TOMMY BURCHELL,

Grievant,

v.

DOCKET NO. 01-HE-370

HIGHER EDUCATION INTERIM GOVERNING

BOARD/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Tommy Burchell, filed the following grievance on May 8, 2001, pursuant to W. Va. Code §§ 18-29-1, et seq., (See footnote 1) against his employer, the Interim Governing Board/Marshall University ("Marshall"): (See footnote 2)

> Senate Bill 547 & 653, Higher Education Commission series 62 (For Classified Staff), M.U. Classified Staff Handbook and a written agreement to settle a past grievance by Mr. Burchell agreed to by Mr. Bill Burdette, then Director of Human Resources for M.U. concerning Mr. Burchell's seniority and overtime work. Specifically, he has not been given the proper senioritystatus that he should have and he is no longer receiving the proper amount of overtime pay due to that improper seniority rating.

> Relief sought: That Mr. Burchell receive the proper seniority from Physical Plant that Mr. Burdette refers to in his memo dated April 26, 1999 and states that his seniority should be from August 8, 1983. Also, that M.U. Physical Plant use a fair rotational system based on Institutional Seniority for all overtime worked. Further, that Mr. Burchell receive overtime pay for approximately 21 hours of work that was given to a less senior worker in Physical Plant between the dates of April 21 and April 23, 2001. (See footnote 3)

The grievance was denied at level one by Grievant's immediate supervisor, Dale Osburn, on May 10, 2001. A level two hearing was held on May 16, 2001, and a decision denying the grievance was issued on May 21, 2001, by Jonathan Brown, Grievance Evaluator, and adopted on May 22, 2001, by

F. Layton Cottril, Jr., General Counsel and designated representative for Marshall. Grievant appealed to level four on May 29, 2001, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on July 12, 2001. This matter became mature for decision on July 27, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Lt. Terrence E. Olson, and Marshall was represented by Connie A. Bowling, Esq., Senior Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

March 2, 1999 memorandum from Tommy Burchell to William Burdette.

Ex. 2 -

March 31, 1999 memorandum from Tommy Burchell to Bill Burdette.

Ex. 3 -

Grievance form filed by Tommy Burchell on April 9, 1999.

Ex. 4 -

April 23, 1999 handwritten withdrawal of grievance by Tommy Burchell.Ex. 5 -
Routine Work Orders opened April 4, 2001 and April 9, 2001.

Ex. 6 -

April 11, 2001 handwritten informational notes by Tommy Burchell.

Ex. 7 -

April 16, 1999 memorandum from Bill Burdette to Dale Allman.

Ex. 8 -

April 26, 1999 memorandum from Bill Burdette to Dale Allman.

Ex. 9 -

Physical Plant Compensatory Time Accrual Form for Tommy Burchell.

Ex. 10 -

Physical Plant Operating Policy, Call Out, effective February 24, 2000.

Ex. 11 -

Classified Staff Handbook, Overtime Policy.

Marshall's Exhibits

Ex. 1 -

Classified Staff Handbook, Employment.

Ex. 2 -

Staff Time Card for Tommy Burchell, April-May 2001.

Ex. 3 -

Seniority List, Grounds.

Ex. 4 -

Physical Plant Operating Policy, Overtime/Comp Time Usage, effective January 1, 1999.

Ex. 5 -

2001 Absentee Calendar for Tommy Burchell.

Testimony

Grievant testified in his own behalf. Marshall presented the testimony of Jim Stephens, Dale Osburn, and Charles Young.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant has been employed by Marshall since 1983.

2. In 1996, Grievant was fired from his job as a Parking Attendant II with the Marshall Parking and Transportation Division. Grievant successfully grieved this adverse employment action, and Marshall was ordered to reinstate Grievant "to his former position at the Parking and Transportation Division." See Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. In the meantime, as a result of reorganization on campus, the Parking and Transportation Division had ceased to exist, and Grievant's former position had been abolished. 4. In November 1997, Marshall transferred Grievant to a higher paying position in the Grounds Department of the Physical Plant.

5. Although Grievant was assigned to and his duties are directed by the Physical Plant, his salary is paid from an account in the Department of Public Safety, which took over the responsibilities of the Parking and Transportation Division.

6. Grievant is currently employed in the Grounds Department as a Campus Service Worker II, and his job is to maintain the parking lots on campus.

7. The workweek for higher education employees begins at 12:01 a.m. on Sunday and ends at 12 midnight the following Saturday. An employee's base salary is compensation for 37.5 hours of work during that period. 128 C.S.R. §§ 62-4.1, -6.1 (1994). (See footnote 4) See W. Va. Code § 21-5C-1 (1999).

8. An employee who works in excess of 37.5 hours in a single workweek is entitled to "straight time pay", or his regular hourly rate of pay, for each hour worked up to 40 hours of work, and overtime pay at 1.5 times the regular rate of pay for work in excess of 40 hours. 128 C.S.R. § 62-4.3 (1994). See 29 U.S.C. §§ 201 et seq.; W. Va. Code §21-5C-3 (1992); Nicholas v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR- 596 (Aug. 17, 1995).

9. An employee is not eligible for overtime pay until he has actually worked 40 hours within a workweek; pay given for holidays, annual leave, sick leave, or work release time is not counted as "working hours" for overtime purposes. 128 C.S.R. § 62-4.4 (1994).

10. Marshall is authorized to offer its employees compensatory time off ("CTO") in lieu of overtime pay pursuant to a mutual agreement arrived at between the supervisor and the employee before the work is performed. See W. Va. Code §§ 18B-7-11 (1995); 21-5C-3 (1992); Douglas v. Bd. of Trustees/W. Va. Univ., Docket No. 94-BOT-188 (Nov. 30, 1994).

11. Determinations as to eligibility for and assignment of CTO are generally left to the

department in which the employee works.

12. In the Grounds Department, overtime work has historically been assigned based on “shop seniority,” or from the date on which an employee began work in that department.

13. Overtime work is offered first to the most senior employee on the Grounds Department seniority list. If the assignment is refused, it is then offered to the next most senior employee, and so on, down the list until it is accepted. The next overtime work assignment is again offered first to the employee at the top of the seniority list, even if less senior employees were not offered the previous overtime assignment. If every Grounds Department employee refuses an overtime assignment, the least senior employee is required to accept the assignment. 14. Occasionally, a department will request Russell Dorton, the most senior Grounds Department employee, because of his long years of experience and his experience in operating certain equipment, such as the machines used to clean and brush the turf on the football field.

15. When the Physical Plant offers an overtime work assignment to Grounds Department employees, the employee is generally given the option of receiving either overtime pay or CTO.

16. When a department other than the Physical Plant requests Grounds Department employees to work overtime, the employee is required to take monetary compensation, paid from the budget of the requesting department. In such circumstances, CTO is not offered because it would have to be taken during the employee's regular work hours for the Physical Plant, depriving the department of the employee during those work hours, thereby creating a hardship on the department.

17. Grievant was regularly offered overtime work, but expressed a preference for earning CTO and historically refused overtime work assignments for which the only compensation offered was overtime pay.

18. In April 1999, Grievant filed a grievance, alleging that as a condition of his involuntary transfer to the Grounds Department, he was supposed to have been allowed to count his total years of service at Marshall, known as “institutional” or “university” seniority, as his shop seniority in the Grounds Department. Grievant asserted he had not been credited with the proper amount of seniority. 19. Grievant withdrew that grievance after Bill Burdette, then-Director of Human Resources, agreed to credit Grievant with his university seniority for purposes of his shop seniority in the Grounds Department. For reasons unknown, Grievant did not receive this credit.

20. In March 2001, Charles Young became Interim Roads & Grounds/Garage Supervisor and

Grievant's immediate supervisor.

21. At about that time, either Mr. Young or Dale Osburn, Assistant Director of the Physical Plant and Mr. Young's immediate supervisor, requested a seniority list for employees in the Grounds Department. This list ranked Grievant twelfth in shop seniority, giving his “starting date” in the department as November 17, 1997. Neither Mr. Young nor Mr. Osburn were aware of Mr. Burdette's agreement to credit Grievant with university seniority.

22. On April 9, 2001, at a meeting with the Grounds Department, Mr. Young discussed seniority and announced overtime assignments for the upcoming commencement ceremonies. When Grievant asked why others were receiving more hours of overtime, Mr. Young informed Grievant of his place on the seniority list and advised him of the seniority policies in the Grounds Department.

23. At Mr. Young's suggestion, Grievant filed this grievance on May 8, 2001, asserting he had not been given the benefit of his settlement of his prior grievance with Mr. Burdette, and seeking credit for his university seniority on the Grounds Department seniority list, “a fair rotational system based on Institutional Seniority for all overtimeworked”, and CTO representing approximately 21 hours of overtime work given to less senior Grounds Department employees between April 21 and 23, 2001.

24. The Physical Plant had assigned 6 hours of overtime work cleaning up the student center plaza on Saturday April 21, 2001, to Mr. Dorton and James Eans, the two most senior employees on the Grounds Department seniority list.

25. The College of Education requested two Grounds Department employees to set up and take down tables and chairs for an elementary education science fair held on Sunday, April 22 and Monday, April 23, 2001. This work was also offered to and accepted by Mr. Dorton and Mr. Eans, who each worked 11 overtime hours paid for by the College of Education.

26. The Athletic Department had requested two Grounds Department employees to set up and take down tables, chairs and garbage cans for a student athlete picnic to be held on Sunday, April 29, 2001. This work was again offered to and accepted by Mr. Dorton and Mr. Eans, who each worked 6 hours of overtime, paid for by the Athletic Department.

27. If Grievant's total years of university service had been credited towards his Grounds Department seniority, he would have been offered the opportunity for overtime work in April 2001, before Mr. Eans.

28. By the time of the Level 1 conference, conducted on May 10, 2001, Mr. Young, Mr. Osburn, and Jim Stephens, the new Director of Human Resource Services at Marshall, had become aware of memos authored by Mr. Burdette incorporating his agreement to give Grievant credit for his university seniority. 29. As a result, Grievant's seniority was recalculated using his total years of university service, and Grievant was placed second on the Grounds Department seniority list.

30. Since that time, Grievant has consistently been offered and refused overtime work for which no CTO was available.

DISCUSSION

This grievance does not involve a disciplinary matter; therefore, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §§ 1-4.21 (2000); Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 7, 2000); Cain v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-331 (Nov. 9, 1999). See W. Va. Code § 18- 29-6 (1992)

Grievant raises several issues in this grievance. The first, that he should be credited with university seniority pursuant to a prior agreement with Bill Burdette, has been resolved. Second, Grievant asserts he is entitled to straight time pay or CTO for overtime in April which he should have been offered. And third, Grievant asks this Grievance Board to declare the rotation system utilized by the Physical Plant unfair and discriminatory, and to order Marshall to develop a more equitable system of overtime rotation.

Marshall responds that, with respect to the third assertion, Grievant has no standing to grieve that issue, and with respect to his entitlement to compensation, that Grievant has failed to prove he would have accepted any offers of overtime not involving CTO.

> "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, [a grievant is] without standing to pursue [the] grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb. 28, 1990).

Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 27, 2000); Elliott v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Econ. Dev. Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

As noted above, Grievant's dispute regarding his seniority has been resolved to his satisfaction. Accordingly, any injury he suffered has been remedied. Nevertheless, Grievant argues that the current method of rotating overtime work assignments by seniority is unfair and discriminates against those Grounds Department employees with less seniority. However, a general claim of unfairness or any employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000), citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)(the. See also, Smith v. W. Va. Parkways Econ. Dev. Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Farley, supra; Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996); McDonald v. Hancock County Bd. of Educ., Docket No. 15-88-055-3 (Sept. 30, 1988). Even if the employer has misapplied a statute or its own policies, where thegrievant is not personally harmed, there is no cognizable grievance. Elliott, supra; Farley, supra; Cremeans v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). An employee who has suffered no injury does not have standing to file a grievance on behalf of other employees who may have. See Farley, supra; Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995); Daugherty v. Bd. of Directors/W. Liberty State College, Docket No. 93-BOD-295 (Apr. 27, 1994); Froats v. Hancock County Bd. of Educ., Docket No. 90-15-475 (Dec. 29, 1993).

Consequently, Grievant's request for a new method of assigning overtime assignments is nothing more than a request for declaratory relief. The Grievance Board has repeatedly refused to issue advisory opinions. Baker v. Bd. of Directors/Concord College, Docket No. 97-BOD-265 (Oct. 8, 1997); Wagner v. Hardy County Bd. of Educ., Docket No. 20-87-102-1 (Feb. 23, 1996); Bandy v. Summers County Bd. of Educ., Docket Nos. 91-45-468/92-45-065 (Feb. 16, 1994); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Adkins v. Lincoln County Bd. of Educ., Docket No. 89-22- 323 (Aug. 21, 1989).

The remaining, and only substantive, issue to be resolved in this grievance is whether Grievant has proven by a preponderance of the evidence that he is entitled to overtime pay or CTO for the

hours worked by less senior employees in April 2001. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's LawDictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. I find that Grievant has not met his burden.

The 11 hours of overtime worked by Mr. Eans on April 22 and 23 was requested and paid for by the College of Education. As discussed earlier, CTO is not an option for overtime worked for departments outside the Physical Plant; therefore, overtime pay was the only compensation available for these 11 hours. Grievant testified that he preferred receiving CTO to overtime pay, and routinely turned down offers of overtime for which CTO was not available. Given Grievant's own testimony, he has not established that he would more likely than not have accepted the overtime offer from the College of Education. Therefore, Grievant has not proven he is entitled to compensation for the 11 hours worked on April 22 and 23.

The 6 hours of overtime worked by Mr. Eans on April 21 to clean up the student plaza was offered and paid for by the Physical Plant, and CTO would have been available for that overtime work. Therefore, it is more likely than not that Grievant would have accepted that overtime work had it been offered to him. Grievant's time cards indicate that Grievant worked a total of 30 hours for that week. Since overtime work is not compensated at 1.5 times the regular rate until the employee has worked 40 hours, Grievant is only entitled to 6 hours of "straight time" pay for not having been offered the assignment. Marshall is not required to give employees CTO in lieu of overtime pay upon request. Rather, CTO is an option for the employee only if there is a mutual agreement with his supervisor before the work is performed. W. Va. Code §§ 18B-7-11; 21-5C-3; Douglas v.Bd. of Trustees/W. Va. Univ., Docket No. 94-BOT-188 (Nov. 30, 1994). Thus, the option to offer CTO in lieu of overtime pay is discretionary with the employer. Arnold v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-130 (July 30, 1997). As there clearly was no pre-existing agreement to give Grievant CTO for the 6 hours of overtime on April 21, 2001, and there is no evidence such an agreement existed with Mr. Eans, Grievant has failed to prove he is entitled to CTO in lieu of overtime pay in this grievance.

CONCLUSIONS OF LAW

1. This grievance does not involve a disciplinary matter; therefore, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §§ 1-4.21 (2000); Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 7, 2000); Cain v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-331 (Nov. 9, 1999). See W. Va. Code § 18-29-6 (1992).

2. Without some allegation of personal injury, an employee is without standing to pursue a grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 27, 2000); Elliott v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb. 28, 1990). See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979).

3. An employee's general claim of unfairness or philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing togrieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000), citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)(the grievance board simply does not have the authority to second guess a state employer's employment policy). See also, Smith v. W. Va. Parkways Econ. Dev. Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Farley, supra; Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41- 479 (July 8, 1996); McDonald v. Hancock County Bd. of Educ., Docket No. 15-88-055-3 (Sept. 30, 1988).

4. Even if the employer has misapplied a statute or its own policies, where the grievant is not personally harmed, there is no cognizable grievance. Elliott, supra; Farley, supra; Cremeans v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

5. An employee who has not been injured by a policy or practice does not have standing to file a grievance on behalf of other employees who may have been adversely affected. See Farley, supra; Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995); Daugherty v. Bd. of Directors/W. Liberty State College, Docket No. 93- BOD-295 (Apr. 27, 1994); Froats v. Hancock County Bd. of Educ., Docket No. 90-15-475 (Dec. 29, 1993).

6. Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the

Grievance Board. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). 7. Grievant has shown no injury which would give him standing to challenge the manner in which the Physical Plant assigns overtime work.

8. W. Va. Code § 18B-7-11 (1995) does not require the higher education employer to offer compensatory time off as compensation for overtime work if requested by the employee; instead, the option to offer compensatory time off in lieu of overtime pay is discretionary with the employer and is available only upon the mutual agreement of the parties prior to the commencement of the overtime work. Arnold v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-130 (July 30,1997). See Douglas v. Bd. of Trustees/W. Va. Univ., Docket No. 94-BOT-188 (Nov. 30, 1994).

9. Grievant has failed to prove by a preponderance of the evidence that he is entitled to overtime compensation for 11 hours on April 22 and 23, 2001.

10. Grievant has proven by a preponderance of the evidence that he is entitled to straight time pay for 6 hours worked on April 21, 2001.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Marshall is hereby **ORDERED** to compensate Grievant in the form of straight pay for 6 hours of work he should have been offered on April 21, 2001.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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: August 28, 2001

Footnote: 1

At the time the grievance was filed, the grievance procedure for higher education employees was governed by the education employees' grievance procedure contained in W. Va. Code §§ 18-29-1, et seq. Higher education employees are required to follow the grievance procedure for state employees set out in W. Va. Code §§ 29-6A-1, et seq. for grievances filed after July 1, 2001. See W. Va. Code § 18B-2A-4 (2001).

Footnote: 2

This grievance was filed in May 2001, at which time state institutions of higher education were governed by the West Virginia Higher Education Policy Commission ("HEPC") and the West Virginia Higher Education Interim Governing Board ("IGB"). W. Va. Code §§ 18B-1-2 (2000); 18B-1B-1 (2000); 18B-1C-2 (2000). On July 1, 2001, the IGB ceased to exist and was replaced by a Board of Governors at each institution. W. Va. Code §§ 18B-1-2; 18B-2A-1 (2001); 18B-2A-4 (2001).

Footnote: 3

Grievant appears to have abandoned his claim for 21 hours and argues entitlement to compensation for 17 hours of overtime compensation.

Footnote: 4

Although state institutions of higher learning ceased to be governed by the University Systems of West Virginia Board of Trustees ("BOT") and the Board of Directors of the State College System ("BOD"), on July 21, 2000, the HEPC adopted a resolution retaining the BOT and BOD rules previously in effect and contained in Titles 128 and 131 of the Code of State Rules. See Chancellor's Interpretative Memorandum No. 6 (July 26, 2000). The Legislature also specifically provided that any orders, resolutions, policies or rules adopted by the BOT, the BOD, or the IGB and in effect on July 1, 2001, would be transferred to the HEPC and continue in effect until rescinded, revised, altered, amended or transferred to the institutional governing boards. W. Va. Code § 18B-1-3(h)(2001).