PATRICIA WOODALL,

Grievant,

v. **Docket No. 03-DOE-157**

DEPARTMENT OF EDUCATION/
SCHOOLS FOR THE DEAF
AND THE BLIND,

Respondent.

DECISION

Patricia Woodall ("Grievant") initiated this proceeding on April 14, 2003, raising two issues. First, Grievant contends that she should be allowed to choose whether to work in her capacity as a "floater" or as a substitute when another child care worker is absent, and, second, that she is entitled to compensation for her time spent in Braille training. The grievances were denied at level one on May 7, 2003. A level two hearing was held on May 29, 2003, and the grievances denied at that level on June 3, 2003. Level three consideration was waived, and Grievant appealed to level four on June 9, 2003. A hearing was held in the Grievance Board's office in Westover, West Virginia, on August 27, 2003. Grievant was represented by Harvey Bane of the West Virginia Education Association, and Respondent was represented by counsel, Heather Deskins. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 30, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Schools for the Deaf and the Blind ("SDB") as a Child Care Worker or "Houseparent." Her duties include the supervision and care for the students at SDB when they are not in classes. Because students at SDB (ages 3 to 18 years) are from all over the state and live in a dormitory setting at the school, they require 24-hour supervision. Grievant began working in this position at the beginning of the 2002- 2003 school year.

2. Grievant's specific job title is Child Care Worker/Night Shift-Female Floater. As a “floater,” Grievant can be assigned to any floor of the dorm where extra help is needed on any night she is scheduled to work. Other Child Care Workers are permanently assigned to a specific area of the dorm.

3. Occasionally, SDB is so short-handed that, despite utilizing Grievant as a floater, substitutes are needed to work at the dorms. The specific work location assignment for Grievant and for the substitute worker on these occasions is decided by Grievant's supervisor.

4. Grievant would like to have the option of choosing where she will work when a substitute is also needed, allowing her to work in her assigned slot or in the slot where a substitute is needed.

5. The job description for Grievant's position states in general qualifications that the individual “must have or acquire sign language and Braille skills.” SDB allows new employees a grace period of one year in which to acquire these necessary abilities.

6. At the time she was hired by SDB, Grievant already possessed sign language skills, but had not yet acquired Braille skills. 7. A Braille class is offered at SDB every year in conjunction with Shepherd College. It is taught each year from September through April on Tuesdays from 3:45 p.m. to 5:15 p.m. SDB employees may take the class free of charge, but are not required to acquire their Braille skills specifically from this course. All employees' skills are tested in a Braille sufficiency test.

8. In October of 2002, it came to the attention of Superintendent Jane McBride that Grievant was not enrolled in the Braille class at SDB. By letter dated October 7, 2002, Superintendent McBride advised Grievant when the class was being taught. This letter further stated: “Please be advised your employment is contingent on the acquisition of these skills and you will need to show documentation of these skills within one calendar year of your date of employment.”

9. Ms. McBride's letter did not directly “order” Grievant to enroll in the Braille class.

10. After receiving Superintendent McBride's letter, Grievant enrolled in the Braille course taught at SDB. Because she works night shift, the time of the class did not conflict with Grievant's work schedule.

11. SDB employees who normally work between the hours of 3:45 and 5:15 p.m. are allowed to attend the Braille class without having to take leave time.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell CountyBd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. The two issues raised by Grievant will be discussed separately below.

Work Schedule

The basic gist of Grievant's claim is that, when the dorm is short-staffed and a substitute is needed, she should be given the option to either work in her assigned “floater” slot for that evening or in the location assigned to the substitute, depending on where she thinks she is needed most. In support of this request, Grievant argues that the children at SDB benefit from consistency and familiarity, and SDB should strive to allow her to work with children most familiar to her, instead of assigning a substitute to care for them. While Grievant's point is well taken, she has simply not provided any legal support for her contention. There is no law, policy, regulation or other provision which requires Respondent to allow Grievant to make such choices regarding her assignments. In the absence of any such violation, the undersigned must presume that SDB officials make worker assignments with the best interests of the students in mind.

Braille Training

Grievant contends that, because the Braille training was required as a condition of her employment, she is entitled to compensation for her time spent in those classes. Respondent counters that, while Braille skills were required of Grievant, the Tuesday course at SDB was not *specifically* designated as the required forum for acquiring those skills. In support of her position, Grievant points to the Fair Labor Standards Act (“FLSA”) (See generally 29 U.S.C. § 254), which has generally been construed to provide thatattendance at *required* training programs is considered work time; however, training is **not** considered work time if all of the following criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course . . . is *not* directly related to the employee's job; **and**

(d) The employee does not perform any productive work during such attendance.

29 C.F.R. § 785.27. (Emphasis added.) The Act further explains that "[a]ttendance is not voluntary, of course, if it is required by the employer." If the employee understands or is "led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance", then attendance is construed to be required.

Grievant contends that she construed the October 7 letter from Superintendent McBride as a mandate that she attend the specific training course offered by SDB. Although this Grievance Board has previously addressed the issue of whether or not training time is compensable, the FLSA was not specifically asserted in those cases. In Jarman v. Fayette County Board of Education, Docket No. 97-10-541 (Apr. 13, 1998) and Stickler v. Lincoln County Board of Education, Docket No. 98-22-058 (July 9, 1998) it was determined that employees were entitled to be compensated for their time spent in required training courses. It was reasoned that, "as long as Grievants attended required training, and not training they chose to take for their personal convenience, [their employer] is required to compensate them for the time spent in such training." Id. However, thesedecisions were based upon a State Superintendent's opinion which has not been raised in the instant grievance.

Nevertheless, the undersigned finds that similar reasoning applies to Grievant's situation, and it would appear that the FLSA would consider Grievant's time spent in the Braille course at SDB to be compensable work time. Although Respondent has argued that Grievant did not have to take this particular Braille course and could have attained the training elsewhere, it is only logical that most, if not all, SDB employees would take advantage of this specific course provided on site at the Schools and free of charge to employees. Moreover, the Superintendent's correspondence to Grievant, emphasizing the urgent need for her to acquire these skills, in conjunction with stating the particular time and location of the Braille course, could easily have led Grievant to believe that attendance at *this particular course* was required of her. Finally, it cannot be overlooked that Respondent's administrators admitted that, if Grievant worked a different shift which conflicted with the time of the Braille class, she would have received compensation for it.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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); 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. With regard to her work assignment when a substitute is also called to work as a houseparent, Grievant has failed to establish a violation, misapplication ormisinterpretation of a statute, policy, rule, regulation or written agreement applicable to her employment. See W. Va. Code § 18-29-2(a).

3. Grievant established by a preponderance of the evidence that she was required to attend Braille training as a condition of her continued employment, entitling her to compensation for her time spent in that course. See generally 29 U.S.C. § 254; 29 C.F.R. § 785.27.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to compensate Grievant at her regular rate of pay for all hours she spent attending the Braille classes at SDB. All other relief is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hampshire 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 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.

Date: October 10, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge