WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTINE ZIRKLE,
Grievant,

v. **Docket No. 07-15-124**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Christine Zirkle ("Grievant")[1] initiated this grievance on October 3, 2005,[2] challenging Respondent's decision to discontinue paying bus operators an overtime rate of pay for all Saturday bus trips, in an effort to comply with the Fair Labor Standards Act ("FLSA"). The grievance was denied at level two in a decision dated February 2, 2007, following a January 31, 2007, hearing. Level three consideration was waived, and Grievant Zirkle appealed to the Grievance Board on February 8, 2007. This matter was placed in abeyance due to legislative changes affecting the grievance procedure and this agency, ultimately being scheduled for a level four hearing in January of 2008. At that time, the parties elected to have this grievance decided upon the basis of the record developed

[1]The original grievance also included Grievants Judy Mullins, Terryn Risk and JoAnn McClain, but it appears that these individuals did not appeal to level four of the grievance procedure.

[2]The reason for the significant delay in scheduling a level two hearing appears to be disputed by the parties, but is not relevant to the outcome of the grievance.

below. This matter became mature for consideration on February 4, 2008, the requested deadline for the parties' fact/law proposals.[3]

Synopsis

Grievant challenged the BOE's decision to discontinue its practice of paying an overtime rate for weekend bus trips, regardless of the total hours worked within the week. In effort to comply with requirements of the FLSA, the BOE informed bus operators in July of 2005 that it would only pay time and a half for weekend trips after the employee's total hours worked that week exceeded forty. Grievant claimed the BOE was bound to its past practice, but the Board did act within its discretion to change its informal practice to comport with the minimum requirements of the federal law.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education ("the BOE") as a bus operator.

2. Prior to June of 2005, the BOE had a practice of paying bus operators at a rate of time and a half their normal salary for extra weekend bus trips, regardless of how many hours the employees had worked during their normal workweek.

3. The practice of paying an overtime rate for weekend bus trips had not been adopted as a formal policy by the BOE at any time prior to 2006, and its origin is unknown.

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[3]Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, William Fahey. Grievant's representative did not file proposals as requested, and Respondent's counsel elected to stand upon the level two decision.

4. In March of 2005, a meeting was held with board of education administrators at which state and federal officials explained the applicability of the FLSA, and its most recent amendments, to school employees.

5. At a meeting held in June of 2005, BOE officials informed bus operators that they would be paid at their regular rate of pay for weekend trips, unless their total actual hours worked that week exceeded forty hours, in compliance with the minimum requirements of the FLSA.

6. Effective January of 2006, the BOE adopted an official policy governing overtime pay, which does allow for instances where the minimum requirements of the FLSA may be exceeded.[4]

7. Grievant did not testify at the level two hearing or provide any information regarding weekend trips she was assigned during 2005.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W. VA. CODE § 18-29-6.[5] "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that

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[4]This policy was not introduced into the record, and its exact provisions are unknown to the undersigned.

[5]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See* Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Because no legal arguments have been filed in this case at any level by Grievant, the exact nature of her argument is unclear. However, it is obvious that Grievant believes that, because the BOE had followed an established practice of paying the overtime rate for weekend trips, it was improper to discontinue that practice. Respondent contends that it is bound to follow the requirements of the FLSA and, in the absence of a properly adopted BOE policy stating otherwise, the payment of overtime is not allowed in instances where an employee has not exceeded 40 hours within a week.[6]

The Grievance Board decided some years ago that it has jurisdiction over claims involving the applicability of provisions of the FLSA. "Under W. Va. Code § 29-6A-2(i), the West Virginia Education and State Employees 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., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq." *Belcher v. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995). Here, Grievant does not appear to dispute that the FLSA only requires the payment of time and a half for hours worked in excess of 40 per week, but contends that the BOE was bound by its prior practice.

An issue quite similar to the one presented in the instant case was addressed by the Grievance Board in *Goins v. Raleigh County Board of Education*, Docket No. 06-41-453

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[6]Although not totally clear, it appears that the grievants in this case only sought relief for the period between June of 2005 and the adoption of the new policy in early 2006, which apparently does grant them an overtime rate when not necessarily required by the FLSA.

(March 23, 2007), a case in which the board of education had a practice of paying service personnel at an overtime rate for any hours worked outside their normal workday, without regard to the total hours worked within a week. It then adopted a formal policy in 2006, stating the requirements of the FLSA of overtime pay only for hours in excess of 40 within a week, discontinuing its prior practice. The administrative law judge held that "[s]ince 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." Addressing the grievants' contentions that the Board's decision contradicted provisions of the so-called "non-relegation clause" of W. VA. CODE § 18A-4-8(m), the following observation was made:

> 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 not claim the perpetuation of an unapproved method of calculation under the flag of the non-relegation clause.

Id., (citing Dillon v. Mingo County Bd. of Educ., Docket No. 05-29-413 (April 28, 2006)).

In addition, the Grievance Board has repeatedly held that "[i]n the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05-43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-246 (Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd. of Educ.*, Docket No. 92-30-314 (Nov. 30, 1992); *Biller v. Upshur County Bd. of Educ.*, Docket No. 90-49-533 (Sept. 27, 1991); *Napier v. Lincoln County Bd.of Educ.*, Docket No. 89-23-635 (May 25, 1990); *Isaacs*

v. Lincoln County Bd. of Educ., Docket No. 89-22-555 (Jan. 12, 1990); *Terek v. Ohio County Bd. of Educ.*, Docket No. 35- 87-294-3 (July 20, 1988).

Even if the previous "practice" of the BOE of paying overtime wages when not required by the FLSA had been a formal policy adopted by the Board, certainly it would be within the BOE's discretion to change that policy to comport with the federal law's requirements. Indeed, the BOE in this case did ultimately choose to allow overtime pay beyond the FLSA's requirements in some instances, but it was not legally required to do so. Similarly, it should not be bound by a previous informal practice and acted within its authority in providing only the compensation required by that law.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W. VA. CODE § 18-29-6.

2. "Under W. Va. Code § 29-6A-2(i), the West Virginia Education and State Employees 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., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq." *Belcher v. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

3. "In the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05-43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-246 (Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd.*

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4. 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 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). *Goins v. Raleigh County Board of Education*, Docket No. 06-41-453 (March 23, 2007)*; See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (April 28, 2006).

5. Respondent did not violate any statute or policy when it changed its method of calculating overtime wages to comport with the requirements of the FLSA.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 18-29-7 (repealed, *See Footnote 5, supra)*. Neither the West Virginia Public 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 6, 2008

DENISE M. SPATAFORE
Administrative Law Judge