EDWARD B. SUTPHIN,

Grievant,

v v.

Docket No. 04-03-261

BOONE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

The grievant, Edward B. Sutphin ("Sutphin"), brought this grievance against his employer, the Boone County Board of Education ("the Board"), alleging that he should have been offered the opportunity to work overtime in connection with construction of a baseball facility for Van High School and moving bleachers from a Little League field to Scott High School.

Procedural Background

At Level I, Sutphin complained that "less senior people were worked on a[n] overtime basis not asking regular employees first." Although incorrectly identified in the statement of grievance, it was agreed that Sutphin was attempting to allege a violation of West Virginia Code section 18A-4-8b. As relief he asked to be "paid for overtime & overtime be offered to regular employees first." Sutphin prevailed on the substantive issue at Level I. In a decision dated April 26, 2004, Sutphin was advised that

> [s]ubstitute employees will not work in excess of forty hours in any given week and will not be eligible for overtime unless all regular employees have been given an opportunity for overtime and have declined. The Level I decision did not address Sutphin's request for a monetary award. Therefore, Sutphin appealed to Level II on May 6, 2004. A Level II hearing was conducted on May 19, 2004. (See footnote 1) The decision denying this grievance at Level II was dated June 29, 2004. While rejecting

Sutphin's argument that there had been a violation of West Virginia Code section 18A-4-8b, the statute dealing with extra-duty assignments, the Level II decision denied the grievance on the grounds that Sutphin's appeal to Level II was untimely.

Proceedings at Level III were waived. Sutphin appealed to Level IV on July 14, 2004. A Level IV evidentiary hearing was conducted on September 20, 2004, in the hearing room of the West Virginia Education and State Employees Grievance Board ('the Grievance Board") at Charleston. Grievant appeared in person and by his counsel, John Roush, Esquire, of the West Virginia School Service Personnel Association. The Board was represented by counsel, Timothy R. Conaway, Esquire. Upon receipt of post-hearing submissions from both parties, this grievance matured for decision on October 22, 2004.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

6 1. Sutphin is a regular employee of the Board who has been classified as an Electrician II/Plumber II since 1998.

7 2. Sutphin erroneously believed that he was classified as general maintenance, as well.

8 3. The Board utilized at least one substitute employee, Bruce Bowe ("Bowe"), in building a baseball facility for Van High School.

9 4. The Board employs three masons, all of whom were assigned to the baseball construction project and all of whom worked there until the project was completed.

10 5. During the baseball construction project, Bowe worked as a general laborer, assisting the masons by performing tasks such as carrying block and mixing mortar.

11 6. Bowe worked overtime a number of days during the baseball construction project.

12 7. Initially, Sutphin's grievance also included complaints that compensatory time had been awarded to substitute employees who worked overtime on a Thursday to move bleachers. The crane rented for this purpose was late in arriving, causing the project to extend beyond their normal work hours.

13 8. Sutphin had previously informed his supervisor, Andrew Dolan, Director of Maintenance, that he did not want to work overtime on Wednesdays, Thursdays, or Saturdays unless it was an emergency.

14 9. The postmark on the Level I decision reflected that it was mailed from Charleston on April 27, 2004. At Level II, Sutphin postulated that he received the Level I decision by April 28, 2004. Tr. 39, 40.

15 10. In correspondence to Steve Pauley, dated July 2, 2004, Sutphin asserted that he did not receive the Level I decision "until on or after the 28th of April."

16 11. Sutphin filed an appeal to Level II on May 6, 2004.

17 12. In terms of seniority, Sutphin ranks eighth or ninth in a group of twelve regular employees in the maintenance department.

Discussion

The Level II decision deemed Sutphin's appeal from Level I to be untimely. The affirmative defense that a grievance is untimely must be proven by the Board by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Macri v. Wayne County Bd. of Educ.*, Docket No. 04-50-120 (June 29, 2004).

The time for filing a Level II appeal ran from Sutphin's receipt of the Level I decision. At Level II, Sutphin indicated he was not sure when he received the Level I decision, which was dated April 26, 2004, but not postmarked until April 27, 2004. Initially, Sutphin postulated that he might have received it on April 28, 2004. Tr. 39, 40. In correspondence to Steve Pauley, dated July 2, 2004, Sutphin asserted that he did not receive the Level I decision until "on or after the 28th of April." (See footnote 2)

The Board did not introduce any evidence to resolve the ambiguity about the date on which Sutphin received the Level I decision. In the absence of such evidence, it is very difficult to tell whether filing the Level II appeal on May 6, 2004, satisfied the five-day time limit set forth in West Virginia Code section 18-29-4(b). ("Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chiefadministrator[.]") Accordingly, it cannot be said that the Board met its burden of proving that the Level II grievance was untimely.

In the underlying proceedings, Sutphin raised a question about the overtime work performed in connection with moving some bleachers. The Board was correct in its assertion that Sutphin would not have been available to work overtime on that project because the bleachers were being moved on a Thursday. Sutphin had previously informed his supervisor that he did not want to work overtime on certain days, including Thursdays.

In his proposed findings of fact and conclusions of law at Level IV, Sutphin does not address the bleacher incident. Therefore, it appears that he has abandoned his claim of entitlement to overtime in connection with the bleacher project.

Even if not abandoned, this argument lacks merit because Sutphin had already told his supervisor that he was not available to work overtime on Thursdays, absent an emergency. There is no evidence that the bleacher project was considered an emergency. To the extent Sutphin seeks any monetary award because he was not offered overtime work in connection with moving the bleachers, his claim must fail.

As noted, Sutphin prevailed at Level I on his request that the Board offer overtime to regular employees before allowing substitutes to accrue overtime. Therefore, the only issue that remains to be addressed is whether Sutphin is entitled to any monetary compensation arising out of the fact that a substitute, Bowe, earned overtime in connection with the construction project for the baseball facility for Van High School. This issue does not involve a disciplinary matter. Therefore, the burden falls to Sutphin to prove his claim of entitlement by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29,1990).

The parties have divergent views of whether the overtime Bowe earned while assisting the masons during construction of the baseball facility was an extra-duty assignment within the meaning of the following pertinent portion of West Virginia Code section 18A-4-8b(f):

> [D]ecisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee 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 such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated[.] For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

Sutphin argues that the overtime performed by Bowe constituted an extra-duty assignment and, as such, the opportunity to perform the overtime work should have been offered to regular employees first. In his view, the overtime should have gone to Bowe only in the event that it was offered to, and declined by, all of the regular employees, including Sutphin. The Board argues that the masonry construction work performed by Bowe is so different in character from the statutory examples of extra-duty assignments, as set forth above, that Bowe's overtime could not properly be considered

an extra-duty assignment. In fact, the Board argues for a change in Grievance Board precedent on the question of what constitutes an extra-duty assignment. (See footnote 3)

This grievance may be resolved on much narrower grounds. Sutphin has alreadyreceived the substantive relief he was seeking, in the form of assurances that overtime would first be offered to all regular employees before being offered to substitute employees. It fell to Sutphin to prove that he suffered damages as a result of the Board's failure to employ this practice with respect to the overtime worked by Bowe.

Sutphin is eighth or ninth on the seniority list for maintenance employees. Therefore, seven or eight more senior employees would have been offered overtime before it would have been offered to Sutphin. The evidence does not show that it was more likely than not Sutphin would have been offered an assignment. It is simply too speculative to assume that all of the more senior employees would have declined the overtime if it had been offered to them. Further, Sutphin failed to establish that he would have worked any of the overtime at issue, even if Bowe had not.

The Grievance Board is authorized to “provide relief found fair and equitable in accordance with the provisions of this article[.]” W. Va. Code § 18-29-5. It is not authorized to award speculative monetary damages and has heretofore declined to make such awards. *Stephenson v. W. Va. Bureau of Employment Programs*, Docket No. 92- DOP-447 (Aug.12, 1993); *Bole v. W. Va. Northern Community College*, Docket No. 91- BOD-194 (Oct. 30, 1992)(“[T]he damage to which Grievant claims [entitlement] is mainly unsubstantiated speculation.”) Sutphin failed to establish entitlement to monetary compensation for any of the overtime Bowe worked in connection with the baseball facility construction project. Accordingly, to the extent he seeks monetary compensation, this grievance must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. This is not a disciplinary grievance. Therefore, Sutphin bears the burden of proof. W. Va. Code St. R. § 156-1-4.21 (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).

2 2. Sutphin must prove his claim by a preponderance of the evidence. W. Va. Code St. R. §

156-1-4.21 (2000). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. An assertion that a grievance should be dismissed as untimely is an affirmative defense, which the Board must prove by a preponderance of the evidence. *Macri v. Wayne County Bd. of Educ.*, Docket No. 04-50-120 (June 29, 2004).

4 4. The Board failed to meet its burden of proving that Sutphin's appeal to Level II was untimely.

5 5. The relief afforded Sutphin at Level I moots his request for “a return to the procedure of offering overtime first to regular employees.” Level IV Grievance Statement.

6 6. Having failed to offer any evidence to support the proposition that some or all of the overtime would have been available to Sutphin if it had first been offered to regular employees, Sutphin has failed to meet his burden of proof.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit Court of Boone 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 and State 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 section 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: December 21, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1 *References to pages in the transcript of the Level II hearing shall appear as “Tr. __.”*

Footnote: 2 *This was the correspondence in which Sutphin requested an appeal to Level III or, if the Board wanted to waive Level III proceedings, Level IV.*

Footnote: 3 *In particular, the Board asks the Grievance Board to overrule Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995), and its progeny.*