THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARK MYERS,
Grievant,

v. **DOCKET NO. 2011-1487-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Mark Myers, filed a grievance against his employer, the Monongalia County Board of Education, on April 18, 2011. The statement of grievance reads:

> Grievant, a regularly employed Plumber II/General Maintenance/Heavy Equipment Operator, contends that Respondent has violated West Virginia Code § 18A-4-8b(f) and engaged in discrimination and favoritism as defined in West Virginia Code § 6C-2-2 in the distribution of overtime. In addition, Grievant contends that the failure to equalize overtime opportunities violates agreements from prior grievances to the effect that the assignments would be rotated. Grievant contends that J.R. Statler, who holds the same multiclassification titles as Grievant, has received many times the amount of overtime assignments received by Grievant. Grievant also contends that, since his employment as a Plumber II/General Maintenance, Ed Phillips has also received more overtime opportunities than Grievant.

As relief Grievant sought, "rotation of overtime in order to give all employees in his multiclassification an equal opportunity for overtime assignments. Grievant also seeks compensation for lost wages to maximum extent permitted by law with interest."

A hearing was held at level one on May 18, 2011, and a level one decision denying the grievance was issued on June 6, 2011. Grievant appealed to level two on June 13, 2011. A mediation session was held on September 26, 2011. Grievant appealed to level three on October 5, 2011. A level three hearing was held before the undersigned

Administrative Law Judge on February 8, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on March 14, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserted that Respondent was not following the rotation list in assigning overtime (extra-duty) work. Grievant demonstrated that on one occasion, his supervisor allowed the employees working on a long-term project to work overtime hours one day to finish the project, rather than going down the rotation list to see who was next on the rotation, possibly resulting in someone unfamiliar with the project working the overtime hours. Grievant did not demonstrate he was next in line to work the overtime on this one occasion, had his supervisor consulted the rotation list.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") since 1989. Grievant works in the Maintenance Department, and is multi-classified as a General Maintenance/Plumber II/Heavy Equipment Operator.

2. Nelson "J.R." Statler, Jr., is also employed by MBOE in the multi-classified positions of General Maintenance/Plumber II/Heavy Equipment Operator.

3. Louis Phillips is employed by MBOE in the multi-classified positions of General Maintenance/Plumber II.

4. Grievant has more seniority in the multi-classifications held than Mr. Statler and Mr. Phillips.

5. On April 14, 2011, Grievant observed Mr. Statler and Mr. Phillips completing overtime forms to turn in to MBOE. Grievant had not been asked if he wanted to work the overtime. Mr. Statler and Mr. Phillips had been working at Brookhaven Elementary School on a project during their regular work hours, and were close to completing it. They were leveling the ground and spreading gravel, getting the site prepared for the contractor to start working on May 10, 2011. They were behind schedule because of weather conditions, and asked their supervisor, Kermit Hess, Maintenance Supervisor, if they could stay one evening so they could finish the work. Mr. Hess authorized the overtime to complete the project. Mr. Statler and Mr. Phillips worked five or six hours of overtime that evening.[1]

6. It is Mr. Hess' practice for as long as he has been in his position to allow a crew that has been working on a project to work any overtime needed to complete that project, rather than call in the next person off the rotation list to work overtime on the project. Grievant has in the past received overtime because he was working on a project during his regular work hours that extended into overtime.

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[1] Grievant had also heard through the rumor mill that sometime in late April or early May 2011, Mr. Statler and Mr. Phillips worked overtime on a Saturday spreading gravel at Brookhaven Elementary School. Mr. Hess was not aware of this. Grievant presented no other evidence to support this assertion, and it will not be considered by the undersigned.

7. Mr. Hess maintains rotation lists for each classification which he supervises for purposes of making extra-duty assignments. Grievant was on the rotation lists for his classifications.

8. During the winter of 2010-2011, Grievant accepted the opportunity to work snow removal on one occasion, and declined to work a second opportunity.

9. Mr. Hess attempted to contact Grievant by calling his cell phone on more than two occasions when there was snow removal work to be done during the winter of 2010-2011, but Grievant did not answer the telephone. When this occurred, Mr. Hess went on to the next person on the list to offer them the opportunity to work overtime performing snow removal, because he did not have time to leave a message and wait and see if he got a call back. Mr. Hess had informed the employees that this would be the procedure.

10. The record does not reflect how many opportunities for overtime snow removal were available during the 2010-2011 school year.

11. Mr. Hess asks Maintenance Department employees who are interested in performing snow removal to place their names on a list. During the 2010-2011 school year, nine or ten employees placed their names on the list.

12. During the 2010-2011 school year, Grievant was paid $3,164.50 in overtime, Mr. Statler was paid $5,657.25 in overtime, and Mr. Phillips was paid $369.09 in overtime. During the previous school year, Grievant was paid $10,317.66 in overtime, Mr. Statler was paid $4,106.25 in overtime, and Mr. Phillips was paid $1,993.36 in overtime. The record does not reflect the hourly rate of any of these employees, or the number of hours worked. Much of the overtime Grievant worked during the 2009-2010 school year involved a contract he had with MBOE to work as a painter about 15 hours per week during the

renovation of University High School. That work was completed shortly after the beginning of the 2010-2011 school year.

13. Rather than being paid for overtime worked, MBOE employees may choose to take time off work for every hour of overtime worked, commonly referred to as comp time. During the 2010-2011 school year, Grievant accumulated 35 hours of comp time, Mr. Statler accumulated 18.25 hours of comp time, and Mr. Phillips accumulated 4.88 hours of comp time. The record does not reflect the monetary value of this comp time.

14. Mr. Statler is related to Joseph Statler, who was a member of the Monongalia County Board of Education.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant claimed he was denied the same opportunities to work overtime as other employees, specifically pointing to Mr. Statler and Mr. Phillips. “Overtime work for school service employees is considered extra-duty work, and the assignment of extra-duty work

is governed by W. VA. CODE § 18A-4-8b, which provides for the manner of assigning extra-duty work as follows:

> An employee with the greatest length of service in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments."

McCallister v. Putnam County Bd. of Educ., Docket No. 02-40-034 (April 23, 2002).

Grievant was on the rotation list for extra-duty work, and worked overtime during the 2010-2011 school year. It is clear that Mr. Phillips worked substantially less overtime than either Grievant or Mr. Statler. It is not clear from the record whether Mr. Statler worked more overtime than Grievant. Although Mr. Statler had earned more money from his overtime work than Grievant, Grievant had more compensatory time accumulated than Mr. Statler. Even had Mr. Statler been assigned more overtime hours than Grievant, this would not be dispositive. The question is whether Mr. Hess followed the extra-duty rotation list in making assignments, not how many hours were worked or how much money was earned by any particular individual. One extra-duty assignment may result in one hour worked, while the next one is a six-hour assignment. Which assignment an individual receives is based on who is next on the rotation list.

Grievant pointed to one instance when Mr. Statler and Mr. Phillips were allowed to work overtime, and he was not asked to work overtime. Mr. Statler and Mr. Phillips were allowed to work overtime to complete a long-term project assigned to them, which appears to be general maintenance type work. However, it is unnecessary to determine whether Mr. Hess' assignment of this overtime work to employees who were familiar with the project was appropriate because, in order for a Grievant to demonstrate entitlement to a position

or compensation, it is necessary to establish he or she was "next in line." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998). "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). Grievant did not present any evidence that he was next in line for this work, rather than Mr. Statler or Mr. Phillips.

As to the lack of extra-duty snow removal work assigned to Grievant, Mr. Hess explained that when he needed the snow removed, he called people out in the middle of the night, and did not have time to leave a message and let them get back to him if they chose not to answer the telephone. He needed the work done immediately. Mr. Hess had told those signing up for snow removal that this would be the procedure. "Although not explicitly stated, *Hurley [v. Mingo County Bd. of Educ.*, Docket No. 92-29-068 (Feb. 19, 1993)] clearly stands for the proposition that an employer's attempt to contact persons on the substitute roster in proper order by telephone is sufficient. . . . it is held that a reasonable, good faith attempt to contact employees, in rotation list order, is all that is required by the statute. Attempts to make contact by telephone are generally acceptable. Whether the attempt made is sufficient must be determined on a case-by-case basis." *Jennings v. Wyoming County Bd. of Educ.*, Docket No. 96-55-322 (Nov. 18, 1997). Mr.

Hess' procedure in this instance was certainly reasonable given that he did not have time to wait around for a call back.

Finally, Grievant claimed discrimination and favoritism. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant presented no evidence to support a claim that he was treated differently than any other employee. To the contrary, Grievant testified that he too had been allowed to work overtime on occasion to finish a project to which he was assigned, rather than Mr.

Hess consulting the rotation list to bring in someone unfamiliar with the project to finish the job. Grievant did not prove his claim of favoritism or discrimination.

Grievant argued for the first time in his post-hearing written argument that Respondent had acted in bad faith when Mr. Hess "tried to conceal" that Mr. Statler and Mr. Phillips had worked overtime, by admonishing Grievant when he picked up the overtime sheets that had been placed face down on Mr. Hess' desk and looked at them. Grievant also asserted that Respondent's representative had been "openly hostile" toward Grievant at the level one hearing about this incident. The reason for the admonishment and any perceived "hostility" is obvious. It is somewhat unbelievable to the undersigned that Grievant would assert that Respondent's reaction to Grievant's inappropriate behavior amounts to bad faith. It does not.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. “Overtime work for school service employees is considered extra-duty work, and the assignment of extra-duty work is governed by W. VA. CODE § 18A-4-8b, which provides for the manner of assigning extra-duty work as follows:

> An employee with the greatest length of service in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments.”

McCallister v. Putnam County Bd. of Educ., Docket No. 02-40-034 (April 23, 2002).

3. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998). "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).

4. Grievant presented no evidence that he was next in line for the overtime work performed by Mr. Statler or Mr. Phillips.

5. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove he was the victim of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 11, 2012