WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BALLARD KIRK, et al.,

Grievants,

v. **Docket No. 2010-0603-CONS**

MCDOWELL COUNTY BOARD OF EDUCATION
and WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

DECISION

Ballard Kirk, Sherry Kirk, Milton Horton, Audrey Blevins, Donna Gibson, Thomas Bell, Rita Davis and Roderick Gilliam ("Grievants") are all bus operators employed by the Respondent, McDowell County Board of Education ("the Board"). Together, the Grievants filed a consolidated level one grievance dated September 8, 2009, alleging that extra work assignments had been given to other Board employees with less seniority and seeking to be paid for those assignments. The level one conference was held on December 3, 2009. A level one decision was entered denying the consolidated grievance on December, 29, 2009.

Grievants filed a level two appeal form dated January 6, 2010. The grievance statement was modified to state:

> Grievants contend that less senior bus operators were selected for work to ready a new school for children, excused from regular work early, and transported to the site in board of education vehicles. Grievants contend the positions should have been filled by seniority pursuant to W. VA. CODE § 18A-4-8b.

As relief the "Grievants seek compensation for lost wages and interest." A level two mediation was held in Beckley, West Virginia, on April 21, 2010. An Order was entered

on April 28, 2010, and Grievants filed a level three appeal dated May 5, 2010.

A level three evidentiary hearing was held before Administrative Law Judge ("ALJ") Wendy Elswick in Beckley, West Virginia, on August 17, 2010. Due to mechanical failure none of the testimony taken at the hearing was recorded. The parties agreed to hold the hearing again and it was rescheduled to be held before ALJ Elswick at the Respondent's office in Welch, West Virginia. Before the hearing was held, ALJ Elswick left employment with the West Virginia Public Employees Grievance Board and the grievances were reassigned to the undersigned ALJ.

The new level three hearing was held in Welch, West Virginia, on June 4, 2011. By agreement of the parties, the hearing was held in the offices of the Respondent Board. Seven of the Grievants[1] were present and represented by John E. Roush, Esquire, of the West Virginia School Service Personnel Association. Grievant Roderick Gilliam appeared by telephone, *pro se.* The Respondent Board was represented by Howard Seufer, Jr., Esquire, of Bowles Rice McDavid Graff and Love LLP. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law to be placed in the mail no later than July 15, 2011. Subsequently, the parties agreed to extend the mailing date to July 20, 2011. Both parties submitted fact/law proposals, which were received by the West Virginia Public Employees Grievance Board on July 21, 2011. This matter became mature for decision on that date.

Synopsis

The McDowell County Board of Education had contracted with a company to build

[1] The Grievants represented by Mr. Roush were Ballard Kirk, Sherry Kirk, Milton Horton, Audrey Blevins, Donna Gibson, Thomas Bell and Rita Davis.

a Bradshaw Elementary School. The contractor subcontracted with a second company to clean the school after construction so that it could be occupied by the students and staff at the beginning of the school year. The subcontractor hired some of the Board's employees to perform this clean-up work at times they were not working for the Board. Grievants argue that this clean-up work was actually work for the Respondent Board and the duties should have been posted and filled pursuant to the procedures set out in W. VA. CODE § 18A-4-8b. They contend that if these procedures had been followed, they would have been awarded the jobs because of their advanced seniority. Therefore they are seeking pay for this work.

Respondent notes that this clean-up was the sole responsibility of the contractor who was building the school and the employees were hired and paid by a subcontractor, not the Board. Since the employees were not performing the clean-up work for the Board, the provisions of W. VA. CODE § 18A-4-8b did not apply and the grievances are DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. All of the Grievants are regularly employed as bus operators by the Respondent McDowell County Board of Education. Additionally, they have all been employed by the Board from time to time in the summers to perform custodial or maintenance duties.

2. The West Virginia School Building Authority had financed the construction of a new Bradshaw Elementary School in McDowell County which was supposed to be ready for occupancy at the beginning of the 2009-2010 school year. SWOPE Construction

Inc. was the general contractor that was hired to build the new school.

3. One of the requirements of the construction contract was that SWOPE was responsible for thoroughly cleaning the building after construction was completed and turning the building over to the Board ready for immediate use by students and staff.

4. SWOPE subcontracted the job for the final cleaning of the building to a private, local company, E. T. Lacy, Inc. ("Lacy"). Lacy's responsibility was to clean the floors and other surfaces in the building after the construction was completed.

5. The Board supplied the cleaning supplies[2] to be used in the final cleaning process so that they could be certain that approved products, that would continue to be used in the building, were used in the initial cleaning. The contract required SWOPE to reimburse the Board for the cost of the materials and supplies used.

6. As the beginning of school approached, Lacy had to hire additional workers to finish the cleaning process prior to the opening of the new school year. Mr. Lacy hired four Board employees, Czell Townsend, James Deshazo, Steven Lee and Weldon Thompson to help with the clean-up. These men were regularly employed by the Board as bus operators, but were working summer maintenance jobs when they were hired by Lacy.

7. Mr. Lacy saw the four Board employees while they were performing their summer duties and asked Board Maintenance Foreman, Thomas Parish, if they were good workers. Mr. Parish confirmed that they were. Mr. Lacy then hired these four workers to help with the clean-up work when they were not working for the Board.

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[2] The cleaning supplies provided by the Board included floor stripper, wax and sealing chemicals for the floor as well as other substances for cleaning surfaces.

8. The payroll records which Lacy submied to the United States Department of Labor show that each of these employees worked the following days and hours in August of 2009:

- Czell Townsend: 19th, 8hrs.; 20th, 8hrs.; 21st,1.75hrs.; 24th - 28th (8hrs. each day).
- James DeShazo: 20th, 8hrs.; 21st, 3hrs.; 24th - 28th (8hrs. each day).
- Steven Lee: 20th, 8hrs.; 21st, 5.5hrs.; 24th - 28th (8hrs. each day).
- Weldon Thomas: 20th, 8hrs.; 21st, 5.5hrs.; 24th - 28th (8hrs. each day).

Respondent's Exhibit 2. These workers were hired and paid by Lacy for the clean-up work at the new school.

9. The first day of the employment term for the 2009-2010 school year in McDowell County was Friday, August 21, 2009.[3] That day was scheduled as a continuing education day for bus operators.[4] Since all of the Grievants and the four individuals hired by Lacy were bus operators employed by the Respondent, they were all required to report to work for the Board on this day at Mount View High School in Welch.[5]

10. The Board had a practice at that time of allowing employees to leave work up to an hour early on continuing education days for personal reasons, as long as the practice was not abused. On August 21, 2009, Mr. Townsend, Mr. Deshazo, Mr. Lee and

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[3] W. VA. CODE § 18A-4-8(a) states:

> . . . The employment term for service personnel may not be less than ten months. A month is defined as twenty employment days: Provided, That the county board may contract with all or part of these service personnel for a longer term. The beginning and closing dates of the ten-month employment term may not exceed forty-three weeks.

[4] Continuing education days are noninstructional days set aside in the employment term to provide training and staff development for employees.

[5] Respondent's Exhibit 1, McDowell County Schools School-Year Calendar 2009-2010.

Mr. Thomas took advantage of that practice and left the continuing education session to go to the new Bradshaw Elementary School to work for Lacy.

11. When Maintenance Foreman Parish realized that the four were going to work at Bradshaw on the afternoon of August 21, he asked them to take a Board vehicle that was loaded with cleaning supplies for use in preparing the new school for occupancy. On August 21 and 22, the four employees who were working for Lacy, left their personal vehicles in Welch and drove to the Bradshaw School in a Board vehicle so they could deliver the supplies to the school to be used in the clean-up. At the end of work on each of these days, the workers returned the Board vehicle to Welch and drove home in their personal vehicles.[6]

12. Monday, August 24th was another continuing education day and Tuesday, August 25th was a preparation day.[7] The four employees who were employed by Lacy missed half a day of work for the Board on August 25, so that they could finish the clean-up work at the new Bradshaw Elementary School. Each of these bus operators were required by the Board to take personal leave for the one half day of work they missed to report to work for Lacy on August 25.[8]

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[6] Foreman Thomas testified that the Board benefitted from the employees taking the Board vehicle to Bradshaw because he did not have to assign and pay a different Board employee to drive the supplies to Bradshaw for the clean-up operation.

[7] Preparation days are noninstructional days within the employment term set aside in the school calender for employees to prepare for opening the schools for instruction. *See,* W. VA. CODE § 18-5-45(g).

[8] Respondent's Exhibit 3, McDowell County Schools *Absence Detail Records* for August 25, 2009 for James Deshazo, Stephen Lee, Weldon Thomas, and Czell Townsend. Each of these workers testified that they were actually charged a full day of personal leave for August 25.

13. All of the Grievants were qualified by prior experience to perform the clean-up work at the new Bradshaw School.

14. All of the Grievants had more seniority as employees of the Respondent Board than the four workers who were hired by Lacy to perform the clean-up operation at the new school.

Discussion

As this consolidated grievance does not involve a disciplinary matter, Grievants bear the burden of proving their consolidated grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants argue that the clean-up jobs to prepare the new school for occupancy were actually Respondent's jobs and therefore had to be filled according to the procedures for filling service personnel positions set out in W. VA. CODE § 18A-4-8b. As indicators that these jobs were Board jobs, Grievants' counsel notes that:

- The work was performed on Respondent's property, with materials supplied and designated by Respondent, by workers who are regularly employed by the Respondent;
- One of Respondent's vehicles was used to transport materials and the workers to and from the work site;
- The workers were recruited at one of Respondent's work sites and received a recommendation from Respondent's Maintenance Foreman; and,
- The four workers missed partial days of their regular work for the Respondent on August 21st and 25th to work on the clean-up job at the

new Bradshaw Elementary School.[9]

Respondent asserts that the clean-up work was part of the construction contract with SWOPE and it had nothing to do with the hiring of the workers to complete that work. Respondent notes that the work was performed by SWOPE's subcontractor, Lacy, who is not bound by the hiring provisions of W. VA. CODE § 18A-4-8b and Respondent had no control over who was hired or how the work was performed other than the cleaning supplies that were used.

Grievants are correct to the extent that "[t]he contractual scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time, regular duties of school service personnel positions. *See, [State ex rel. Boner v. Kanawha County Bd. of Educ.*, 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 v. Braxton County Bd. of Educ.*, Docket No. 00-04-090 (July 28, 2000). Therefore, if the clean-up work was regular work of school personnel, the positions would have to be filled according to W. VA. CODE § 18A-4-8b. However, the clean-up work performed by James Deshazo, Stephen Lee, Weldon Thomas, and Czell Townsend was part of SWOPE's contractual obligation. The work was the responsibility of SWOPE's subcontractor, Lacy, and Respondent had no right to interfere with how it was performed beyond what was contained in the construction contract. The fact that the four men were hired to perform some of the clean-up work were also Board employees was pure happenstance. In fact,

[9] Paraphrased from Grievants' Proposed Findings of Fact and Conclusions of Law.

these four were hired as additional workers because the clean-up was not going to be completed on schedule. No one suggested that the jobs held by other clean-up workers, not employees of the Board, were Respondent's jobs to be filled pursuant to the WEST VIRGINIA CODE, which would be the case if the jobs were indeed Board jobs.

The four workers were allowed to leave an hour early on August 21st, but the Board practice was to allow employees to occasionally leave work an hour early without taking leave. Additionally, the four missed work on August 25th. However, the evidence showed that they were charged personal leave for the four hours of regular work they missed. In fact, while Respondent's Exhibit 3 indicated that each of these four employees was charged with four hours of personal leave, each of them testified that he was actually charged a full day of leave. Clearly, the four workers were not doing the clean-up work while they were on Board time. The fact that they used the Board's vehicle to travel to and from the clean-up work has no bearing on the clean-up jobs. The vehicle was used only because of the need to transport supplies to the job site.

The Grievance Board has held that boards of education do not have to offer short term, specialized assignments to regular or substitute employees where it can present a sound reason for not doing so. *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003). In this situation however, that exception does not need to be reached. The clean-up jobs were completely under the control of SWOPE and its subcontractor Lacy. SWOPE and Lacy had no obligation to follow W. VA. CODE § 18A-4-8b or any of the other statutory rules related to public school personnel laws because these were private sector positions. Accordingly, the consolidated grievance is DENIED.

Conclusions of Law

1. As this consolidated grievance does not involve a disciplinary matter, Grievants bear the burden of proving their consolidated grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. "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 school service personnel positions. *See, [State ex rel. Boner v. Kanawha County Bd. of Educ.*, 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 v. Braxton County Bd. of Educ.*, Docket No. 00-04-090 (July 28, 2000).

3. Boards of education do not have to offer short term, specialized assignments to regular or substitute employees where it can present a sound reason for not doing so. *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

4. The clean-up jobs that are the subject of this grievance were private sector positions which were completely under the control of SWOPE and its subcontractor Lacy. These firms had no obligation to follow W. VA. CODE § 18A-4-8b or any of the other statutory rules related to public school personnel laws since they were not filling public school service personnel positions.

Accordingly, the consolidated grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: DECEMBER 1, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE