

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LYDIA POTTORFF**  
**Grievant,**

**v.**

**Docket No. 2019-0878-KanED**

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

## **DECISION**

Lydia Pottorff, Grievant, filed a grievance against her employer, Kanawha County Board of Education ("KCBE"), Respondent, protesting her working conditions and compensation received. The grievance was filed initially at level one on or around February 7, 2019, claiming in summary that she was subjected to a hostile work environment which prevented her from receiving "step-up" assignments and having "other missed work opportunities." As relief, Grievant requested "cessation of the behavior described in the statement of the grievance and any and all relief deemed appropriate by the hearing officer and/or the ALJ." A decision granting the grievance was rendered on March 18, 2019. During the time period of the level one decision being issued, Grievant transferred from the hostile environment to an alternative school board facility. It is not herein contested that Grievant is currently subjected to a hostile work environment.

Grievant was unsatisfied regarding the relief granted at level one and appealed to level two on April 2, 2019. A mediation session was held on May 15, 2019. The grievance was placed in abeyance for a period to permit continued efforts to find a resolution. Grievant appealed to level three on October 17, 2019. A level three hearing was held before the undersigned Administrative Law Judge on February 25, 2020, at the

Grievance Board's Charleston office. Grievant appeared in person and was represented by John Everett Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent was represented by Assistant Principle Angela Cruikshank and Lindsey D.C. McIntosh, Esquire, General Counsel for the Board. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about April 6, 2020. Both parties submitted fact/law proposals.

### **Synopsis**

The issue in discussion is entitlement, if any, to money Grievant improperly missed out on in overtime, step-up pay, and/or compensation she may have earned had she been awarded a summer substitute contract. Grievant was employed by Respondent as a Custodian I at Capital High School (CHS) at the time that she initially filed this grievance. While at Capital High School Grievant was subjected to what was found to be a hostile work environment. During the time that Grievant was subjected to this hostile work environment, she alleges that other employees with less seniority were being improperly given step-up assignments and overtime work ahead of her. Grievant also claims that she was unlawfully denied a summer substitute assignment during the Summer of 2018.

Grievant has the burden of establishing the amount of wage(s) she was improperly denied. It is more likely than not that Grievant missed out on a limited amount of overtime and/or step-up pay, given the recognized (hostile) work environment however the amount of lost compensation is subjective. Grievant did not establish she was denied a summer

substitute contract due to malfeasances of Respondent. The make-whole remedy of five hundred (\$500) dollars is **GRANTED** to Grievant, which is calculated as the outstanding proportionate amount of extra-duty pay that is due to Grievant per distribution of applicable moneys to CHS custodians over the statutorily recognized time period for back pay.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant has been an employee with Kanawha County Schools for three years. At the time that she initially filed this grievance at level one she was a Custodian I at Capital High School.

2. Grievant applied for and received an alternative custodial position, transferring from Capital High School to Ben Franklin Career Center. Grievant began working in the new position on or about March 22, 2019.

3. The instant grievance was granted at level one and Respondent has conceded that harassment and a hostile work environment had existed at Capital High School.<sup>1</sup> While at Capital High School Grievant was subjected to a hostile work environment. See level one March 18, 2019 Decision, Conclusions of Law 8.

4. Tom Cope is a Custodian IV and head custodian at Capital High School.

---

<sup>1</sup> During the time period of the level one decision being issued, Grievant transferred from Capital High School to Ben Franklin Career and Technical Center. It is not herein litigated that Grievant is currently subject to a hostile work environment.

5. Adam Lucas is a Custodian III and the supervisor/foreman of the evening shift custodians at Capital High School.

6. At the time relevant to this matter, Head Custodian Cope made the overtime assignments at Capital High School with the assistance of Supervisor Lucas. L3 testimony

7. In the fall of 2017, Principal Larry Bailey directed Head Custodian Cope not to call Grievant in rotation for step up assignments after she raised questions concerning direction of custodians to clean a locker room area possibly contaminated with an infectious disease. Mr. Cope, as the head custodian at Capital High School, complied with this directive. Cope testimony

8. Thereafter, a week or so after the meeting of Principal Bailey and Head Custodian Cope, Supervisor Lucas advised Grievant that he had been directed to skip Grievant for extra-duty/overtime assignments as well as step-up assignments. Grievant testimony

9. Grievant was routinely skipped over for opportunities for extra-duty/overtime assignments as well as temporary step-up assignments. Also see level one March 18, 2019 Decision, Conclusions of Law 7

10. The evening shift custodians at Capital High School during the 2017-2018 and 2018-2019 school years included Adam Lucas, Grievant, Joshua Mullins, Timothy Powers, Darlie Humphreys and Michael Armstrong.<sup>2</sup> Adam Lucas is a Custodian III. All the other identified custodians hold the classification title of Custodian I. G Ex 3

---

<sup>2</sup> For reasons not clear on the record, Adriene Pritt was included on the lists of Capital

11. Some of the custodians at Capital High School were not interested in performing extra-duty/overtime assignments during the 2018-2019 school year. In particular, Mike Nida and Josh Mullins indicated no desire to perform overtime/extra-duty assignments. L3 testimony Nida and Mullins

12. The evening shift custodians at Capital High School worked the following amounts of over time from February 17, 2018 through March 15, 2019:<sup>3</sup>

Name	Salary earned* <sup>4</sup>	Number of assignments
Adam Lucas	\$805.35	36
Grievant	\$153.04	13 <sup>5</sup>
Joshua Mullins	\$354.17	42
Timothy Powers	\$1420.82	64
Darlie Humphreys	\$68.85	0
Michael Armstrong <sup>6</sup>	0	0

High School custodians on Grievant's Exhibits 2 and 3. However, the testimony at level three indicates that she was never assigned to Capital High School as a custodian.

<sup>3</sup> See records of overtime for CHS custodians, G Ex 2 and Custodian Rotational Roster G Ex 3. As presented by Grievant's fact/law proposals, the methodology used for the information in this and the next chart was as follows: From the amount listed on the summary page of Grievant's Exhibits 2, extra-duty/overtime assignments prior to February 19, 2018 and after March 15, 2019 have been deducted from the calculation on the first page of Grievant's Exhibit 2. The wages earned during the summer of 2018, whether the employee was on the summer substitute list or was working under his or her regular contract were deducted because Grievant would have been outside of her regular contract at that time, roughly July 2018. Some of the miniscule periods of time that were credited as overtime are likely the result of the employee working over on particular date to finish up his or her regular work and simply clocked out a little late. Nevertheless, the time is being considered overtime/extra-duty assignments time and included in the calculations. See Grievant's proposed findings of fact and conclusions of law.

<sup>4</sup> The amounts indicated are attempts at identifiable applicable overtime compensation. Money earned outside of the known applicable period of Grievant's eligibility for overtime wages has been respectively deducted. See Grievant's fact/law proposal. The undersigned is aware and recognizes there is a good faith estimation of the amounts provided by Grievant's counsel pursuant to G Ex 2, "Records of Overtime for custodians assigned to Capital High School."

<sup>5</sup> Via level three testimony Grievant only recalled one or two overtime opportunities, one in particular in June of 2018. Grievant's Exhibit 2, provides Grievant was presented with a number of overtime assignments in excess of the two overtime opportunity Grievant tends to recall.

<sup>6</sup> Mr. Armstrong was not hired as a regularly employed custodian until February 22, 2019, only a few weeks before Grievant left Capital high School.

13. The custodians at Capital High School, who were on a shift other than evening, worked the following amounts of overtime from February 17, 2018 through March 15, 2019:<sup>7</sup>

Name	Salary earned*	Number of assignments
Clinton "Tom" Cope	\$3065.89	23
George McIntyre	\$230.72	9
Brian Briles	\$364.50	8
Hansel Parsons	\$193.91	23
Sterling Miller	\$292.47	7
Shawn Grady	\$365.63	15
Michael Nida	\$56.24	18

14. Respondent permits regularly employed custodians to sign up for a special summer substitute list during the time period when (a) their employment term for one year has ended and (b) their employment term for the succeeding school year has not started. See *West Virginia Code* §18A-4-15(b)(3); Also see R Ex 3

15. Tabatha Gillespie is an employee of Respondent's human resources or personnel department and has special responsibility for Respondent's service personnel employees. HR Specialist Gillespie testified at the L3 hearing of the instant grievance.

16. Ms. Gillespie, within the duties of her position, sent an email out to custodians advising them of the opportunity to sign up for a special summer substitute list near the end of the 2017-2018 school term. See R Ex 1; also see Gillespie testimony

---

<sup>7</sup> See Grievant's Exhibits 2 and 3. As presented by Grievant's fact/law proposals, extra-duty/overtime assignments prior to and after that time period have been omitted from this calculation. The summer substitute wages earned in the summer of 2018 and extra-duty assignments/overtime wages earned in July 2018 have also been subtracted. As previously stated, the undersigned is aware and recognizes the information as a good faith estimation of the amounts as provided by counsel.

17. Head Custodian Cope printed out a copy of R Ex 1 (Gillespie's email) for the summer of 2018 summer substitute list and made it available to the custodians at Capital High School. He put a copy on his desk and submitted the forms that the custodians at the school filled out to the central office. L3 testimony Tim Powers, Josh Mullins and Tom Cope

18. Custodians are not required to submit their individual interest in summer substitute employment to Head Custodian Cope. Documentation of a custodian's interest in a summer assignment is needed at Respondent's central office. Grievant does not allege she documented any interest in signing up for a summer substitute contract assignment with Central Office or Head Custodian Cope.

19. Grievant did not sign up for a 2018 summer substitute custodian contract. Accordingly, Grievant was not on the summer substitute custodian list for the Summer of 2018.<sup>8</sup>

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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

---

<sup>8</sup> Summer substitute contracts are general and not specific to a school. Grievant was not required to pick up an assignment at Capital High School where the alleged hostile work environment was occurring.

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

During the time that Grievant was subjected to a hostile work environment, Grievant alleges other employees with less seniority were improperly being given step-up assignments and overtime work ahead of her. It is recognized as established fact that Grievant was routinely skipped over for opportunities for extra-duty/overtime assignments as well as temporary step-up assignments. Finding of Fact 9, *supra*. In that Respondent does not contest the hostile work environment, the primary issue(s) being addressed at level three is the prospective compensation that Grievant contends she missed due to the hostile work environment. Grievant seeks to be compensated for missed overtime, step-up pay, and summer substitute pay, that she alleges she is/was eligible to receive. It is represented that Respondent did not contest the hostile work environment claim and addressed the behavior causing the hostile work environment upon becoming duly aware (January 2019). Respondent and Grievant could not reach an agreement on a sum certain for prospective loss wages, the primary issue(s) in dispute is the amount of compensation, if any, Grievant is entitled due to malfeasance of Respondent.

Opportunities to work overtime for service employees of Respondent are considered extra-duty assignment. Kanawha County Schools Administrative

Regulation, Overtime, Series G78A, §78.04.4. G Ex 1 Grievant did not keep track of the days that she was denied step-up<sup>9</sup> or overtime<sup>10</sup> assignments and could not state at the level three hearing one definitive date that she was inappropriately denied a step-up assignment or an overtime opportunity.<sup>11</sup> This is problematic. It is Grievant's burden to establish with specificity identifiable loss. Respondent argues that Grievant is requesting far more damages than she is entitled.

Grievant contends that she lost numerous opportunities to earn wages over and above the salary to which she was entitled under her regular contract of employment. Yet Grievant establishes little to no definitive date that she was inappropriately denied a step-up assignment or an overtime opportunity. Grievant suggests she is entitled to \$1609.43 for loss of extra-duty/overtime assignments during the time period of February 19, 2018 through March 15, 2019 or in the alternative \$786.93. See Grievant's fact/law proposals. The undersigned is persuaded that Grievant is requesting more compensation than the facts and applicable law support. Speculation of lost economic opportunity is not sufficient to meet the proof burden. See *Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004); *Thacker v. Dep't of Health & Human Res.*, Docket No. 2017-1422-DHHR (Sep. 7, 2018). Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a "make-whole" remedy, intended to

---

<sup>9</sup> The opportunities to "step-up" into the position of absent employees receiving a higher pay grade is noted as governed in relevant part pursuant to *West Virginia Code* §18A-4-15(b)(3).

<sup>10</sup> The opportunity for extra-duty assignments is noted as governed in relevant part pursuant to *West Virginia Code* §18A-4-8b(f).

<sup>11</sup> The question of whether Grievant should have been on the summer substitute custodian list is taken up separately. The undersigned is not persuaded that Grievant's failure to sign up for a 2018 summer substitute custodian contract was due to malfeasance of Respondent. Issue discussed infra.

restore the grievant to his or her rightful place as an employee. *Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar 30, 1999). See *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ.*, Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017).

Given the recognized hostile work environment, intentional exclusion of Grievant for extra-duty work, it is not speculative that Grievant missed out on a limited amount of overtime and/or step-up pay. However, the amount of lost compensation is uncertain. This 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).

It is herein recognized that Grievant's fair share of overtime and/or step-up pay might be calculated as the proportionate amount of overtime pay distributed over the statutory allowed period of time for back pay.<sup>12</sup> From February 19, 2018 through March

---

<sup>12</sup> Back pay may be granted for one year prior to the filing of a grievance, See *West Virginia Code §6C-2-3(c)*.

15, 2019 evening custodians worked 155 extra-duty/overtime assignments and earned approximately \$2802.23. As one of five employees more or less available for such assignments, Grievant's fair share could be theoretically viewed as approximately 20% of the opportunities, accordingly \$560.45. Expanding the field to include the custodians on other shifts as well as those on the evening shift, the total overtime salary earned by all custodians at Capital High School rises to \$7371.59. As one of twelve custodians "available" for such assignments, Grievant's fair share theoretically would be 8.33% of the opportunities of the total overtime wages (\$614.30) for custodians at the school during the time period in question. It is represented that Grievant received \$153.04 extra-duty/overtime compensation. See records of overtime for CHS custodians, G Ex 2. Regrettably, the evidence in the record gives no way of determining how much salary Grievant lost by missing opportunities to "step-up" into the Custodian III or Custodian IV positions. However, this amount would probably be *de minimus* anyway as the difference between a Custodian I and a Custodian III is only about \$3.15 per day,<sup>13</sup> further the opportunities are sporadic and occurring only intermittently.

Accordingly, Grievant's outstanding fair share of extra-duty compensation could be calculated as the proportionate amount of overtime pay distributed to CHS custodians over the statutory allowed period of time for back pay minus the amount of extra-duty/overtime compensation Grievant received during that period:

$$\begin{array}{r} \$560.45 \text{ minus } \$153.04 \text{ equals } \$407.41 \\ \text{or} \\ \$614.30 \text{ minus } \$153.04 \text{ equals } \$461.26 \end{array}$$

---

<sup>13</sup> Concept and information conceded by Grievant. See Grievant's fact/law proposals; also see *West Virginia Code* §18A-4-8a.

Thus in review of the plausible information provided (exhibits, testimony and submitted fact/law proposals) the undersigned administrative law judge, as the trier of fact, is persuaded that a total of five hundred(\$500) dollars is fair compensation for prospective lost compensation denied Grievant. This amount is a good faith make-whole remedy of absent step-up assignment, misdirected overtime and applicable interest Grievant is entitled in the circumstances of this grievance. Grievant should note and be aware she did not truly establish any definitive date that she was inappropriately denied a step-up assignment or an overtime opportunity. Speculation of lost economic opportunity is not sufficient to meet a Grievant's proof burden. But for the identified establishment of a hostile work environment (intentional withholding of extra-duty/overtime assignments) Grievant would not be granted any prospective wage. The stated five hundred dollars remedy is fair and grounded in mathematically sound analysis of the information provided by the parties.<sup>14</sup> The Grievance Board has no authority to award relief for tort-like claims or punitive damages. See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

Lastly, Grievant avers that during a time period relevant to the hostile work environment she was not offered summer substitute custodian work. Grievant highlights

---

<sup>14</sup> The Grievance Procedure allows for fair and equitable relief, which has been interpreted by this Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). The Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Troutman v. Dep't. of Health and Human Res./William R. Sharpe Jr. Hospital*, Docket No. 2013-0630-DHHR (April 26, 2013).

that Tim Powers, a custodian with less seniority than Grievant at Capital High School, on the summer substitute custodian list earned \$3,417.90 during the summer of 2018. See G Ex 2 and 3. Grievant asserts that she is entitled to like compensation.<sup>15</sup> Respondent disagrees with this assertion. The undersigned concurs with Respondent on this issue.

Grievant was not on the summer substitute custodian list for the summer of 2018. Respondent permits regularly employed custodians to sign up for a special summer substitute list during the time period when (a) their employment term for one year has ended and (b) their employment term for the succeeding school year has not started. See *West Virginia Code* §18A-4-15(b)(3). Grievant did not sign up for a 2018 summer substitute custodian contract.<sup>16</sup>

Grievant was or should have been aware of the need to sign up for summer substitute list. An email was sent out to custodians advising them of the opportunity to sign up for a special summer substitute list near the end of the 2017-2018 school term by Respondent's human resources/personnel department. See R Ex 1; L3 Gillespie testimony. Additionally, Head Custodian Cope printed out a copy of R Ex 1 and/or other documentation for the summer of 2018 summer substitute list and reportedly made it available to the custodians at Capital High School. Lastly, word of mouth in the workplace. The practice of signing up for summer employment is not a new or secret

---

<sup>15</sup> In the summer of 2018 there was an issue of bacterial mold in one or more Kanawha County Schools and the abatement of this issue resulted in an abnormally more wages than usual for those who worked a summer contract that year.

<sup>16</sup> Grievant contends one of two rationales for her failure to document an interest in a summer substitute custodian contract; unaware of the procedure due to improper notification and/or intimidated by her supervising custodian at Capital High School.

activity unknown to school employees. Grievant has been a full-time employee with Kanawha County Schools for three years. Grievant's allegation she was denied a summer substitute custodian work because she was denied opportunity to sign up for the summer substitute contract is not reliable. Grievant's explanation for her failure to properly register for summer substitute custodian work is not found to be credible.<sup>17</sup> School employee who wish to work in the summer months have the responsibility to sign up for the prospective employment. The practice of signing up for prospective summer employment is not a surreptitious activity unfamiliar to school employees. It is not persuasively established that Respondent failed to inform or make the prospect of summer employment known to Grievant. Further, summer substitute contracts are general and not specific to a school. Grievant was not required to pick up an assignment at Capital High School where the alleged hostile work environment was occurring.

Grievant's failure to sign up for the 2018 summer substitute custodian list is relative. However, it is not established by a preponderance of the evidence that unlawful actions of Respondent prohibited Grievant from registering for such employment. Grievant's allegation that she was denied summer substitute custodian work because she

---

<sup>17</sup> An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

was denied opportunity to sign up for the summer substitute contract is not credible. Respondent established that summer contracts for substitute service personnel were offered to employees, including Grievant. See R Ex 1; L3 testimony Gillespie, Power, Lucas and Mullins. Grievant was not on the summer substitute custodian list for the summer of 2018, because she did not sign up for a summer custodian contract. Accordingly, she was not contacted when a summer substitute assignment became available. Grievant is not entitled to prospective wages she failed to make herself eligible to receive. Auxiliary, it is also noted that the determination of speculative lost wage of a potential substitute employment is speculative.<sup>18</sup>

In summation, it is not established that Grievant's failure to sign up for a 2018 summer substitute custodian contract was due to malfeasances of Respondent. Accordingly, it is not found that Grievant is entitled to any lost compensation stemming from prospective 2018 summer substitute custodian employment. However during a

---

<sup>18</sup> In recognition to the numerous assignments which summer contract custodians performed for Respondent during the summer of 2018, the numerous employees offered those assignments, along with the potential pool of participants, it is thought to be speculative to attempt to ascertain who may or may not have accepted or declined the various assignments, if they had been offered in proper rotation. When the relief sought by a grievant 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). "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.'" See *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *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. Richards v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998). Academically speaking, it is not established by a preponderance of the evidence that Grievant would be the recipient of a summer substitute contract, if she had indeed been on the summer substitute list. This Grievance Board does not award relief based upon speculation about what might happen.

time period that Grievant was subjected to a hostile work environment, while at Capital High School as a Custodian I, it is more probable than not that she was not provided her fair share of step-up assignments and overtime work compensation, this money is calculated to be five hundred dollars (inclusive of relevant interest).

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. The burden of proof in a non-disciplinary matters rests with Grievant. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. Grievant was subject to a period of recognized hostile work environment perpetrated by responsible agents of Respondent. Grievant was not provided her fair share of extra-duty assignments. See *West Virginia Code* §18A-4-8b.

3. As a result of intentional actions by Respondent's agents Grievant suffered economical loss, in the form of lost extra-duty/overtime compensation.

4. Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a "make-whole" remedy, intended to restore the grievant to his or her

rightful place as an employee. *Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar 30, 1999). See *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ.*, Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017).

5. The Grievance Procedure allows for fair and equitable relief, which has been interpreted by this Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). The Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Troutman v. Dep't. of Health and Human Res./William R. Sharpe Jr. Hospital*, Docket No. 2013-0630-DHHR (April 26, 2013).

6. The Grievance Board has no authority to award relief for tort-like claims or punitive damages. See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

7. It is not established that Grievant's failure to sign up for a 2018 summer substitute custodian contract was due to malfeasances of Respondent. Grievant is not entitled to a windfall of speculative compensation. *Saddler v. Raleigh County Board of*

*Education*, Docket No. 02-41-420 (Apr. 29, 2003); *Shaffer v. Kanawha County Board of Education*, Docket No. 2013-9261-KanED (July 3, 2012).

Accordingly, this grievance is **GRANTED**. It is **ORDERED** that Respondent shall pay Grievant five hundred (\$500) dollars back pay, as soon as administratively possible, but not later than forty-five (45) days after the date of this decision.

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 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: May 19, 2020**

---

**Landon R. Brown**  
**Administrative Law Judge**