

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**KATHY CYPHERS,  
Grievant,**

**v.**

**Docket No. 2018-0962-MrnED**

**MARION COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Kathy Cyphers, is employed by Respondent, Marion County Board of Education, as a Secretary III. Grievant filed a Level One grievance form dated February 12, 2018, stating:

Extra duty assignment and overtime pay have been assigned and continue to be, to retired and non-senior secretaries in violation of WV Code 18A-4-8b(f), WV Code 18A-4-8g and in an arbitrary and capricious, and flagrant abuse of the Board's policies regarding extra duty pay and overtime. It is believed, pursuant to recent FOIA requests poorly answered that this work totals approx. \$11,000 to date.

For relief, Grievant asks for the following:

Posting of all extra duty assignments and overtime pay pursuant to statutory requirements, and an award of back pay for all hours that the grievant should have been able to work had the extra duty and overtime been assigned consistent with state law and board policies.

A Level One conference was held on May 11, 2018. A Level One decision was issued on September 5, 2018, denying the grievance. A Level Two mediation session was conducted on November 5, 2018. Grievant perfected her appeal to Level Three on November 14, 2018. A Level Three evidentiary hearing was conducted before the undersigned on March 11, 2019, at the Grievance Board's Westover office. Grievant



appeared in person and by her counsel, George B. (“Trey”) Morrone III, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on May 22, 2019.

### **Synopsis**

Grievant asserts that she, a regularly employed secretary, should have been given the opportunity to perform extra-duty assignments related to a secretarial position in personnel. Respondent does not deny that it assigned the secretarial duties to another regular service employee and to a retired employee. Respondent should have offered this work to regular secretaries in seniority order on a rotating basis before offering the opportunity to a retired secretary. Grievant failed to demonstrate that she should have been offered any particular extra-duty assignment on any particular date, and that she would have been available to take that assignment on that date. This grievance is granted, in part, and denied, in part.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant is employed by Respondent and holds the classification title of Secretary III.
2. Grievant’s regular work hours are 7:00 a.m. to 2:30 p.m., and she performs her secretarial duties in the central office.
3. Grievant asserts she was available to perform extra secretarial duties and work overtime each day after 2:30 p.m., and Grievant was willing to adjust her daily work schedule to accommodate the additional work assignments.



4. The additional work assignments, which are the subject of this grievance, are associated with a position previously held by Grievant, Secretary III - Personnel - Central Office. Grievant vacated that position when she transferred to her current Secretary III position also at the central office. Per the relevant job posting, this vacancy was filled by Trina Brown.

5. Debra Shuck, who was previously employed by Respondent with the classification title of Secretary III, retired, effective March 31, 2015.

6. A large amount of irregular work has arisen since Trina Brown began the new position, some of which was performed by Trina Brown and some of which was performed by Ms. Shuck.

7. Respondent requires regular service personnel to get pre-approval of overtime with respect to any work beyond the normal workday.

8. Respondent has repeatedly given the extra-duty assignments to Trina Brown and she has been paid at an overtime rate for performing these assignments.

9. Respondent did not give pre-approval of any overtime work performed by Trina Brown.

10. Respondent has utilized the services of Ms. Shuck, at a rate of \$28.55 per hour, to perform work associated with the new position held by Trina Brown.

11. Respondent did not obtain Board approval to hire, contract with or to pay Ms. Shuck.

12. Respondent has never posted or made available to other qualified regular service personnel, including Grievant, any of the extra-duty assignments performed by Ms. Shuck and/or Ms. Brown.



13. From July 11, 2017, through March 1, 2019, extra-duty assignments were performed by Ms. Shuck and Ms. Brown at various times throughout the workday, both during and outside Grievant's regular work hours.

14. Ms. Shuck was employed to train Ms. Brown relevant to Respondent's personnel department and its functions. The majority of this training took place during the regular workday when Grievant would have been working in her regular job.

15. Respondent acknowledges that the Board of Education did not approve the hiring of Ms. Shuck to perform the extra-duty assignments as an independent contractor, a substitute or otherwise.

16. Respondent acknowledges that it did not afford other qualified regular service personnel, including Grievant, the opportunity to perform the secretarial duties assigned to Ms. Shuck and Ms. Brown.

17. From July 2017 through January 2018, Grievant worked a number of overtime hours. There are forty-seven regular secretaries on Respondent's secretary seniority list.

### **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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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). "A preponderance of the evidence is evidence of greater weight or more convincing 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 contends that she, a regular employee, should have been given the opportunity to perform secretarial duties as an extra-duty assignment, as opposed to Respondent assigning the duties to a retired employee and/or another currently employed Secretary III. Grievant points out that neither the extra-duty assignments, nor the hours during which they were to be performed, were ever posted or made available to any regular service personnel holding the secretarial classification title. Grievant argues that the duties performed by Ms. Shuck and/or Ms. Brown could have been performed after 2:30 p.m., as evidenced by their time records.

As counsel for Grievant aptly points out to the undersigned, Respondent's action in this case is the same type of conduct addressed in a previous grievance filed by Grievant in the matter of *Kathy Cyphers and Tonya Leigh Boore v. Marion County Board of Education*, Docket No. 2018-0308-CONS. In the Level One decision, Respondent was ordered to follow the requirements of WEST VIRGINIA CODE § 18A-4-8b, with respect to extra-duty assignments. In particular, Respondent was ordered to follow WEST VIRGINIA CODE § 18A-4-8b(f) with respect to all extra-duty work. These cases were resolved by settlement agreement.

Extra-duty assignments are irregular jobs that occur "periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival



trips.” W. VA. CODE § 18A-4-8b(f)(1). This CODE Section describes how extra-duty assignments are to be made, stating in § 8b(f)(2) that:

(A) A service person with the greatest length of service time 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 employees have had an opportunity to perform similar assignments. The cycle is then repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

The parties do not dispute that the work assignments that were not offered on a rotating basis appear to meet the definition for an “extra-duty” assignment as it was an “irregular job that occur[ed] periodically or occasionally,” as opposed to regularly. Accordingly, Respondent should have offered this work to regular secretaries in seniority order on a rotating basis before offering the opportunity to retired secretaries like Ms. Shuck.

The Grievance Board has held that the opportunity to perform overtime work by service personnel is an extra-duty assignment that must be offered on a rotating seniority basis to all regular employees within the classification. Overtime work for school service employees is considered extra-duty work, and the assignment of extra-duty work is governed by WEST VIRGINIA CODE § 18A-4-8b, which provides for the manner of assigning extra-duty work. *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-0674-MonED (April 9, 2013).

The record of this case failed to demonstrate many facts which are prerequisites to Grievant’s entitlement to any compensation relating to allegedly missed extra-duty work



opportunities. Some of the work at issue, performed by Ms. Brown, was regular secretarial work occurring outside of her regular work hours that did not result in overtime pay. Some of the work at issue, performed by Ms. Brown, was regular secretarial work occurring outside of her regular work hours that did result in overtime pay. Some of Ms. Brown's hours were training hours and no one but Ms. Brown could have worked those hours. Regardless of these distinctions, as with any other extra-duty assignment, a secretarial extra-duty assignment would first be offered to the most senior secretary in the county, then the second-most-senior secretary and so on, until all of the secretaries have been given the opportunity to perform an extra-duty assignment. See W. VA. CODE § 18A-4-8b(f).

WEST VIRGINIA CODE § 18A-4-8b(f)(2)(b) does provide that employees within a particular classification may agree on the use of an alternate procedure for assigning extra-duty assignments. For the sake of example, as Grievant suggested at Level Three, offering overtime work only to service employees in the same classification who work at the same work site. But, any alternate procedures must be pre-approved by a super-majority of the workers in that classification and the school board. No evidence was offered that any such alternate procedure for assigning secretarial extra-duty assignments existed in Marion County. Accordingly, the regular rule of WEST VIRGINIA CODE § 18A-4-8b(f) applies in that all secretaries in the county, in seniority order, would need to be called for any extra-duty assignments. To the extent that certain work performed by Ms. Brown should have been assigned as extra-duty work, such work should have been offered to every secretary in Marion County, in seniority order.



Even if some of the work performed by Ms. Brown might have been considered extra-duty work, and if all of Ms. Brown's overtime hours would have been considered extra-duty work, the record failed to establish which of Ms. Brown's assignments should have been considered extra-duty assignments. Grievant failed to demonstrate that she should have been offered any particular extra-duty assignment on any particular date, and that she would have been available to take that assignment on that date.

Finally, for a grievant to demonstrate entitlement to a position or compensation, it is necessary that he or she prove that they were next in line. *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006). Grievant failed to offer evidence that she was next in line for any of the alleged extra-duty assignments at issue. Grievant has a little more than five years of seniority, and is 33<sup>rd</sup> on the secretary seniority list. Ms. Brown was hired in 1985, and is the third-most senior secretary in Marion County. Grievant failed to prove which of Ms. Brown's assignments beyond the regular work day should have been offered as extra-duty assignments, and she failed to prove the number of such assignments that should have been offered to her and that she would have taken those assignments. In addition, if each instance on which Ms. Brown worked beyond 40 hours per week had been offered to other Marion County Schools secretaries in rotating seniority order, as extra-duty work, Grievant would have been just one among 46 regular secretaries who would have been offered this work.

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 her grievance by a preponderance of the evidence. Procedural Rules



of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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).

2. The Grievance Board has held that the opportunity to perform overtime work by service personnel is an extra-duty assignment that must be offered on a rotating seniority basis to all regular employees within the classification. Overtime work for school service employees is considered extra-duty work, and the assignment of extra-duty work is governed by WEST VIRGINIA CODE § 18A-4-8b, which provides for the manner of assigning extra-duty work. *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-0674-MonED (April 9, 2013).

3. WEST VIRGINIA CODE § 18A-4-8b(f) applies in that all secretaries in the county, in seniority order, would need to be called for any extra-duty assignments. To the extent that certain work performed by Ms. Brown should have been assigned as extra-duty work, such work should have been offered to every secretary in Marion County, in seniority order.

4. Grievant failed to prove that she was next in line for any of the extra-duty assignments at issue. When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, the claim must be denied. *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

Accordingly, this grievance is **GRANTED, IN PART**, and **DENIED, IN PART**. Respondent is **ORDERED** to follow WEST VIRGINIA CODE § 18A-4-8b(f) with respect to all extra-duty work. Grievant's demand for back pay 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

**Date: June 10, 2019**

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**Ronald L. Reece**  
**Administrative Law Judge**