situations where the work to be performed by the contract employees was did not amount to "full- time regular duties of school service personnel."

5. Respondent was not required by law to offer this short term, specialized assignment to its regular or substitute employees, and has presented a sound reason for its decision not to do so.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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 15, 2003

Footnote: 1

The grievance was denied at Level I on June 7, 2002. Grievant appealed to Level II, where a hearing was held on September 5, 2002. A Level II decision denying the grievance was issued on September 30, 2002. Grievant bypassed Level III, appealing to Level IV on October 8, 2002. A Level IV hearing was scheduled for November 26, 2002. The parties then agreed to submit the grievance for decision based upon the record developed at Level II. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Kathryn R. Bayless, Esquire. This grievance became mature for decision on December 20, 2002, the deadline for receipt of written arguments.