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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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BRENDA NAPIER and DIANA WATTS

v.

Docket No. 89-50-135

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievants Brenda Napier and Diana Watts are central office secretaries for Respondent Wayne County Board of Education. Along with other similarly-assigned clerical personnel, they initiated the following grievance on January 4, 1989:

Grievants contend that the assignment of overtime duty to one (1) central office secretary without posting that duty is in violation of. . .[W.Va. Code] §18A-4-8b. Grievants request that the Wayne County Board of Education be ordered to post this duty.

¹ A request for back pay was apparently made at the informal conference prior to Level I but withdrawn at Level I
(Footnote Continued)

After denials at Levels I and II² and waiver at Level III, Grievants advanced their claim to Level IV,³ where it was heard May 22, 1989.⁴ The parties agreed to submit proposed findings of fact and conclusions of law, if at all, on or before June 19, so the case is mature for disposition.

The facts surrounding this dispute are basically uncontroverted. In April 1986, Respondent's Superintendent of Schools Michael E. Ferguson asked Cheryl A. Thompson, a central office secretary/switchboard operator, to assume the duty of telephoning needed substitute personnel. Ms. Thompson agreed to undertake this task. Ferguson testified at Level II that in 1986 he understood this assignment could be performed during the regular workday, but that over the years the job had gradually become more demanding to the point of requiring overtime, home-based work. On December 1, 1988, Respondent awarded Ms. Thompson seven hours per week overtime compensation for this service, retroactive to

(Footnote Continued)

II. Grievants attempted to reinstate this request during Level IV hearing; due to the outcome herein, the viability of the back pay issue need not be addressed. See also n. 9, infra.

² These Grievants' immediate supervisor is Respondent's Superintendent of Schools, so Levels I and II were essentially combined.

³ All other secretaries who were parties at the lower levels have chosen not to pursue this matter at Level IV.

⁴ An earlier hearing was continued upon Grievants' motion. Respondent had no objection to this delay.

the beginning of the 1988-89 school term.⁵ On January 24, 1989, Superintendent Ferguson, in response to West Virginia Governor Gaston Caperton's call for fiscal cutbacks in education, cancelled all overtime "except for absolute emergencies" and use of substitutes absent his express approval. Since January 24, Ferguson himself has contacted all substitute employees needed for work, and Ms. Thompson has not performed or been paid for any overtime.

The parties agreed that, even though Ms. Thompson's overtime duties were not "regularly scheduled" in the sense of being performed the same number of hours per week or at the same times of day, there was a continuous need for such work and further that efficiency demanded the same individual be responsible for all the substitute calling. From this, Grievants contend the assignment to have been "extracurricular" per W.Va. Code §18A-4-16, which provides, in pertinent part,

(1) . . . Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis.

(3) The terms and conditions of the agreement between the employee and the board of education shall be in writing and signed by both parties.

⁵ At one point, Grievants alleged this overtime pay amounted to a \$4,000.00 per year increase in Ms. Thompson's salary.

(4) An employee's contract of employment shall be separate from ⁶ the extracurricular assignment agreement. . . .

Code §18A-4-8b(b) provides, in pertinent part:

A county board of education shall make decisions affecting. . . 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 . . . [§18A-4-8]. . . on the basis of seniority, qualifications and evaluation of past service.

Significantly, Grievants did not present evidence of Ms. Thompson's "seniority, qualifications and evaluation of past service." Respondent's overall position is that Ferguson's January 24 directive eliminated the job in question and that any rights Grievants may have had in this situation were thus mooted. Grievants replied with the opinion that Respondent's financial situation would

⁶ Examples of extracurricular assignments from the statute are "instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students."

Clearly, the task of calling substitutes was not an "extra-duty assignment" per W.Va. Code §18A-4-8b(b), which is "defined as [an] irregular job[] [which] occur[s] periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." As an aside, it is noted that if the task were considered extra-duty, havoc would be wreaked on the efficiency of the system since perhaps each instance of calling would have to be offered to available personnel by rotation. See id.

⁷ Respondent posed the argument that there was no requirement the task of calling substitutes be performed by a service employee.

eventually improve so that overtime would again be generally allowed.⁸

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievants are secretaries employed in Respondent's central office. On December 1, 1988, Respondent awarded another central office clerical staffer, Cheryl A. Thompson, seven hours per week overtime pay for calling substitute personnel needed for work.

2. Ms. Thompson had been performing these duties, without pay, since April 1986. At that time, no overtime was needed, but the task gradually grew since then to require such.

⁸ In their proposed conclusions of law, Grievants creatively argue that,

[T]his grievance is not moot because the termination of the assignment on January 24, 1989, was improper. Had the Board of [of Education] properly posted and assigned this job, it could not have been terminated prior to the end of the 1988-89 school year. As the Board [of Education] has not acted in compliance with §18A-2-7 this spring, the assignment cannot now be terminated prior to the conclusion of the 1989-90 school year.

Due to the outcome herein, this contention need not be further addressed.

3. The job of calling substitutes was never posted as a vacancy; Ms. Thompson was merely assigned thereto.

4. As of January 24, 1989, no overtime or substitute employment has been allowed in the Wayne County Schools, absent compelling circumstances. Ms. Thompson's "overtime position" was thus effectively voided, and no employee has been paid for calling substitute personnel since that date.

CONCLUSIONS OF LAW

1. The task of calling substitutes, with its attendant regular payment of seven hours per week "overtime," was an extracurricular assignment per W.Va. Code §18A-4-16. As such, it should have been posted as a vacancy.⁹

2. Extracurricular assignments, like regular assignments, must be filled on the basis of seniority, qualifications and evaluation of past service. W.Va. Code §18A-4-8b(b); Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Smith v. Jefferson Co. Bd. of Educ., Docket No. 19-88-082 (Nov. 29, 1988).

3. Grievants have the burden of proving their claim by a preponderance of the evidence. Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-187 (Nov. 7, 1988).

⁹ This Decision should not be interpreted to state that true overtime work is at all improper.

4. Moot questions are not cognizable in the education employees grievance procedure. Wilburn v. Kanawha Co. Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988). Since the position of telephoning substitutes has been eliminated, and there is no indication of impropriety in Respondent's action in this regard, the sought remedy of the job being posted is unavailable to Grievants. See Johnson v. Lincoln Co. Bd. of Educ., Docket No. 89-22-139 (June 28, 1989).

5. Although Grievants have shown that Respondent erred in December 1988 by not posting the assignment as extracurricular, neither of them has established entitlement to that position based on her seniority, qualifications or evaluation of past service. See W.Va. Code §18A-4-8b(b). An element of this non-establishment is Grievants' failure to present evidence of Ms. Thompson's seniority, qualifications and evaluation of past service so that comparison could be effected. See Johnson v. Cabell Co. Bd. of Educ., Docket No. 06-87-248-1 (July 20, 1988). Thus, Grievants' request for back pay, to the extent it was appropriately resurrected at Level IV,¹⁰ must be disallowed.¹¹

¹⁰ Respondent, in its proposed conclusions of law, argues the back pay issue to be a "new grievance" and, as such, untimely raised.

¹¹ At various times throughout the administrative processing of this grievance, Grievants have made additional, often rather vague arguments, including ones based on favoritism, discrimination and lack of uniformity
(Footnote Continued)

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



**M. DREW CRISLIP
HEARING EXAMINER**

Date: June 28, 1989

(Footnote Continued)

of pay. It was difficult to discern which of those, specifically, were still being asserted at Level IV; however, the undersigned has taken great pains to review the record and has not found merit in any of Grievant's points except as noted to the contrary in this Conclusion of Law 5. Even if Grievant's case otherwise had merit, there would certainly be no basis for the undersigned to award both of them back pay commensurate with Ms. Thompson's overtime compensation.