EARL V. BOYLAN, ET AL.,

Grievants,

v. DOCKET NO. 94-DOH-211

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Earl V. Boylan, John H. Gallo, Clarence L. Hughart, Harry E. Hustead, Ronald L. Knight, Vincent P. Lopez, Jack A. Moore, William H. Myers, Kenneth P. Patrick, James K. Phillips, Steven E. Seckman, and Robert L. Wolfe, are all employees of the Department of Transportation, Division of Highways. They initiated their grievance on December 20, 1993, which states:

> One of the highlights of the statewide Reclassification Project was to bring consistency throughout all of state government with regard to compensation. However, the Division of Highways requires their employees to work eight hours per day (40 hours per week) while other state agencies are only required to work seven hours per day (35 hours per week) or seven and one-half hours per day (37.5 hours per week). This amounts to working 6.67% or 14.29% longer than employees who work for other state agencies and are paid from the same "universal" 23 step pay plan. This amounts to disparate treatment of Division of Highways employees.

Relief Sought:

> For all Division of Highways employees to be given a percentage salary increase corresponding to theadditional hours worked <u>or</u> be allowed to work a shorter work day as do employees of other state agencies. The relief sought (compensation) is to be retroactive to the statute of limitations for this disparate treatment of Division of Highways workers.

The grievance was denied at Levels I and II because Grievants' supervisors were without authority to grant the relief requested. A hearing was held at Level III on March 21, 1994, and a decision rendered on March 21, 1994 denying the grievance. Appeal was made to Level IV on May 24, 1994, and hearing was held in Charleston, West Virginia on July 22, 1994. (See footnote 1) Grievants elected not to submit post-hearing briefs. Proposed Findings of Fact and Conclusions of Law were submitted by Respondent on August 17, 1994, at which time this case became mature for decision.

The facts are not in dispute. Grievants are all employed by the Department of Transportation, Division of Highways. The Division of Highways' work hours have been established by Commissioner's Order since 1973 as being a standard forty-hour work week consisting of five days of eight hours each from 7:30 a.m. to 4:00 p.m. with a one-half hour unpaid lunch period from 12:00 noon to 12:30 p.m. Grievants all currently work these hours. Level IV, Grievants' Exhibits 7 and 8.

Grievants contend that this work week results in a commitment on their part of 42.5 hours a week in order to be paid for 40 hours a week. Grievants contend that this is a violation of equal pay for equal work and is discriminatory in that employees of otherState agencies commit less hours to attain pay for a 40-hour work week. Some agencies have work schedules that provide for five days a week, eight hours a day with a one-half hour paid lunch period, resulting in a 40-hour work week. Some agencies have work schedules that provide for five days a week, eight hours a day with one-half hour unpaid lunch period, resulting in a 37.5-hour work week. Some agencies have work schedules that provide for five days a week, seven and a half hours a day with an unpaid one-half hour lunch period, resulting in a 35-hour work week. Level III, Grievants' Ex. 1.

W. Va. Code § 29-6-10(2) grants specific authority to the Division of Personnel to adopt a pay plan for state employees and provides, in pertinent part, that the "principle of equal pay for equal work shall be recognized in the several agencies of state government." Section 6.01 of the Division of Personnel Rules and Regulations explains the "Purpose and Intent" of the compensation:

> To attract qualified employees and retain them in the classified service, the Board shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various state agencies and on comparability to pay rates established in other public and private agencies and businesses. The intent of the Board is to recommend to the Governor a pay plan with annual adjustments for cost-of-living increases and additional funds for merit increases.

The doctrine of "equal pay for equal work" does not apply to hours of work. That principle only applies to the compensation plan and the requirement that employees within the same classification or who perform substantially the same duties be paid rates established in the compensation plan. Grievants do notcontend that they are not being paid in accordance with the compensation plan or that they are being paid differently than other workers performing the same duties as they. Thus, their claims that the doctrine of "equal pay for equal work" has been violated must fail.

Grievants' claims of discrimination must also fail. "Discrimination" is defined by W.Va. Code §29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or are agreed to in writing by the employee." In order to establish a prima facie case of discrimination the grievants must establish:

> (1) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (2) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) have not, in a significant particular; and
>
> (3) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agree to in writing by the grievants.

Holcomb v. W. Va. Dept. of Highways, Docket No. 89-DOH-398 (Oct. 31, 1989).

Grievants have not made a prima facie case of discrimination inasmuch as they have failed to establish that the Division of Highways has treated them any differently than any other of its employees with whom they are similarly situated. Indeed, from the face of this grievance, it appears that the Division of Highways has treated all of the Grievants, who presumably are similarly situated, exactly the same. In addition, the Commissioner's Orders, Grievants' Exs. 7 and 8, establish the same work hours for"employees in central headquarters and district offices", with the provision that individual employees may have their work schedules changed in order to accomplish their individual assignments in the most efficient manner.

To the extent that Grievants are claiming that they are being treated differently than all other state

employees, that claim must fail in that it is too broad and ambiguous. As stated above, there are many different work schedules established by the different agencies for their employees, including different work schedules within an agency, in order to accommodate and achieve the specific goals of each agency. Level III, Grievants' Ex. 1.

West Virginia Division of Personnel Rules and Regulations Section 15.03 (introduced but not marked at Level IV) provides as follows:

> Agency Work Schedules: Each appointing authority shall establish the work schedule for the employees of his agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a work week, the day and time that the work week begins and ends, and the time that each work shift begins and ends. The work schedules and changes thereto must be submitted to the Director within fifteen (15) calendar days after employees commence work under the schedule.

As reflected in Grievants' Exhibits 7 and 8, above, the Commissioner of Highways complied with Section 15.03 on at least two occasions. Grievants' Ex. 7, dated October 15, 1973, established a forty hour work week consisting of five days of eight hours each, from 7:30 a.m. to 4:00 p.m. with a one-half hour lunch period. Grievants' Ex. 8, dated January 21, 1975, set the samestandard forty hour week for the purposes of computation of overtime.

Grievants submitted into evidence draft proposals by the Division of Personnel designed to establish uniform guidelines for all state employees regarding, among other things, hours of work, to ensure compliance with state and Federal wage and hour laws. Level III, Grievants' Exs. 2, 3, 4.

Those proposals defined "workday" as consisting of eight hours, including a half-hour paid meal period. "Meal period" is defined as "normally, non-work time when employees are completely relieved from work, a duration of one hour or less." A "work week" consists of forty hours, and overtime is paid for hours worked in excess of forty hours in a work week.

Grievants offered these exhibits in an attempt to establish that it was contemplated by the Division of Personnel that state employees work eight hours a day, including a half-hour <u>paid</u> meal period. They, on the other hand, are required to work eight hours a day, with a half-hour <u>unpaid</u> meal period.

It is important to note that Grievants' actual work time does not exceed forty hours a week. The additional 2.5 hours a week is made up of unpaid lunch, or "non-work" time. Further, the proposals submitted by Grievants were never adopted and their relevance to this matter is limited to their

usefulness in providing definitions of certain terms. As indicated above, § 15.02 authorizes each appointing authority to establish its ownwork schedules presumably in acknowledgement that each agency may have differing requirements in terms of staffing needs.

Conclusions of Law

1. Grievants have failed to establish that the Division of Highways has violated, misapplied or misinterpreted any statutes, policies, rules, regulations or written agreements under which Grievants work, including any violation, misapplication or misinterpretation regarding compensation, hours, or terms and conditions of employment. W. Va. Code § 29-6A-1, et seq.

2. Grievants have failed to establish that they have been discriminated against by the Division of Highways in its application of the Commissioner's Order establishing a standard forty-hour week consisting of five days of eight hours each, with a one-half hour unpaid lunch period.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Dated: October 25, 1994

Footnote: 1 *Grievants Boylan and Patrick were the only grievants present at the Level IV hearing.*