CHRISTINA NAPIER,

Grievant,

v.

DOCKET NO. 99-22-116

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Grievant, Christina Napier, filed the following grievance against her employer, the Lincoln County Board of Education ("Board") on February 5, 1999:

> Violation of WV Code 18A-4-7a in posting and filling of professional positions. Specifically, Site Coordinator at Ferrellsburg, Harts, Atenville and Big Ugly Community Center.
>
> Relief sought: Grievant seeks one position as site coordinator and compensation including back pay and benefits. (See footnote 1)

The grievance was denied at level one by Principal C. M. Baker, and the grievance was advanced to level two, where it came on for hearing on March 9, 1999. Respondent moved to dismiss the grievance for lack of jurisdiction under the grievance statute, W. Va. Code §§ 18-29-1, et seq., and the Superintendent's designee, Charles S. McCann, granted the motion and dismissed the grievance on March 9, 1999. Grievant appealed that dismissal to level four on March 18, 1999. During a pre-hearing conference on April 30,1999, before Administrative Law Judge Lewis Brewer, the Board reasserted its Motion to Dismiss, and ALJ Brewer set a briefing schedule on the Motion. (See footnote 2) The Board filed its written Motion to Dismiss on May 21, 1999, and Grievant responded on May 26, 1999. The parties agreed that a ruling be issued on the Motion to Dismiss before setting a date for a level four hearing on the merits of the grievance.

BACKGROUND

Over a period of time prior to March 1998, community and educational leaders in southern Lincoln County, West Virginia, developed a plan for a program of educational and social services to be provided through a joint cooperative project of the Board and Step by Step, Inc., a nonprofit organization which has been providing social services to area youth in southern Lincoln County, including operation of the Big Ugly Community Center. The project, titled West Virginia Dreams, applied for funding from the U.S. Department of Education through money appropriated for such projects under the "21st Century Community Learning Centers Act", 20 U.S.C. §§ 8241, et. seq.

The programs to be offered by West Virginia Dreams were to be managed by a management team consisting of Darlene Dalton, Principal of Atenville Elementary School, Peggy Adkins, Principal of Harts High School, and Michael Tierney, Director of Step by Step, Inc. While a detailed discussion of the programs and services to be offered by West Virginia Dreams is not necessary here, it should be noted that the programs and services are not "traditional" public school education (e.g., hosting baby showers). To offer theseservices, West Virginia Dreams had to employ persons to manage and provide services. This hiring process reflected the input and control of both parties of West Virginia Dreams, the Board and Step by Step, Inc.

There were several positions available through this program and they were posted, utilizing the resources available to the Board, on a regular Vacancy Bulletin first on December 17, 1998, with a closing date of December 29, 1999, and again in January, February and March, 1999, all in the same manner. In addition to posting the vacancies on a Board Vacancy Bulletin, the positions were also advertised in the Charleston Gazette, the Logan Banner, and local newspapers. The positions posted were identified as "extra- duty", part-time, evening positions (approximately 10 hours per week).

The posting for the Site Coordinator positions, which Grievant seeks, specifies that the position is with the 21st Century Community Learning Center, and states that applications are to be forwarded to Step by Step, Inc., at the Big Ugly Community Center. The posting also specifies that applicants will be recommended for hire by "the Management Team", as well as recommended by the Superintendent of Schools, and finally, approved by the Board "as provided by 21st Century Grant."

Grievant, as well as others, submitted applications in response to the posting. Michael Tierney of Step by Step, Inc., reviewed and organized the applications and information for further review, and

interviews were conducted by the Management Team (Mr. Tierney, Ms. Dalton, and Ms. Adkins). Only after recommendation by the Management Team did any prospective employee proceed to review by the Superintendent and the Board for approval. Grievant was not selected for one of the SiteCoordinator positions, and filed this grievance, alleging a violation of W. Va. Code § 18A- 4-7a, dealing with hiring of professional employees.

ISSUE

The Board moves this Grievance Board to dismiss this grievance, alleging that individuals hired for the West Virginia Dreams community project are not employees of the Board, and therefore, not subject to the hiring requirements set forth in W. Va. Code § 18A- 4-7a, and are further not entitled to the protections of the grievance statutes for education employees, W. Va. Code §§ 18-29-1, et seq.

Grievant alleges that the individuals hired for the West Virginia Dreams project are employees of the Board, as that term is defined in W. Va. Code §§ 18-29-1, et seq. Consequently, as employees of the Board entitled to the protections of the grievance statute, as well as the protections afforded education employees in Chapters 18 and 18A, those individuals should have been selected under the provisions of W. Va. Code § 18A- 4-7a.

The issue to be decided, then, is whether the employees hired to work in the West Virginia Dreams community project, through the 21st Century Community Learning Grants, are “employees” of the Board of Education entitled to the protections afforded all education employees in Chapters 18 and 18A of the West Virginia Code.

DISCUSSION

In determining whether the relationship of master and servant (or employer and employee) exists there are four elements that are considered: (1) selection and engagement of the servant, (2) payment of wages, (3) power of dismissal and (4) thepower of control of the servant's action. Where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged. The first three of these elements are not essential to the relationship, and the power of control is the most significant element. The right to control and the power to discharge are the usual marks of the relationship between master and servant. If the employer has the right to supervise the work being done for him by another, the relationship of master and servant exists.

Actual control, however, is not the test; it is the right to control which is determinative. Rowe v. Grapevine Corp., 193 W. Va. 274, 456 S.E.2d 1 (1995); Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990); Davis v. Fire Creek Fuel Co., 144 W. Va. 537, 109 S.E.2d 114 (1959).

In a similar circumstance involving a board of education and a position that was funded by an outside source, this Grievance Board found that, where the evidence of record established that the county board was responsible for posting the vacancy, interviewing the applicants, approving the Superintendent's recommended appointment, managing the employee's payroll and other employment-related paperwork, and supervising the incumbent employee during the period of appointment, the individual holding the position was a regular, part-time, temporary employee of the board, and thus, entitled to utilize the grievance process afforded all state education employees. Phillips v. Webster County Bd. of Educ., Docket No. 93-51-073 (May 27, 1993), aff'd, Circuit Court of Kanawha County, Civil Action No. 93-AA-155 (Mar. 17, 1994). In making that determination, the Administrative Law Judge stated:

> Neither is the source of funding controlling herein. This situation is comparable to positions which are federally-funded but are within the daily control of the Board. Even though funding emanates from a source outside the state and the positions exist on a contingent basis pending continued funding, the employees are for all intents and purposes employees of the Board.

Id.

The evidence presented in the instant case with regard to the motion to dismiss indicates that, while the employees of the project are paid through the Board treasurer's office, the Board is not involved with any of the paperwork required by the project. The positions are 12-month, 10 hours per week, and take place after regular school hours. The individuals employed are under the control of the Management Team, which is in bi-weekly contact with the Federal representative of the grant. The locations of the project, the community centers, are not owned or operated by the Board. No data was presented regarding who had evaluation or firing authority over the employees, but it is clear that the employees' work will be directed by the Management Team and the Federal representative of the project.

In contrast with the Phillips decision, where no evidence was presented that the funding partner, the Benedum Foundation, retained any day-to-day control over the position at issue or the program,

the evidence in this case demonstrates just the opposite: that the Management Team is responsible for the day-to-day operations of the West Virginia Dreams project, and the Board has little input other than the posting and hiring function. Therefore, based upon the evidence presented, the undersigned finds that the position of Site Coordinator is not a regular position with the Board; and thus, any challenges regarding the hiring for the position are outside the jurisdiction of this Grievance Board, and not applicable to the provisions of W. Va. Code §§ 18 and 18A.

WHEREFORE, the Board's Motion to Dismiss is hereby **GRANTED** and this grievance is hereby **DISMISSED** from the Grievance Board's docket.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 15, 1999

Footnote: 1

Grievant amended her complaint at level two and the statement of grievance above reflects the amended version.

Footnote: 2

This case was reassigned to the undersigned on June 28, 1999, for administrative reasons.