BONNIE SIPPLE,

Grievant,

v.

DOCKET NO. 03-DOE-023

WEST VIRGINIA DEPARTMENT OF EDUCATION/

WV SCHOOLS FOR THE DEAF AND BLIND,

Respondent.

D E C I S I O N

Grievant, Bonnie Sipple, filed the following grievance against her employer, the West Virginia Department of Education/WV Schools for the Deaf and Blind ("Schools") on December 2, 2002:

> On 10/19/02 I worked 11 ½ hours. When I attempted to use my overtime as comp time, I was denied because I had used sick leave on 10/23/02. This is a violation of W. Va. Code 18A-4-10 and the Schools policy on compensatory time stated in the Employee's Handbook.
>
> Relief sought: I want my compensatory time awarded without regard to my use of sick leave, and to be compensated for any lost wages at 1 ½ the regular rate.

The grievance was denied at the lower levels of the grievance procedure, and Grievant appealed to level four on January 21, 2003, where the parties agreed to submit the case on the record developed below. The grievance became mature for decision on February 28, 2003, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Harvey M. Bane, West Virginia EducationAssociation, and the Schools was represented by Kristin Willard at level two, and Heather Deskins at level four. (See footnote 1)

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. 1 -

Request & Approval for Overtime/Compensatory Time, submitted October 20, 2002.

Ex. 2 -

Compensatory Time Record, July 1, 2002 to June 30, 2003.

Ex. 3 -

November 22, 2002 letter from J. D. Corbin to Bonnie Sipple.

Ex. 4 -

December 12, 2002 letter from Joseph D. Corbin to Bonnie Sipple.

Ex. 5 -

Schools Employee Handbook, Compensatory Time.

LII Schools Exhibits

Ex. 1 -

Request & Approval for Overtime/Compensatory Time, submitted May 21, 2002.

Ex. 2 -

Compensatory Time Record, July 1, 2001 to June 30, 2002.

Testimony

Grievant testified in her own behalf. The Schools did not present any additional witnesses.

The material facts essential to the resolution of this grievance are not in dispute, and are set forth in the following findings of fact.

FINDINGS OF FACT

1. Grievant is employed as a Child Care Worker at the Schools. The established workweek for Child Care Workers begins with second shift on Saturday and continues through the first shift of the following Saturday. Employees of the Schools are state, not county, employees. See W. Va. Code § 18A-4-17(2). 2. On October 19, 2002, Grievant accompanied students to a football game at West Virginia University in the course of her regular duties as set forth in her job description. The students returned to the Schools approximately three and one-half hours after Grievant's regular shift had ended.

3. According to standard procedure at the Schools, Grievant completed and submitted a request to be granted compensatory time for the three and one-half hours she worked beyond her normal shift. LII G. Ex. 1.

4. Although Grievant requested compensatory time at a rate of time and one- half for the extra hours worked, the Schools only approved her request for compensatory time on an hour for hour basis. LII G. Exs. 1, 2.

5. The reason compensatory time was awarded in this manner was because Grievant had used a day of sick leave during the workweek. Calculating Grievant's hours worked during the week in question shows she worked thirty-five and one-half (35 ½) hours. Because Grievant did not work in excess of forty (40) hours in the work week, she was only entitled to compensatory time on an hour for hour basis, rather than time and one-half.

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 §§ 4.21 (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. A preponderance of the evidence is defined as "evidence which is of greater weight or moreconvincing 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 Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports

both sides, a party has not met her burden of proof. Id.

Grievant claims she was improperly compensated for three and one-half hours of extra work on an hour for hour basis, and instead should have received time and one-half payment for the three and one-half hours extra she worked on October 19, 2002. She claims a violation of W. Va. Code § 18A-4-10 and the Schools compensatory time policy. (See footnote 2) The Schools asserts it compensated Grievant in accordance with all applicable statutes and policies.

W. Va. Code § 18A-4-10 provides in pertinent part:

> At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term. Unused leave shall be accumulative without limitation and shall be transferable within the state. A change in job assignment during the school year shall in no way affect the employee's rights or benefits.
>
> A regular full-time employee who is absent from assigned duties due to accident, sickness, death in the immediate family, or life threatening illness of the employee's spouse, parents or child, or other cause authorized orapproved by the board, shall be paid the full salary from his regular budgeted salary appropriation during the period which such employee is absent, but not to exceed the total amount of leave to which such employee is entitled.

The portion of the Schools' Employee Handbook regarding compensatory time provides, at page 17:

> If, in cases of emergency or when required by the public interest, a service employee is required to work in excess of prescribed working hours on weekdays, Saturdays, Sundays, or holidays, compensatory time may be granted by the Superintendent subject to the following regulations:
>
> 1. Prior approval to work additional hours must be granted by the immediate supervisor and the Superintendent.
> 2. Time beyond the 37 ½ [hour] workweek shall be credited on an hour-for-hour basis.
> 3. Time worked beyond 40 hours per week shall be credited on a one and one-half hour basis for each hour worked.
> 4. Compensatory time shall be used within the same workweek, if

> possible, and always within one (1) month at a mutually agreed upon time with the employee's direct supervisor.
>
> 5. Compensatory time cannot be carried over from the previous school year.

LII G. Ex. 5.

The Handbook clearly expresses that time worked beyond the standard thirty-seven and one-half hour workweek shall be credited on an hour-for-hour basis, but that time worked beyond forty hours shall be credited on a one and one-half hour basis. Because Grievant used day of sick leave on October 23, 2002, she did not work beyond forty hours during the workweek in question. Accordingly, the award of three and one-half hours of compensatory time on an hour-for-hour basis occurred exactly as set forth in the Handbook.

Pursuant to W. Va. Code § 18-29-2(a), this Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair LaborStandards Act (FLSA), 29 U.S.C. 201, et seq. See Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). The FLSA requires that employers compensate each employee for his or her hours of work in excess of forty hours per week at a rate of not less than one and one-half times the regular rate at which he or she is employed. 29 U.S.C. 207(a)(1) (Emphasis added). Because Grievant used a sick leave day on October 23, 2002, she did not work in excess of forty hours during the workweek in question. Under the FLSA, there is no obligation on the part of the employer to compensate an employee at one and one-half times her regular rate until she has actually worked over forty hours in a given workweek.

In West Virginia, classified civil service employees are covered by the FLSA as are the employees of the Schools. Division of Personnel Policy 20, Fair Labor Standards Act for Public Employees, specifically states in its Frequently-Asked Questions section, at question twenty-one, as follows:

> The FLSA requirement to pay premium rates for hours worked over 40 in a week applies only to time the employee **actually spends working**. Sick leave time, even if the employer pays the employee for the hours, is not considered hours worked.

(Emphasis in original). Though employees of the Schools are not classified civil service employees, the application of the FLSA is the same. The personal leave day taken by Grievant on October 23,

2002 is not included in a calculation of actual hours worked for overtime purposes.

Likewise, W. Va. Code § 21-5C-3 provides, in pertinent part:

> (a) On and after the first day of July, one thousand nine hundred eighty, no employer shall employ any of his employees for a workweek longer than fortyhours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one- half times the regular rate at which he is employed.
>
> (b) As uses in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:
>
> (1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . ..

Thus, West Virginia law agrees with the FLSA in that only those hours actually worked by an employee are included in a calculation of hours worked for overtime purposes.

The Schools is a unique residential employment setting. Deaf and blind students live on the campus of the Schools twenty-four hours a day. They must be supervised at all times by employees of the Schools. This does not occur in any county school system or in any correctional education setting. As such, Child Care Workers at the Schools are unique employees. They must be assigned to shifts that ensure that students are always cared for and safe.

On October 19, 2002, a group of students was taken by bus to a football game at West Virginia University. As outlined in her job description, Grievant accompanied the students to the game for supervisory purposes as part of her normal work shift. Because the bus returned to the Schools after Grievant's regularly scheduled work shift was over, she was permitted to choose to be compensated for the extra hours she worked with eitheractual wages or compensatory time. Grievant chose compensatory time, and she was not denied that time; she simply did not receive the time at a rate

one and one-half times her regular rate of pay because she took a sick leave day during the same workweek she accrued the compensatory time. Thus, she did not actually work over forty hours during the workweek and was not entitled to time and one-half compensation.

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 §§ 4.21 (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. Pursuant to W. Va. Code § 18-29-2(a), this Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201, et seq. See Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

3. The FLSA requires that employers compensate each employee for his or her hours of work in excess of forty hours per week at a rate of not less than one and one-half times the regular rate at which he or she is employed. 29 U.S.C. 207(a)(1) (Emphasis added).

4. Division of Personnel Policy 20, Fair Labor Standards Act for Public Employees, specifically states:

> The FLSA requirement to pay premium rates for hours worked over 40 in a week applies only to time the employee **actually spends working**. Sick leave time, even if the employer pays the employee for the hours, is not considered hours worked.

5. W. Va. Code § 21-5C-3 provides, in pertinent part:

> (a) On and after the first day of July, one thousand nine hundred eighty, no employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one- half times the regular rate at which he is employed.

> (b) As uses in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

> (1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . ..

6. Because Grievant did not actually work more than forty hours during the workweek in which she claimed compensatory time, she was not entitled to compensation at time and one-half her regular rate of pay, but only on an hour-for-hour basis, which she was granted.

7. Grievant has failed to prove by a preponderance of the evidence that the Schools violated any statutes, laws, or policies, governing the payment of overtime.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hampshire 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: March 10, 2003

Footnote: 1

The grievance was denied at level one by Joseph D. Corbin on December 12, 2002, and after a level two hearing on January 8, 2003, denied by Grievance Evaluator Stephen K. Davis on January 12, 2003.

Footnote: 2

Grievant's proposed findings of fact and conclusions of law for the first time allege violations of W. Va. Code §§ 18A-4-8a and 18A-4-8b. The introduction of these allegations after the conclusion of the taking of evidence at level two is impermissible as it renders the grievance at hand to be a substantially different grievance pursuant to W. Va. Code § 18-29-3(j), and in that no evidence was presented on these issues. See Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995) and Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995). Consequently, these allegations will not be addressed.