THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

WILHEMINA GOINS and

SUE SWEPSTON,

Grievants,

v. DOCKET NO. 06-41-453

RALEIGH COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants filed this grievance on August 14, 2006, stating, "Grievants contend that Respondent erred as a matter of law and fact in changing the manner in which it calculated time worked and compensated [sic] for overtime. Grievants contend Respondent violated *W. Va. Code* §§ 18A-4-8(m) & 18A-2-6."

Their stated relief sought is, "Grievants seek reinstatement of previous practice and policy concerning calculation of time worked and compensation for overtime assignments." Upon agreement of the parties, this case was submitted on the record developed below. Grievants are represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent is represented by Gregory Bailey, Esq., Bowles Rice McDavid Graff & Love. This case became mature on February 2, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants assert Respondent cannot change the method by which it calculates overtime, and even if a change in calculation can be made, Respondent did not comply with the procedures outlined in *W. Va.* § 18A-2-6. Grievants argue the Fair LaborStandards Act only sets minimum

requirements, and does not prohibit an employer from exceeding those minimum standards. Grievants also assert they have standing to assert this grievance.

Respondent avers neither Grievant has experienced any loss of compensation by virtue of the change in calculation of overtime. Respondent also argues Grievants did not establish that the prior method of overtime compensation was established by Board action. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Wilhemina Goins and Sue Sweptson hold continuing contracts of employment with Respondent. (Stipulated by Parties).

2. Grievant Goins has approximately twenty-one years of service with Respondent. (Stipulated by Parties).

3. Grievant Swepston has approximately twenty-six years of service with Respondent. (Stipulated by Parties).

4. Grievant Sweptson transferred to the Purchasing Department as a Secretary/Accountant on or about October 16, 2006. (Stipulated by Parties).

5. On July 11, 2006, Respondent approved Policy C.1.26, Overtime Regulations, which requires overtime compensation be paid at one and one-half times an employee's regular rate of pay when the employee works over 40 hours in a work week. During a regular work week this would have no effect on Grievants.

6. Prior to the implementation of this policy, Grievants were compensated for overtime at the rate of one and one-half times their regular rate of pay for anytime worked outside their regular workday, without regard to the 40 hours workweek.

7. Grievants were informed of the change in overtime calculation by memorandum dated July 27, 2006.

8. Respondent's policy is applicable to Grievant Swepston in her new position in the Purchasing Department. (Stipulated by Parties).

9. Grievants did not consent to the implementation of this policy.

10. Neither Grievant has been required to work beyond their regular work day since the implementation of this policy.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

Because Respondent has asserted Grievants have not experienced any loss since the implementation of the policy, that issue will be addressed first. The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, 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); *See Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992).

In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [heseeks] 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). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

In this instance, Grievants have standing. While Grievants have not been asked to work additional hours, the new method for calculating overtime clearly affects them. Grievants clearly have an interest in the outcome.

Also, as noted by Grievants' attorney, the time for filing a grievance is quite short. *W. Va. Code* §

18-29-4(a)(1) instructs that a grievant has fifteen working days from the time of the occurrence of the event that gives rise to the grievance. Implementation of the policy was the event that gives rise. Grievants have standing to pursue this grievance.

With respect to the change in method for calculating overtime, Grievants assert Respondent violated *W. Va. Code* §§ 18A-2-6 and 18A-4-8(m). *W. Va. Code* § 18A-2-6 states:

After three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: Provided, That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date,except that for the school year one thousand nine hundred eighty-eight - eighty-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eight nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment. Those employee who have completed three years of acceptable employment as of the effective date of this legislation shall be granted continuing contract status.

Respondent implemented the policy concerning calculation of overtime to comply with the Fair Labor Standards Act, which requires an employee work in excess of 40 hours during a work week to be paid overtime.

The genesis of the former method of calculating overtime compensation was not established. Regardless of the source of this approach, there is no evidence that it was established by Board action. The Grievance Board has held that a county board of education is not bound by an employee's unauthorized conduct. *See Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999).

Since there is no evidence that the prior method for calculating overtime was established by

Board action, it is not a contractual entitlement, and Respondent is not bound to continue to follow this unauthorized method.

W. Va. Code § 18A-4-8(m) provides:

No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

With respect to this provision, known as the non-relegation clause, the Grievance Board has held that where a county board of education seeks to conform to therequirements of the FLSA with regard to the calculation and recording of time, changes that are characterized by an attempt to achieve consistency with the requirements of the FLSA are not the sort of changes proscribed by the non-relegation language of *W. Va. Code* § 18A-4-8(m). *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (April 28, 2006). While county boards of education may be authorized to exceed the overtime compensation entitlement established by the FLSA, either in the manner of calculation or the rate of compensation, unless it is shown that a county board of education made a knowing decision to establish an enhanced entitlement, school employees may no claim the perpetuation of an unapproved method of calculation under the flag of the non- relegation clause.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. "[S]tanding, 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); *See Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992).

3. In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "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). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

4. Grievants had standing to file this grievance.

5. A county board of education is not bound by an employee's unauthorized conduct. *See Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999).

6. Where a county board of education seeks to conform to the requirements of the FLSA with regard to the calculation and recording of time, changes that arecharacterized by an attempt to achieve consistency with the requirements of the FLSA are not the sort of changes proscribed by the non-relegation language of *W. Va. Code* § 18A- 4-8(m). *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (April 28, 2006).

7. Respondent did not violate any statute or policy when it enacted a uniform method for calculating overtime.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County. Any such appeal must be filed within thirty 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: March 23, 2007

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Wendy A. Campbell

Administrative Law Judge