CAROLE EVERSOLE,

Grievant,

v. **Docket No. 05-14-466**

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Carole Eversole ("Grievant") initiated this proceeding on December 20, 2004, alleging entitlement to compensation for over 170 hours of overtime that she allegedly worked over a 2-3 year period. She also seeks a salary supplement allegedly given to other employees performing similar duties.

After denials at the lower levels (See footnote 1) , Grievant appealed to level four on December 28, 2005. A level four hearing was held in Westover, West Virginia, on March 15, 2006. Grievant was represented by John E. Roush, Esquire, of the School Service Personnel Association, and Respondent was represented by counsel, Norwood Bentley. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 13, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by Respondent from 1977 until her retirement in December of 2005. For the last ten years of her employment, her title was Food Service Planner/Executive Secretary, a position which reported directly to the Finance Director.

2. Grievant received a county supplement for her classification as a finance department employee, which was $3300 during the last two years of her employment.

3. Since 2003, Grievant's supervisor has varied, due to turmoil in Respondent's central office. After a financial audit was conducted in the early fall of 2003, the Finance Director at that time, Dale Hays, was placed on suspension, along with two other finance office employees. While the other two employees returned to work in January of 2004, Mr. Hays remained on suspension until he won his

level four grievance in early 2005. *See Hays v. Hampshire County Bd. of Educ.*, Docket No. 04-14-114 (Mar. 16, 2005). During Mr. Hays' absence, Grievant was to report to the superintendent. However, Superintendent David Friend began an extended medical leave of absence during the summer of 2004, when interim Superintendent Paula O'Brien served in that position. (See footnote 2) Also in early-mid 2004, Denise Hott was hired as Finance Director and became Grievant's direct supervisor.

4. In September of 2003, because allegedly excessive overtime pay had caused Respondent's finances to be audited, Superintendent Friend declared that no further overtime would be authorized. (See footnote 3) 5. Since at least 2003, Respondent has utilized a specific form on which overtime work is to be reported, which must be approved by the employee's supervisor and the superintendent. Grievant knew about this form. L II Tr. at 28.

6. Also in the fall of 2003, all central office employees were required to sign a sheet each time they arrived at the office and each time they left the office.

7. When Ms. Hott became Finance Director in 2004, she advised all employees that overtime would not be permitted.

8. During Mr. Hays' suspension, and prior to Ms. Hott's hiring, Grievant's duties increased. Because Grievant did not meet the qualification requirements for the position, the State Department of Education refused Respondent's request to temporarily classify Grievant as Child Nutrition Director. (See footnote 4)

9. Although Grievant alleges that she worked nearly 80 hours of overtime prior to September of 2003, for which she requested compensatory time, there is no record of these hours, and Mr. Hays did not recall Grievant ever placing a request for authorization or payment of this overtime. Mr. Hays also did not ask Grievant to work any overtime hours during the period alleged.

10. Grievant testified that she was required to work an eight-hour day, including a half hour lunch and two fifteen-minute breaks. However, there is no statement in the record as to what time Grievant was to report to work and what time she was to leave each day. Although the sign-in sheets indicate that Grievant was probably supposed to arriveat 7:30, there is no factual evidence as to what time she was permitted to leave at the end of the workday.

11. The central office sign-in sheets for the period from October 22, 2003, through November 30, 2004, indicate that Grievant, on occasion, stayed in the office until approximately 4:30 and

sometimes 5:00 p.m.

12. Grievant did not request approval or payment for overtime work, nor did her superiors request or knowingly allow her to work overtime hours during this period.

13. Nancy Biggs is employed as Respondent's Purchasing Director and receives a $5500 supplement for her duties as a department director. The record contains no comparison of her duties to those Grievant performed while she had no supervisor.

Discussion

This is a non-disciplinary grievance in which Grievant bears the burden of proof, and her allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's claims are twofold: first, she claims entitlement to compensation for the 80 hours of compensatory time she accrued prior to September of 2003, along with payment for the additional 170 hours of overtime she allegedly worked between 2003 and December of 2004, and second, she believes she is entitled to the same $5500 supplement given to the Director of Purchasing.

Overtime

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). 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). Grievant relies heavily on the *Guide to Fair Labor Standards Act for West Virginia School Districts*, promulgated by the State Department of Education. That policy, in Section 6, “Compensable Hours Worked,” states that “[i]f an employer knows or has reason to know that an employee is continuing to work, it is considered work time,” and the employee must be compensated.

According to Grievant's testimony, which contained various inconsistencies, she assumed Superintendent Friend knew she was working overtime, because of her presence at the central office. However, she also admitted that she knew for several years that a specific form was utilized for approval of and payment for overtime work, but she did not submit any such forms during the fall of

2003 and the following year. Grievant also testified that, when Ms. Hott assumed the Finance Director's duties sometime in 2004, she made quite clear to all employees that no one would be working overtime. Finally, although Grievant "assumed" Mr. Friend knew she was working overtime, he had also proclaimed a ban on overtime by September of 2003, which could easily lead one to the conclusion that he believed Grievant was working these hours simply of her own accord, presuming that he knew about them. (See footnote 5)

Keeping in mind that Grievant must prove her claims by a preponderance of the evidence, which "requires proof that a reasonable person would accept as sufficient thata contested fact is more likely true than not," (See footnote 6) it is quite impossible for the undersigned to grant Grievant's request for payment for overtime work. First, there is a serious question as to whether or not Grievant's superiors actually "knew or should have known" she was working overtime hours. As recently discussed in *McCallister v. Department of Revenue*, Docket No. 05-TD-042 (Dec. 30, 2005), when an employee works extra hours simply because they want to, without their superiors' expectation or approval, the overtime work is unauthorized. As occurred in *McCallister*, a specific form was to be utilized to obtain approval for overtime work when needed, which Grievant suddenly decided not to use beginning in September of 2003, which by happenstance was the same time that a financial audit occurred and Superintendent Friend declared that overtime was no longer allowed. Grievant's timing and failure to follow the established procedures at the time her alleged overtime work occurred are certainly suspect.

In addition, Grievant has also requested compensation for overtime which occurred throughout 2004, when at some point, Grievant admittedly knew that her direct supervisor, Ms. Hott, was not permitting employees to work any overtime whatsoever, "not even three minutes," as Grievant herself testified. It is, therefore, incongruous for Grievant to once again claim she was required to work overtime during that time period with her superiors' knowledge and/or approval, which she obviously did not have.

Another substantial obstacle regarding Grievant's request is the simple fact that there is no evidence establishing her exact expected work hours. Even if Grievant wereable to establish that she was required to work overtime and is entitled to compensation for it, which she has not done here, the evidence submitted would make a calculation of required overtime work impossible. Indeed, even the submissions of counsel for the respective parties at level four are extremely different regarding what

the exact amount of overtime hours would be, if Grievant were successful, further demonstrating that there is not a clear record here of what Grievant's normal work hours were, at what point her work became overtime hours, and whether or not the overtime was performed with her employer's actual or implied knowledge. In addition, there is no evidence that the sign-in sheets from the central office were verified by anyone or that they were to be used for pay purposes. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990); *See Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (April 30, 1998).

Similarly, the 80 hours of “comp” time which Grievant alleges was authorized by Mr. Hays prior to September of 2003 has not been documented, and Mr. Hays' testimony completely contradicted Grievant's on this point. Without supporting evidence that she was actually required to work such hours or when they occurred, Grievant cannot establish entitlement to payment for compensatory time.

Supplement

Grievant's claim of entitlement to the same supplement as Ms. Biggs is quite familiar; similar claims were raised recently by Linda Carder and Teresa Stine, also employees of Respondent's Finance Office. In *Carder/Stine v. Hampshire County Boardof Education*, Docket No. 05-14-267 (Jan. 9, 2006), the grievants claimed that they, too, performed duties similar to the director of a department, i.e. Ms. Biggs, which would entitle them to the larger $5500 supplement. Ms. Carder and Ms. Stine, classified as Accounts Payable Coordinator/Accountant III and Payroll Coordinator/Accountant III, respectively, were unable to prove that their duties were substantially similar to those of the Coordinator of Purchasing. They based their claim, as Grievant does here, on an alleged violation of the uniformity provision of W. Va. Code § 18A-4-5b, which requires that salary schedules be uniform “for all persons regular employed and performing like assignments and duties within the county.” The following language from that decision is informative:

> The evidence reveals that, in addition to their coordinator duties, both Grievants also perform various accounting functions and provide direct assistance to the Finance Director. Not only does their multi-classification status distinguish their positions from Ms. Biggs', but it is also clear that Ms. Biggs functions far more independently with administrative decision-making authority that Grievants do not possess, despite their ability to perform their duties without direct supervision.

Without a comparison of Grievant's duties to those performed by Ms. Biggs, Grievant cannot prove it

is more likely than not that her duties are substantially similar.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant bears the burden of proof, and her allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18- 29-6, 156 W. Va. C. S. R. 1 § 4.21. 2. 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).

3. Grievant has failed to prove by a preponderance of the evidence that she worked overtime from 2003 through November 30, 2004, which her employer required or had reason to have knowledge of.

4. A board of education “may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements" and "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county." W. Va. Code §18A-4-5b.

5. Boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have “like classifications, ranks, assignments, duties and actual working days.” *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ*., Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ*., Docket No. 95-15-217 (Sept. 29, 1995).

6. Grievant has failed to prove by a preponderance of the evidence that she performs “like assignments and duties” to those performed by the Director of Purchasing.

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.

Date: May 18, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It is not readily apparent from the record why the lower level proceedings took such a lengthy period of time.

Footnote: 2

This information was gleaned from the record of proceedings in Mezzatesta v. Hampshire County Board of Education, Docket No. 05-14-144 (Aug. 15, 2005).

Footnote: 3

See Hays, supra.

Footnote: 4

Mr. Hays also served as Child Nutrition Director.

Footnote: 5

Due to Mr. Friend's extended medical leave of absence, and his recent retirement, neither party called him to testify in this matter.

Footnote: 6

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).