LOUISE SMITH,

Grievant,

v. Docket No. 95-29-013R

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Louise Smith, is employed as a Custodian III by the Mingo County Board of Education ("MCBOE"). She originally filed this grievance on November 16, 1994, alleging she had been working a seven day a week schedule since 1981 and had been required to work many weekends. Her requested relief was for her schedule to be changed to a Monday through Friday work week, and that she be paid for the fourteen previous years of weekend and holiday work. The Level II Decision issued on December 5, 1994, changed Grievant's work schedule to a Monday through Friday work week. (See footnote 1) The request for back pay was denied. After this decision was rendered, Grievant continued to work on weekends, as she did not want her compensation decreased.

Grievant appealed to Level IV, and the parties agreed to submit the case on the record developed below, including stipulations. (See footnote 2) The Level IV Decision granted Grievant back pay, plus interest, for Saturdays and Sundays worked from November 21, 1994,through April 14, 1995. This ruling was based on the records submitted by the parties, and it did not grant any relief for the overtime claimed prior to filing the grievance.

This decision was appealed to the Mingo County Circuit Court, and on October 9, 1998, the case was remanded to this Grievance Board "for further development of the record as it pertains to the issue of back wages . . . ." This Order was received by the Grievance Board on November 17, 1998, and after receiving mutually agreeable dates from the parties, the grievance was scheduled for hearing on February 3, 1999. This case became mature for decision on March 16, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

The issue presented by the parties and to be examined on remand from the circuit court is whether Grievant is owed back pay in addition to the amount Grievant has already received pursuant to the 1995 review by the Department of Labor ("DOL"). Grievant received approximately $1,043.70 dollars as the result of a review by the U.S. Department of Labor, based on the time records submitted by Grievant from November 18, 1994, to November 17, 1995. These dates and this amount extended past the order of Administrative Law Judge Albert Dunn issued by this Grievance Board on July 5, 1995. It was unclear how the Department of Labor became involved in this case. In the prior Grievance Board Decision, Administrative Law Judge Albert Dunn held Grievant had not established entitlement to any back pay other than the amount he awarded in his July 1995 Decision. Administrative Law Judge Dunn's decision was based on the time sheets filled out subsequent to the filing of the grievance, and these time sheets were submitted as evidence at that Level II hearing.

At the beginning of the remanded Level IV hearing, Respondent asked the grievance be dismissed as untimely filed. Respondent also argued that if Grievant were to establish her entitlement to back pay, the amount should be limited by the doctrine of laches because of Grievant's significant delay in bringing her claims. Respondent also noted Grievant was paid overtime on December 22, 1995, for the entire year, after she filed the grievance and to cover time for which Grievant had maintained records. Finally, Respondent argues Grievant was paid for the time she worked, and there is no evidence to support Grievant's claim that she worked additional hours, or that her employer knew Grievant worked additional hours, if Grievant did work overtime.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a Custodian III, and from 1981 until 1996, Grievant worked a nine hour split

shift, and she was responsible for maintaining/firing the coal fired furnace at Gilbert Grade School ("GGS").

2. Many Custodian III's, throughout the Mingo County School System, are employed with a nine-hour split shift contract because once a furnace is fired it must be maintained on Saturdays, Sundays, and some Holidays, as well as throughout the school day. Individuals who are on this type on contract are paid for forty-five hours throughout the school year even though they work only forty hours. The additional money is for the inconvenience of having to attend to the furnace during the winter months. Custodian III's with this type of contract are paid for the forty-five hours throughout the year and receive this additional pay even when the furnace is turned off, and they are not required to perform weekend work.

3. Grievant had a nine-hour split shift contract which she signed. She was paid for forty-five hours of work for every week during the school year. She was expected to work only forty hours each week.

4. Custodian III's on a split shift contract are to work approximately 33 hours Monday through Friday when the furnace is fired, and are to divide the remaining time, approximately five hours, on Saturdays and Sundays to maintain the furnace. When thefurnace is not fired, Custodian III's are expected to work 37 ½ hours, Monday through Friday. (See footnote 4)

5. Grievant's time sheets for 1992 through 1994, prior to filing the grievance, indicate she worked five, eight hour days, Monday through Friday. No weekend hours were indicated at any time.

6. Grievant did not fill out her own time sheets; the school secretary filled them out for her. Grievant signed these sheets below a statement which says: "I was officially employed as stated above and worked the hours as indicated."

7. Grievant worked as expected and per her contract, approximately two and one half hours on each Saturday, Sunday, and Holiday during the school year when the furnace was fired.

8. There were times during the school day when Grievant worked more hours than she was required by her contract. The building principal, Marcia White, was not aware of these additional hours. Ms. White expected Grievant, as a long-term knowledgeable employee, to schedule her own hours and duties so that the furnace could be maintained; she did not

expect Grievant to work overtime. Ms. White was aware Grievant's time sheet reflected a forty hour work week.

9. Ms. Pat Moore was Grievant's principal prior to Ms. White. She believed Grievant worked a split shift and adjusted her schedule to meet the needs of maintaining the furnace.

10. Grievant's family was frequently with her when she stayed late, and when she worked on the weekends.

11. Grievant knew she was working more hours than she was being paid for and never notified anyone in the Central Office, Ms. Moore, or Ms. White until after she filed her grievance.

12. After Grievant filed her grievance, she began to fill out and keep her own time sheets upon the advice of her representatives.

13. In December 1995, Grievant received a payment for the overtime she had recorded on the time sheets discussed in Findings of Fact No. 12.

14. In January 1996, Grievant received a letter from Ms. White outlining her required scheduled for the times when the furnace was fired, and also mandating the work schedule when the furnace was shut down. A no time was Grievant required to work more than forty hours a week. Grievant was to work the hours outlined in Finding of Fact No. 4. Grievant was paid for forty-five hours a week.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

As there were multiple issues raised by the parties they will be considered one at a time.

1. Timeliness

Respondent argued this case should be dismissed as untimely. It is clear pursuant to W. Va. Code § 18-29-3(a) that a board of education must raise the issue of timeliness either at or prior to Level II, for this defense to be considered; otherwise it is deemed waived. This

argument was not made by Respondent at the time of the filing or at the Level II hearing, and it is deemed waived.

2. Laches

"Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987)." COL No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94- BOD-078 (Nov. 30, 1994). Laches occurs when an individual sleeps on her rights or neglects to assert a right of which she is aware. Black's Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. Id.

Grievant testified she believed she was being paid for forty hours of work a week, (See footnote 5) and that she consistently worked more than forty hours from 1981 until 1995. It is unclearwhy Grievant worked these extra hours, and why she did not complain earlier or file a grievance earlier. There is no question she should have filed her grievance many years ago and did not. Grievant provided no explanation for her delay, even when she was given multiple opportunities to explain this failure to act. Her responses to this question of: 1) "I had to work the hours"; 2) "I didn't know I was being done wrong"; 3) "I trusted them"; and 4) "You just don't understand" -- do not help to clarify Grievant's inaction. This much is clear from Grievant's testimony - she believed she was paid for only 40 hours, and she knew she was working more hours than 40. (See footnote 6) Grievant clearly knew, according to her, that she was working greater than 40 hours, and she also waited thirteen years to file this grievance.

It must be noted that this delay in filing created problems for the parties in presenting evidence to support their arguments. The time records for Grievant prior to 1992 were somewhere in storage, and of course witnesses' memories were unclear and indefinite, as revealed by the testimony of several witnesses who stated they could not remember facts and specifics with any detail. The testimony about Grievant's work was only given in generalities with the exception of Grievant's family, who were very clear about Grievant working numerous hours every weekend. Even these family members and Grievant could only guess when the furnace was turned on every year, and were unable to remember the exact hours worked for

each day and weekend. Given this state of affairs, the doctrine of laches must be applied to the current grievance. Grievant has failed to exercise due diligence, and instead sat on her rights. To quote favorably the language from a recent Grievance Board case, "[]laches clearly applies in this case, because [the board of education] would be prejudiced by having to pay numerous years of back pay to Grievants." Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998). In Flint the grievants waited over ten years to question the disparity in their contracts. Laches clearly applies in this case, because MCBOE, which operates on an annual budget, would be prejudiced by having to pay numerous years of back pay to Grievant. Additionally, MCBOE was prejudiced by the staleness of the evidence. Maynard, supra; Buchanan, supra.

However, W. Va. Code §18-29-4(v), provides that "[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice." Thus, even though laches applies to this grievance, if proven, Grievant could receive the overtime for the year prior to filing this grievance in November 1994.

As noted previously, Grievant received a year of overtime pay on December 22, 1995, for the school year after she filed for grievance and to cover the time for which she had kept records. Grievant has not received payment for the year prior to her filing this grievance.

3. Credibility

Another issue to resolve is the question of witness credibility, because the testimony of the witnesses varied widely. The testimony of Grievant and the other witnesses as tohow many hours Grievant worked during the week and on Saturdays, Sundays, and Holidays was very confusing and contradictory. Additionally, Grievant's own testimony is contradictory, and her testimony does not match the time sheets she placed into evidence that she testified were correct.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ.,

Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit Systems Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the majority of the witnesses and to assess their words and actions during their testimony. Grievant presented the testimony of many family members and friends todemonstrate she worked numerous hours of overtime from 1981 to 1995. This testimony was conflicting and also conflicted with the records Grievant filled out and upon which her compensation by DOL was calculated. For example, Grievant's husband testified he and Grievant usually worked two, four hour periods for a total of eight hours on each Saturday, Sunday, and Holiday when the furnace was fired. Grievant's daughter and nephew also indicated Grievant worked these hours and at times even more on Saturdays, Sundays, and Holidays. Mr. Straley, a retired electrician, testified it took approximately 15 to 20 minutes to complete the job of filling the coal bins and readying the furnace each time. (See footnote 7) **The time sheets filled out solely by Grievant from November 1994 to November 1995, indicate she worked an average of two and one half hours on each Saturday, Sunday, and Holiday.** (See footnote 8)

Another time problem with Grievant's testimony was her testimony that she stayed most days and did not split her shift. At the prior Level II hearing, Grievant indicated she almost always went home during lunch time. A co-worker, Margaret Trent, testified Grievant had a split shift and went home during lunch. This same employee indicated Custodian III's were to do this because of the time for the furnace, and this practice had been in place for many years, and all employees were aware of the purpose and reason for a split shift. Treasurer Tim Sammons testified similarly and stated employees wantedthe split shift because they could

earn more money and frequently transferred positions to obtain one of these positions. Principal White testified Grievant was a good worker and knew her job so she expected Grievant to determine how to split her shift and plan her days depending on the weather and the needs of the furnace.

Additionally, a word must be said about the portion of a 1985 calendar Grievant presented as an exhibit to support her additional hours. (See footnote 9) **Grievant testified this document was filed out during the 1985 year as the events occurred. The undersigned Administrative Law Judge finds this testimony to be untrue. An examination of the calendar does not demonstrate the differences in time shown in the documents filled out by Grievant during the 1995-1996 school year. Times are listed routinely for a month at a time, i.e. September 7:30 to 4:00.**

The other records submitted by Grievant demonstrate her work time varied from day to day. For example, one day she would work nine and one half hours, the next day she might work nine hours and fifteen minutes, and the following day her work time might be ten hours and fifteen minutes. Additionally, almost all the entries on the 1985 calendar are written neatly with a pencil, giving the impression that they were all placed on the calendar at one time, whereas other types of notation on the calendar are in different inks and are somewhat sloppy at times. Further, Grievant has filled in times worked in calendar spaces when there were no corresponding dates in the block; i.e., September 30 was on a Monday, but the rest of the blocks without dates are filled in with times worked. Also givingrise to the question of the authenticity of the document is the notation on September 3, 1985, "not firing furnace". This notation makes no sense unless this calendar was filled out for this hearing. No notation of any split shift is indicated anywhere on the document, even though by Grievant's own testimony at Level II, she almost always went home during the day. On the whole, the undersigned Administrative Law Judge finds this document to be false and filled out for the purpose of supporting Grievant's position. This calendar was not filled out contemporaneous to the events reflected on the calendar and cannot be accepted as viable evidence.

In considering all the testimony presented, the undersigned Administrative Law Judge finds Grievant's claims that she worked approximately 16 hours each weekend and eight hours each holiday she fired the furnace to be an exaggeration, and not supported by the

evidence, as well as the documents submitted by Grievant.

4. Merits of the case

A review of all this testimony resulted in Finding of Fact No. 7, which states Grievant worked 2 and ½ hours each Saturday, Sunday, and Holiday when the furnace was fired. She did not work the other weekends. As far as whether Grievant worked more hours than she was supposed to work during the week, the undersigned Administrative Law Judge finds that, on occasion, Grievant did work more than her required number of hours. It is also clear her employer was not aware she was working these extra hours, nor did Grievant discuss her situation with anyone in authority. Grievant presented no evidence to establish that any of her principals or any of the administrative staff at the Central Officewere aware of any overtime. Additionally, it cannot be determined with any degree of certainty how many hours Grievant may have worked extra during a given year.

The general rule of thumb is that if an employer knows an employee is working extra hours, in other words "suffers and permits" the employee to work, and does not make the employee stop, that employer will be required to pay for these additional work hours even if the employee was not requested to work. Syl. Pt. 1, McCarty v. Harless, 181 W. Va. 719, 384 S.E.2d 164 (1989). See Davis v. Food Lion, 797 F. 2d 127 (4Th Cir. 1986); Pforr v. Food Lion, 851 F.2d 106 (4Th Cir. 1988). Grievant has the burden of proof on the issue of whether the employer knew of the overtime work and whether the employer "suffered or permitted" her to work the additional hours. McCarty, supra.

In this instance, no one in authority was aware of Grievant's additional work hours until she filed her grievance. Grievant's time sheets had reflected the proper number of hours she was to work, forty, if not the correct placement of those hours on the correct days. Once MCBOE was aware of the problem, it took action to resolve the situation, starting with granting Grievant a five day work week in the Level II decision. (See footnote 10) **Grievant continued to work additional hours after her grievance was filed, and she was paid for those hours. After Grievant received the payment directed by DOL, Grievant received aletter setting forth her schedule, and she was no longer allowed to set her own schedule as she clearly was not following the work schedule of a split shift employee.** (See footnote 11)

Since MCBOE was not aware on the additional hours Grievant worked, it did not "suffer

and permit" her to work overtime. Thus, MCBOE cannot be held accountable to pay Grievant for those hours.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Pursuant to W. Va. Code § 18-29-3(a), the defense of timeliness is deemed waived in this grievance as it was not raised at Level II or before.

3. Grievant has the burden of proof on the issue of whether the employer knew of the overtime work, and whether the employer "suffered or permitted" her to work the additional hours. McCarty v. Harless, 181 W. Va. 719, 384 S.E.2d 164 (1989). See Davis v. Food Lion, 797 F. 2d 127 (4Th Cir. 1986); Pforr v. Food Lion, 851 F.2d 106 (4Th Cir. 1988). 4. The general rule of thumb is that if an employer knows an employee is working extra hours, in other words "suffers and permits" the employee to work, and does not make the employee stop, that employer will be required to pay for these additional work hours even if the employee was not requested to work. Syl. Pt 1, McCarty, supra.

5. Grievant has not met her burden of proof and established MCBOE was aware that she was working more than her scheduled hours.

6. "Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987)." COL No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94- BOD-078 (Nov. 30, 1994).

7. Laches applies in this case, because Grievant sat on her rights when she had the requisite knowledge to file a grievance. MCBOE was prejudiced by the staleness of the

evidence and decreased memories caused by the passage of time. Additionally, MCBOE would be prejudiced by having to compensate Grievant for numerous years of back pay, as this is "a matter involving a public interest, such as the manner of the expenditure of public funds." Maynard, supra; Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998).

8. W. Va. Code §18-29-4(v), provides that "[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriaterelief for a period of one year prior to the filing of a grievance based upon a continuing practice."

9. Because Grievant failed to demonstrate that her employer was knowledgeable about her working additional hours and did not "suffer and permit' her to work overtime, MCBOE cannot be held accountable for any overtime Grievant may have worked.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Mingo 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1999

Footnote: 1

At Level II, Grievant indicated she wanted to be placed in a Monday through Friday work week, but did not want any decrease in compensation. As discussed later in this Decision, Grievant was compensated, pursuant to a signed contract, for her weekend work.

Footnote: 2

In the prior grievance, Grievant was represented by Rosemary Jenkins from the West Virginia Federation of Teachers, and Respondent was represented by MCBOE's Attorney W. Graham Smith.

Footnote: 3

Grievant was represented by Attorney Richard Robb, and Respondent was represented by Attorney Hannah Curry.

Footnote: 4

Service personnel are given a half hour duty-free lunch each work day.

Footnote: 5

The record clearly reflects Grievant was on a nine hour split shift, received pay for forty-five hours of work a week, and was to work forty hours. Grievant signed a nine hour employment contract, and MCBOE records reflect Grievant was paid for forty-five hours each and every week. Grievant stipulated to this fact when the grievance was originally filed at Level IV.

Footnote: 6

At times her testimony about the number of hours she worked greater than 40 varied from 5 to 16 to 20.

Footnote: 7

This estimated time did not include dealing with the hot ashes.

Footnote: 8

When the weather was warmer, the time was less, and when the weather was colder the time was greater. It is noted that in the time sheets kept by Grievant in 1995, that when the furnace was turned off, she began staying later on Monday through Friday. This phenomenon was not explained.

Footnote: 9

No explanation was offered as to what happened to the first seven months of this calendar.

Footnote: 10

Obviously, Grievant did not comply with this directive, and she continued to work and record her hours. At that time, MCBOE was on notice that Grievant was working additional hours, but did not take clear action to stop her.

Footnote: 11

It appears from the evidence that at some time Grievant filed a grievance on this issue.