WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD EUGENE SHAFFER,
Grievant,

v. **Docket No. 2013-0261-KanEd**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Ronald Eugene Shaffer, Grievant, filed this grievance against his employer the Kanawha County Board of Education ("KCBE"), Respondent, on August 30, 2012. Grievant grieves that a substitute employee was permitted to work overtime on August 28, 2012, while he as a regular employee was not offered the opportunity for the assignment. Grievant alleges this is a violation of county practice and W. VA. CODE § 18A-4-8b. The relief requested is "compensation for lost wages with interest and the opportunity for such assignments in the future."

A conference was held at level one on October 15, 2012, and the grievance was denied at that level on November 5, 2012. Grievant appealed to level two on November 9, 2012. A mediation session was held on January 3, 2013. Grievant appealed to level three on January 11, 2013. A level three hearing was held before the undersigned Administrative Law Judge on March 13, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by its General Counsel, James Withrow. 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 12, 2013.

Synopsis

Grievant contends that he, a regular employee, should have been given the opportunity to work overtime on a date certain as opposed to the substitute general maintenance employee who worked the overtime. The amount of overtime in dispute is a total of one and an half (1.5) hours. Respondent maintains Grievant's allegations of wrongdoing is misplaced. Respondent avers Grievant should not be granted a windfall pursuant to a mistake or misunderstanding not of its making. Respondent maintains Grievant is not entitled to the relief sought pursuant to the facts of the instant matter.

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

Findings of Fact

1. Ronald Shaffer, Grievant, is employed by Respondent as a Heavy Equipment Operator at the Crede maintenance facility. Grievant has worked for Respondent for approximately 4 ½ years. Grievant has held a number of different classifications during his tenure of employment with Respondent.

2. Terry Hollandsworth is the Executive Director for Maintenance, Custodial Services and Energy Management for KCBE. He has been employed with Respondent for approximately 8 years. Not withstanding other responsibilities, Director Hollandsworth is responsible for administrating and managing numerous activities and duties performed by employees of the maintenance division on behalf of Respondent.

3. At the end of the regular working day on August 28, 2012, Director Hollandsworth directed Mike Chandler and Mark Humphreys, regular employees, to go to

Chandler Alternative School and remove a large amount of "junk" from one of the classrooms so the room could be made ready to contain students.[1]

4. Tom Lacy is a substitute general maintenance employee. During the week of August 25-31, 2012, Lacy was substituting for a crew member who was on vacation. Mr. Lacy was assigned to work with Mike Chandler on the furniture truck during this week.

5. On August 28, 2012, Grievant was not offered the opportunity to work overtime.

6. Tom Lacy accompanied Chandler and Humphreys on the overtime assignment.

7. Director Hollandsworth was not aware that Lacy was engaged in the overtime assignment until Mr. Hollandsworth saw him at Chandler Alternative School after Mr. Hollandsworth arrived there to check on the progress of the project.

8. The overtime assignment to which Mr. Lacy participated on August 28, 2012, involved working as a helper on a truck and the moving of furniture to prepare a school for the new school term.

9. Mr. Lacy clocked 1.5 hours of overtime on August 28, 2012. This was the only overtime employee Lacy clocked for the month of August 2012.

10. Grievant did not work any overtime for the week of August 25-31, 2012. Grievant worked a total of 41.50 hours of overtime during the month of August.

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[1] Reportedly from January through August 2012, Kanawha County School maintenance department devoted significant resources to converting a former elementary school to an alternative middle and high school, to be ready for students in the Fall of 2012.

11. Administrative personnel of the Maintenance Department are sensitive to giving priority in overtime assignments to regular employees rather than substitutes. See Director Hollandsworth Testimony.

12. The total amount of compensation in dispute represents approximately thirty-seven ($37) dollars in prospective wage for Grievant.[2]

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

This grievance is regarding one and a half (1.5) hours of overtime that Grievant did not receive. There has been a level one conference, level two mediation and a full-blown

[2] Amount calculated based upon Grievant's hourly wage, at time and a half. Calculation could be off by a nominal amount, figures were mathematically computed from yearly wage. Amount in discussion is less than forty dollars before taxes.

level three grievance hearing regarding Grievant's entitlement to prospective wages associated with an overtime assignment on August 28, 2012. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. This grievance is with regard to a diminutive amount of compensation. Respondent's maintenance department is sensitive to giving priority in overtime assignments to regular employees rather than substitutes. The parties have divergent views on the merits of the instant facts; however, it is unclear why this matter was not prudently resolved.

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); Myers v. Monongalia County Bd. of Educ., Docket No. 2012-0674-MonED (April 9, 2013). In a nutshell, substitute employees do not receive overtime opportunity unless every regular maintenance employee was either already working overtime, refused the opportunity to work overtime or was otherwise unavailable.

Grievant contends he is entitled to the compensation he would have received if Respondent had rightfully offered him the overtime assignment performed by a substitute general maintenance employee on August 28, 2012.

It is recognized and not disputed by Respondent that Mr. Lacy should not have received an overtime opportunity unless every regular maintenance employee was either already working overtime, refused the opportunity to work overtime or was otherwise unavailable. Respondent maintains its agent did not send Mr. Lacy on the overtime assignment, but rather discovered that Mr. Lacy had taken it upon himself to join the work crew performing the overtime activity.

Grievant seeks to receive compensation for the 1.5 hours that Lacy worked. Respondent avers Grievant should not be permitted to benefit pursuant to a mistake or misunderstanding by a fellow employee as represented in the facts of this matter. Respondent argues, given there was an error made, which was not the fault of Respondent, it would not be proper to correct the error made by compounding the error. Respondent maintains Grievant should not be unjustly enriched.

A crucial element of this matter which is not necessarily in agreement among the parties is whether Respondent authorized the substitute general maintenance employee, Tom Lacy, for the overtime on August 28, 2012.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). 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, 1993). It is deemed prudent to review the testimony of Director Terry Hollandsworth, Grievant and other relevant corroborating statements of record.

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 undersigned Administrative Law Judge (ALJ) had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. Credibility assessments were made from direct observations as well as review of the record.

Director Hollandsworth testified in a straightforward manner. He did not tend to hesitate or equivocate with his responses on direct or cross examination. Hollandsworth acknowledged Respondent's operating practices with regard to overtime by maintenance employee. He clarified that regular employees are provided overtime opportunities first. He also clarified the circumstances where substitute employees are allowed to complete a job; where it would not make sense to stop the work, send the sub home and wait for an interested regular employee to arrive to do the assignment. Director Hollandsworth's testimony was perceived to be credible. The maintenance department is sensitive to giving priority in overtime assignments to regular employees rather than substitutes.

Director Hollandsworth testifies that he directed Mike Chandler and Mark Humphreys, regular employees, to go to Chandler Alternative School and remove a large amount of "stuff" from one of the classrooms. This information is specifically supported by the testimony of Mark Humphreys. It is not disputed by the testimony of Mike Chandler. Director Hollandsworth's statements with regard to giving directs to Chandler and Humphreys is found to be trustworthy. The refurbishment of Chandler Alternative School was an ongoing project and a considerable amount of man-hours were dedicated to converting the former elementary school to an alternative middle and high school.

Director Hollandsworth indicated he had no conversation with Mr. Lacy specifically authorizing him to accompany Humphreys and Chandler on the overtime assignment. Mr. Hollandsworth indicated he became aware that Lacy was engaged in the overtime assignment when he saw Mr. Lacy at Chandler Alternative School. Mr. Hollandsworth did not take steps to send Mr. Lacy home upon becoming aware of his participation with the overtime activity. The information that Hollandsworth presents regarding this situation is not disputed by any reliable evidence of record. It is consistent with testimony regarding agency past practice. The actions of Mr. Hollandsworth as described are perceived to be the actions and reaction of a reasonable and responsible supervisor. Director Hollandsworth's testimony is determined to be credible and reliable.

The undersigned ALJ observed Grievant during his testimony. Grievant's demeanor demonstrated that he was aware of the issue being discussed. He was acutely aware of what he considered to be his entitlement. He demonstrated a willingness to engage in verbal gamesmanship. Grievant had an agenda and was not timid with his position regarding Respondent's obligation. Grievant did not display much respect for his

employer's decision-making process or demonstrate an appreciation for the difficulty of the mission Respondent was undertaking with regard to Chandler Alternative School. Grievant's attitude effected the persuasiveness of his testimony. Grievant's testimony was laden with bias and self-interest. Grievant's testimony, while not necessarily untruthful, did not satisfy Grievant's burden of proof.

The most benign interpretation of this series of events is that Mr. Lacy misinterpreted the instructions given to Mr. Chandler and Mr. Humphreys,[3] and, since Mr. Lacy was working on the truck during the regular working day, assumed that he should work on the overtime assignment as well. When Mr. Hollandsworth arrived at Chandler, he was faced with a "Hobson's choice"[4] of allowing Mr. Lacy to remain on the assignment or removing him and transporting Mr. Lacy back to the maintenance headquarters. Thought has been dedicated to the known and suspected situations which reportedly transpired on August 28, 2012.

Grievant's contentions have not been ignored. He is correct in claiming that regular employees are entitled to overtime opportunity prior to substitute employees. Nor does Respondent dispute the principle in general. Nevertheless, the fact that a substitute

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[3] Mark Humphreys filed a grievance concerning a substitute employee working and receiving overtime as the completion of the job extended beyond the regular workday. Mr. Humphreys felt overtime should be assigned to regular employees rather than substitutes. In Mr. Humphreys' grievance it was determined the substitute was engaged in the performance of an assignment, it would not make sense to stop the work, send the sub home and wait for an interested regular employee to arrive to do the job. Humphreys' June 26, 2012, Level One Decision "The maintenance department is sensitive to giving priority in overtime assignments to regular employees rather than substitutes." *Id*. See also Director Hollandsworth's instant level three testimony.

[4] Thomas Hobson, an English livery-man, who required every customer to take the horse nearest the door. An apparently free choice when there is no real alternative.

worked an identified span of overtime does not establish Grievant's entitlement to the compensation. A grievant must sustain an actual injury by being passed over for a position to which he was actually entitled; otherwise any award of back pay would be a windfall. *See Saddler v. Raleigh County Bd. of Educ.,* Docket No. 02-41-420 (Apr. 29, 2003), *Young v. Kanawha County Bd. of Educ.,* Docket No. 2011-1845-KanED (Nov. 19, 2012).

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 presented that he was not offered the work and that he was available to work the overtime. Grievant did not establish any evidence that he was next in line for the overtime work assignment. It is more likely than not that several employees were at the garage at the end of the regular work day. It is not known how many such employees are superior or junior to Grievant in seniority. It is speculative for the undersigned to award Grievant the 1.5 hours of compensation for overtime worked by Lacy, if it is not established that Grievant was the most senior regular employee (next in line). Grievant testified he would have been amenable to working overtime. It is not established that Grievant is the only regularly employed maintenance

employee who would be willing to work overtime. It is not established that Grievant was the next in line for the overtime assignment under discussion. Grievant has not met his burden and established that he is entitled to 1.5 hours of compensation representing the overtime that was performed by a substitute employee moving material at Chandler Alternative School on August 28, 2012.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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 Board, 156 C.S.R. 1 § 3 (2008).

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

3. 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); *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-0674-MonED (April 9, 2013).

4. 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).

5. Grievant presented no evidence that he was next in line for the overtime work performed by a substitute employee on August 28, 2012.

6. In the facts of this matter, it is speculative to award Grievant 1.5 hours of overtime compensation for identified work performed at the conclusion of a regular work shift on August 28, 2012.

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 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 (2008).

Date: July 3, 2012

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Landon R. Brown
Administrative Law Judge