BOYD MAYLE,

Grievant,

v. Docket No. 04-01-258

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Boyd Mayle ("Grievant"), employed by the Barbour County Board of Education ("BCBE") as a Custodian, filed a level one grievance on May 24, 2004, in which he alleged, "Glenn Sweet offered to pay me 1½ time if I would work [outside school environment] days 8th and 9th of April. I worked 23½ hours on those days and only got paid 10 hours of 1½ pay." For relief, Grievant requested time and one-half pay for the remaining 13½ hours, with interest. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. Superintendent R. Matthew Kittle, denied the grievance at level two, and BCBE waived consideration at level three. Appeal to level four was made on June 30, 2004. A telephonic hearing to supplement the record was conducted on August 20, 2004, at the request of the parties. Grievant was present, and was represented by William C. White of the West Virginia Education Association, and Superintendent Kittle represented BCBE. Both parties agreed to waive the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature at the close of the hearing.

The following facts are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by BCBE for approximately 21 years, and held the classification of Maintenance/Custodian at all times pertinent to this decision.

2. Glenn Sweet, Coordinator of Facilities, asked Grievant to work on April 8 and9, 2004, to repair a sewage line at Barbour County High School. April 8 and 9 were designated out of school environment days for which Grievant was not regularly paid. Mr. Sweet represented to Grievant that he would be compensated at 1½ times his regular rate of pay for the time worked on those days.

3. Grievant worked 10 hours on April 8, and 13½ hours on April 9, 2004. Grievant was compensated at the overtime rate for only ten of the hours. Grievant received his regular rate of pay for the remaining 13½ hours worked.

4. Grievant had worked 26½ hours April 5, 6, and 7, 2004. With the additional 23½ hours worked on April 8 and 9, Grievant worked a total of 50 hours that calendar week.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6. "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, the employee has not met his burden. Id.

Grievant argues that, acting in good faith, he entered into an oral contract with Mr. Sweet to work on April 8 and 9 at 1½ times his regular wages. Grievant asserts that Mr.Sweet has the implied authority to make the offer, and he would not have agreed to work for regular wages. Finally, Grievant argues that BCBE is not prohibited by any law or policy from paying him at the higher rate for giving up his days off. BCBE relies upon the doctrine of ultra vires to support the calculation of overtime pay.

It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. Dickson v. Dep't of Env. Protection/Div. of Personnel, Docket No. 03-DEP-381 (Apr. 14, 2004); Rush v. Kanawha County Bd. of Educ., Docket No. 02-20-362 (Feb. 28, 2003); Ollar v. W. Va. Dep't of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993). These level four decisions are based on rulings by the West Virginia Supreme Court of Appeals which have held that, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross

Hosp. Serv., Inc., 179 W. Va. 605, 328 S.E.2d 356 (1985). Also, "'[a]ny other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" Freeman v. Poling, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

In the present grievance, Mr. Sweet had no authority to promise Grievant time and a half wages for April 8 and 9, 2004. Such a promise was ultra vires act, and is not enforceable. Cook v. Mason County Bd. of Educ., Docket No. 96-26-105 (Aug. 19, 1996). While Mr. Sweet did not intentionally misrepresent the offer to Grievant, BCBE is not required by the Federal Fair Labor Standards Act to pay overtime rates until he works beyond 40 hours a week. Grievant is correct that BCBE could agree to pay him at the higher rate; however, Mr. Sweet did not have the authority to make such an offer.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6.

2. A supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. Dickson v. Dep't of Env. Protection/Div. of Personnel, Docket No. 03-DEP-381 (Apr. 14, 2004); Rush v. Kanawha County Bd. of Educ., Docket No. 02-20-362 (Feb. 28, 2003); Ollar v. W. Va. Dep't of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993). 3. BCBE is not bound by the unauthorized representation of an administrator that Grievant would be paid overtime wages for 13½ hours worked on April 8 and 9, 2004.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour County. Any such appeal must be filed within thirty (30) days of

receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education andState 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: SEPTEMBER 15, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE