THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ARLIE WILSON MYERS,
Grievant,

v. **DOCKET NO. 2012-0674-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Arlie Wilson Myers, filed a grievance against his employer, the Monongalia County Board of Education, on December 23, 2011. The statement of grievance reads:

> Respondent failed to assign overtime/extra-duty assignments in the maintenance department in the summer of 2011 on either an equitable basis (equalization of hours worked) or on a rotational basis (equalization of opportunity). Grievant asserts a violation of W. Va. Code 18A-4-8b & § 6C-2-2.

As relief Grievant sought, "compensation for lost wages and benefits of any kind."

A hearing was held at level one on February 24, 2012, and a level one decision denying the grievance was issued on March 7, 2012. Grievant appealed to level two on March 13, 2012. A mediation session was held on August 30, 2012. Grievant appealed to level three on September 10, 2012. A level three hearing was held before the undersigned Administrative Law Judge on January 28, 2013, 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 Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on

March 4, 2013, 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 during the summer of 2011, resulting in other employees receiving more overtime than he did. Respondent asserted the grievance was not timely filed. Grievant filed the grievance as soon as he confirmed that others had received more overtime than he. The grievance was timely filed. Grievant did not demonstrate that he should have received any of the overtime worked by any employee in the same multi-classification as Grievant.

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") for nine years as an Electrician in the Maintenance Department, and is multi-classified as a General Maintenance/Electrician.

2. Bob Ashcraft is employed by MBOE in the multi-classified positions of General Maintenance/Electrician.

3. Ed Rice is employed by MBOE in the multi-classified positions of Truck Driver/General Maintenance.

4. Gerald Marshall is employed by MBOE in the multi-classified positions of General Maintenance/Carpenter/Groundsman.

5. During the summer of 2011, MBOE Maintenance Department employees worked on the construction of an annex to a school at Brookhaven, Monongalia County. The project began in early June, and needed to be completed by the end of the summer of 2011. It was completed shortly after school began, around August 26, 2011.

6. It is the practice of the MBOE Maintenance Supervisor, Kermit Hess, 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, because the person called off the rotation list will not be familiar with what work has already been done and what remains to be done to complete the project. Mr. Hess usually followed this practice on the Brookhaven school project during the summer of 2011. This is not scheduled overtime, but is viewed by Mr. Hess as the continuation of a job.

7. On at least two occasions during the summer of 2011, Mr. Hess asked Grievant if he would stay and work overtime in order to complete drywall projects, and Grievant declined the overtime.

8. In mid-August 2011, Grievant heard Mr. Ashcraft state that he had worked overtime some evenings during the summer of 2011, and someone else told him that Mr. Marshall and Mr. Rice had worked some overtime during the summer of 2011.

9. Grievant had also worked some overtime during the summer of 2011 on the Brookhaven school project, but believed from the conversations he heard that Mr. Ashcraft, Mr. Marshall, and Mr. Rice had received more overtime than he.[1] Grievant spoke with

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[1] Grievant also referred for the first time in his post-hearing written argument to the overtime worked by Chris Gillespie, Jr. The record reflects only that Mr. Gillespie performed some electrical work during the summer of 2011, but it does not reflect his classification, or what type of work he was performing when he was working overtime. As

Karen Guminey, his local union representative. Ms. Guminey then submitted a Freedom of Information request to MBOE, seeking compensatory time and overtime records. Ms. Guminey provided the records she obtained to Grievant shortly before he filed this grievance.[2]

10. Grievant worked overtime on August 3, 22, 23, 25, and 26, 2011, for a total of 20.5 hours.[3] The record does not reflect what type of work Grievant was performing when working overtime, or how the overtime came to be assigned to him.

11. Mr. Rice worked overtime on July 25, 27, 28, and 29, 2011, and August 1, 2, 3, 4, 8, 10, 11, 15, 16, 17, 18, 19, 22, 23, and 25, 2011, for a total of 90.5 hours. The record does not reflect what type of work Mr. Rice was performing when working overtime, or how the overtime was assigned to him.

12. Mr. Ashcraft worked overtime on July 19, 20, 21, 23, 25, 27, 28, and 29, 2011, and August 1, 9, 10, 11, 15, 16, 17, 18, 19, 22, 23, and 24, 2011, for a total of 76 hours. The record does not reflect what type of work Mr. Ashcraft was performing when working overtime, or how the overtime was assigned to him.

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will be discussed later, overtime is to be assigned by classification, so the undersigned must know the employee's classification in order to properly evaluate the assignment of overtime. Further, Respondent was not put on notice that Grievant was challenging the overtime assigned to Mr. Gillespie, and given the opportunity to respond. Mr. Gillespie's overtime will not be further addressed.

[2] The record does not reflect the exact date when Grievant received this information.

[3] The days and number of hours contained in this finding of fact, as well as the next three findings of fact, were taken by the undersigned from many pages of documents comprising Grievant's level three Exhibit Number 1, and may, for that reason, contain unintended errors of omission, or errors in addition.

13. Mr. Marshall worked overtime on 34 days from June 15 through August 26, 2011, for a total of 233 hours. The record does not reflect what type of work Mr. Marshall was performing when working overtime, or how the overtime was assigned to him.

14. Mr. Rice had worked for MBOE longer than Grievant. The record does not reflect whether Mr. Ashcraft and Mr. Marshall had worked for MBOE longer than Grievant, or the seniority of any of these individuals in the various classifications they held.

15. Respondent raised a timeliness defense at level one of the grievance procedure.

Discussion

Respondent asserted that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, and therefore it must be dismissed. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va.*

Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . ..

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). However, under the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. It has been found by the Grievance Board that when a Grievant makes inquiries to confirm the facts before filing a grievance, this falls within the discovery exception, and the date from which the grievance must be filed is the date the Grievant receives confirmation of the facts. *Kiger v. Monongalia County Bd. of Educ.*, Docket No. 05-30-062 (May 31, 2005).

In this case, Grievant thought that there may have been some disparity in the assignment of overtime during the summer or 2011, after he heard another employee talking about the overtime he had received, and after he heard that other employees had worked overtime, but he did not know whether others had worked more overtime than he until he received the records requested by Ms. Guminey. Rather than file a grievance based on speculation, he waited until he had the information in hand which he believed confirmed his speculation. This falls within the discovery exception, and the grievance was timely filed.

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 during the summer of 2011, specifically pointing to Mr. Ashcraft, Mr. Rice and Mr. Marshall.[4] "Overtime work for school service employees is considered extra-duty work,

[4] Grievant did not address the hours worked by Mr. Rice or Mr. Marshall in his post-hearing written argument.

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). Respondent argued that when an employee stays past his normal workday in order to complete a project, incurring overtime in the process, this does not constitute an extra-duty assignment. Respondent pointed out that it would be unworkable and nonsensical to tell the employee working on the project to stop, and then call out an employee off the rotation list who had no familiarity with the project to take over in the middle of the project. This would no doubt result in delay, additional cost, and mistakes. Respondent also pointed out that Grievant had not demonstrated that he was next in line to be called out.

Obviously, Mr. Marshall worked far more overtime hours than Grievant, Mr. Rice and Mr. Ashcraft combined. However, except for the General Maintenance classification, Mr. Marshall is not in the same classification as Grievant. Grievant is not on the same rotation list as Mr. Marshall for Carpenter or Groundsman work, and the record does not reflect what type of work Mr. Marshall was performing when he was working overtime. Grievant has not demonstrated that he was in the same classification as Mr. Marshall for purposes of the assignment of overtime, and that he should have been called out for any of the overtime assigned to Mr. Marshall. Likewise, although Mr. Rice worked more overtime hours than Grievant, his multi-classification is also different than Grievant's and the record does not reflect what type of work Mr. Rice was performing when he was working overtime.

The undersigned declines to assume that Mr. Rice was performing General Maintenance work when he was working overtime during the summer of 2011. Again, Grievant has not demonstrated that he was in the same classification as Mr. Rice for purposes of the assignment of overtime, and that he should have been called out for any of the overtime assigned to Mr. Rice.

Only Mr. Ashcraft is in the same multi-classification as Grievant. Mr. Ashcraft worked more hours of overtime than Grievant during the summer of 2011, and worked overtime on more days than Grievant. However, this fact standing alone does not demonstrate that overtime was not properly assigned. Many of these days are one day after the other, and it is possible that in these instances, this would have constituted one assignment, depending on what work was being performed, but the record does not reflect whether this was the case. Mr. Hess admitted that during the summer of 2011 he usually assigned overtime work to employees familiar with the project rather than using a rotation list, which would appear to be in violation of the cited statutory provision. However, Mr. Hess did not testify that he never used a rotation list, and the undersigned cannot determine from the evidence placed in the record how the overtime came to be assigned to Mr. Ashcraft. Mr. Hess did testify that Grievant had declined overtime offered to him during the summer of 2011 on more than one occasion, and Grievant did not deny this.

Further, in order for a Grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he 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 any of the overtime work assigned to Mr. Ashcraft during the summer of 2011, that he was not offered the work before Mr. Ashcraft, or that he was available to work the overtime on any of the days Mr. Ashcraft worked overtime. It would be completely speculative for the undersigned to award Grievant compensation for any of the days Mr. Ashcraft worked overtime. While the undersigned certainly questions whether Mr. Hess' practice for assigning overtime is consistent with the statutory requirements, it would not be appropriate to rule on this issue in this case given the facts as developed.

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 was not in the same multi-classification as Mr. Rice or Mr. Marshall, and is not similarly situated to either of them. As discussed above, Grievant demonstrated only that Mr. Ashcraft worked more overtime than he during the summer of 2011, but did not present evidence to support any determination as to how this came to be. Accordingly, the undersigned cannot conclude that Grievant was treated differently from Mr. Ashcraft.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994);

Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

2. Respondent must assert a timeliness defense at or before level two of the grievance procedure. W. VA. CODE § 6C-2-3(c)(1). Respondent timely asserted this affirmative defense.

3. An employee is required to file his grievance within fifteen days following the grievable event, or "within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. W. VA. CODE §§ 6C-2-3(a)(1), 6C-2-4(a)(1).

4. Under the "discovery rule exception," as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.

5. Respondent failed to prove that the grievance was not timely filed after Grievant learned of the facts giving rise to the grievance.

6. 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).

7. "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).

8. 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).

9. Grievant did not demonstrate that he was in the same classification as Mr. Marshall or Mr. Rice for purposes of the assignment of the overtime at issue, nor did he

demonstrate that the overtime was not properly assigned to Mr. Ashcraft. Grievant also presented no evidence that he was next in line for the overtime work performed by Mr. Ashcraft.

10. 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).

11. Grievant was not similarly situated to Mr. Marshall or Mr. Rice, and he did not demonstrate that he was treated differently from Mr. Ashcraft.

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 9, 2013