PAUL DOUGLAS, et al.

v. Docket No. 94-BOT-188

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY

DECISION

Paul Douglas, acting on behalf of himself and all trades worker employees (hereinafter Grievants), employed in the Department of Housing and Residence Life at West Virginia University (WVU or Respondent), advanced a grievance to level four on May 12, 1994, in which they allege a violation of Board of Trustees Policy Bulletin No. 62 occurred when a limitation was placed on their accrual of compensatory time off (CTO). (See footnote 1) A level four hearing was conducted on July 8, 1994, at which time Grievants requested additional information from Respondent. By letter dated July 28, 1994, Assistant Attorney General Rosemary J. Humway advised the Grievance Board that Respondent had provided Grievants the specified documentation. Grievants submitted a final written statement with attachments on August 16, 1994; Respondent elected not to file post-hearing proposals which were due twenty days after the additional documentation was provided.

The evidence of record establishes that when Grievant Douglasrequested use of CTO in February 1994, Respondent found that he and other employees in the division of Housing were carrying in excess of the Board of Trustees Policy Bulletin No. 62 mandated maximum 37.5 hours of compensatory time. Subsequently, they were "paid down" to that amount and advised that they could no longer exceed said level of compensatory time. Previously, Grievants had been permitted to accrue virtually unlimited CTO so long as it was used within 60 days.

Grievants, appearing pro se, argue that BOT Policy Bulletin No. 62 (September 14, 1987) addressed two types of CTO. Type I, earned during holidays and for regular overtime work, could be accumulated without limit and need only be taken prior to transferring. Type II, earned during emergency situations, was subject to the 37.5 hour limit. Grievants further assert that revised Policy Bulletin No. 62 (January 1, 1994) makes no reference to a specific number of hours which may be accrued as CTO.

Several Grievants opined that the imposition of the 37.5 hour cap on CTO penalizes them for working overtime and/or that the limitation makes it less desirable to work holidays, overtime, and during emergencies. Grievants argue that the prior practice allowed them to carry a greater number of hours which were available to them upon request and provided motivation for them to work holidays, overtime, and during emergencies, keeping the department running smoothly. Further, they assert that the procedure was not abused and that all CTO time was used within 60 days in compliance with Policy Bulletin No. 62. In support ofGrievants' position, Supervisor Donald Robbins explained that the limitation creates a hardship for Grievants since they may not use the CTO until it is credited to their account, two weeks after it is earned. Thus, the restriction on time accrued, together with the lag time in crediting recently earned overtime, may result in Grievants not possessing CTO when they desire to take leave time. Based upon their conclusion that the CTO has been improperly limited, Grievants request that WVU be required to reinstate the past practice of allowing unlimited accrual of CTO and that

CTO time [earned during the period it has been restricted] be reinstated, without loss of pay . . . [or] if [Respondent's] interpretation is up held [sic] as stated, we are asking that all monetary value, CTO or pay be retroactive back for the two years statue [sic] of limitation, starting at Thanksgiving 1993 which began our limits as to your 37.5 hours.

Respondent asserts that Grievants have no entitlement to unlimited CTO, on the contrary, they have been improperly accruing excessive amounts of it since 1987 when Policy Bulletin No. 62 defined the maximum institutional standard as 37.5 hours. (See footnote 2) Respondent further argues that Grievants have suffered no harm since they are paid for overtime in excess of the maximum CTO allowed and they may use, then reaccrue, the CTO as they desire. The practice previously followed by the Division of Housing is notonly in violation of Policy Bulletin No. 62, Respondent argues, but the excessive accumulation and subsequent use of large blocks of CTO by numerous employees could conceivably lead to disruption of its organizational needs.

During the time period in question, two versions of Policy Bulletin No. 62 have been in effect. The policy in effect from July 1987 through January 1994, stated in pertinent part:

3.1 There are two (2) types of compensatory time off.

3.1.1. Employees required to work on any designated Board of institution holiday . . shall receive regular pay for that holiday plus substitute time off at the rate of one and one-half (1 1/2) times the

number of hours actually worked on the holiday. The time off should be used within sixty (60) calendar days following the holiday. Type One must be used by the employee transferring to another position before the transfer.

3.1.2. Employees required to work in excess of their regular daily work schedule . . .may be given compensatory time off as follows:

3.1.2.1. If compensatory time off can be granted and used before the end of that employee's regularly scheduled workweek, the employee may be given compensatory time off equal to the actual hours worked beyond the employee's regularly scheduled workday. Such compensatory time off is calculated at the straight time rate for up to forty (40) hours per week.

3.1.2.2. If compensatory time off cannot be used before the end of the employee's regularly scheduled workweek and the employee works more than forty (40) hours during the workweek in which the compensatory time is earned, compensatory time off may be given at the rate of one and one-half (1 1/2) times the number of hours actually worked.

3.2. Compensatory time must be used within a reasonable period of time not to exceed sixty (60) calendar days from the date it is earned. The employee may accrue not more than thirty-seven and one-half (37 1/2)compensatory hours based on time actually worked and shall be paid overtime compensation in cash for any additional overtime hours worked. . . .

The Policy Bulletin No. 62, revised effective January 1, 1994, reduced the section on CTO as follows:

5.1 Compensatory time off shall be allowed only to the extent authorized by federal and state law.

5.2 When a full-time or part-time classified non-exempt employee is required to work on any designated board or institution holiday, that employee at his/her option shall receive regular pay for that holiday plus substitute time off or additional pay at the rate of one and one-half (1 1/2) times the number of hours actually worked. The time off must be used within a six-month period following the holiday.

5.3 When an exempt employee is required to work on any designated board or institution holiday, that employee shall be given substitute time off on an hour-for-hour worked basis.

In addition to these two "types" of CTO, a third variety, that earned during the emergency closing of a school, is also at issue. Grievants worked numerous hours from January 4-6 and 16-22, 1994,

when President Neil Bucklew invoked emergency status due to weather and closed WVU. In the 1987 version of Policy Bulletin No. 62, Section 8.2 provided that:

Should an employee be required to work by the president or his designee during a declared emergency, that time worked shall be considered as extra work and will entitle the employee to be compensated at the rate of time and one-half for the hours worked. The decision as to whether an employee will receive overtime pay or compensatory time off for emergency work must be by mutual agreement between the supervisor and the employee. . .

Because the 1994 version of Policy Bulletin No. 62 did not address this issue, Drayton R. Justus, Assistant Vice President for Human Resources, issued a memorandum dated January 28, 1994, to all Deans, Directors and Chairpersons referencing "Declared Emergency Situations Classified Employee Compensation." Mr. Justus advised that "past practice on this issue will prevail" i.e., classified employees required to work during the declared emergency period were entitled to regular pay plus additional compensation at the rate of one-and-one-half for actual hours worked. This compensation was to be provided in the form of CTO or wages, as determined by mutual agreement between the employee and the supervisor, with consideration given to operational needs which might override the mutual agreement. "If compensation is in the form of CTO, only a maximum of 37.5 hours may be authorized; the remainder of compensation due must be in wages." The CTO was to be used within 60 calendar days or would be lost to the employee. If operationally prohibited from taking the earned CTO within 60 calendar days, the employee was to be compensated in money.

Both W.Va. Code §21-5C-3, which addresses overtime compensation, and the Fair Labor Standards Act provide the option of compensatory time off in lieu of overtime compensation. Both utilize language establishing that CTO is discretionary with the employer (employees "may" receive) and neither contain language which could be interpreted to prohibit an employer fromestablishing a maximum amount of CTO to be accrued. (See footnote 3) Therefore, it is determined that the 37.5 hour cap on CTO set by the Board of Regents in 1987 was not improper.

Grievants correctly assert that the 1987 Policy distinguishes two types of compensatory time off, that earned for holidays and that earned when the employee is required to work in excess of his regular daily work schedule. However, Section 3.2., which addresses CTO generally, specifies that an employee may not accrue more than 37.5 compensatory hours. Grievants' interpretation of the Policy

to allow unlimited CTO accrual is erroneous and Respondent's restriction was properly in place until January 1, 1994, the effective date of the revised Policy.

As previously noted, the 1994 Policy does not contain any specific hour restrictions on the accrual of CTO. The Section 5.1 provision which allows CTO "only to the extent authorized by federal and state law" apparently refers to the above-cited language that CTO may be granted at one and one-half times the employee's regular rate, although this vaguely worded statementmight also subject employees to federal and state limitations referred to in footnote 2. In any event, the effect of this revision is to eliminate the 37.5 hour cap on CTO contained in the 1987 version of Policy Bulletin No. 62. Absent any subsequent amendments since January 1, 1994, Grievants, and indeed all employees, may accumulate unlimited CTO, unless subject to specific federal and/or state regulations, for work on holidays and for time in excess of their regular workweek.

Respondent concedes that it had no policy in January 1994 to address the compensation of employees who work during the emergency closure of an institution. Mr. Justus represented in his memorandum that a formal policy on this issue was to be promulgated by July 1, 1994. If said policy was implemented it was not made a part of the level four record. With no policy relating specifically to compensation for overtime worked during emergency closings of institutions, Respondent's utilization of the prior policy cannot be deemed improper.

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

FINDINGS OF FACT

1. Grievants are employed as trades workers assigned to the Division of Housing in the Department of Housing and Residence Life at West Virginia University.

2. With a brief exception in 1991, prior to February 1994, Grievants were allowed to accumulate unlimited CTO, contrary toBoard of Trustees Policy Bulletin No. 62.

3. The January 1994 revision of Policy Bulletin No. 62 included no restrictions on the number of hours an employee may accrue and use as CTO. This version of the Policy also omitted any reference to employees who work during declared emergencies.

4. Respondent continues to limit the maximum amount of overtime used as CTO to 37.5 hours.

Employees are compensated in cash for any additional overtime hours worked.

5. Grievants have suffered no tangible harm during 1994 inasmuch as they have been compensated for all overtime worked.

CONCLUSIONS OF LAW

1. Grievants have failed to prove that the Policy Bulletin No. 62 (1987) provision restricting the accrual of compensatory time to 37.5 hours was in violation of any statute, regulation, or policy, or was otherwise improper.

2. Grievants have proven by a preponderance of the evidence that Policy Bulletin No. 62 (January 1994) contains no restrictions on the number of hours which may be accrued for use as CTO.

3. Grievants may accrue overtime to be utilized as CTO subject only to hourly restrictions imposed by relevant state and federal laws.

Accordingly, the grievance is GRANTED and Respondent isOrdered to allow the accrual of CTO for work on holidays or beyond the regular workweek, as addressed by Policy Bulletin No. 62 (Jan. 1994), i.e., limited only by relevant state and federal restrictions. To the extent that a policy addressing overtime work during declared emergencies has been adopted, its provisions shall be valid until shown otherwise. This relief is to be granted beginning December 1, 1994. Reinstatement of CTO for 1994 is denied as being unduly burdensome to implement and in consideration that Grievants have been monetarily compensated for all overtime worked in excess of the 37.5 hour limitation.

November 30, 1994 Sue Keller, Senior Admn. Law Judge

Footnote: 1The record indicates that fourteen employees signed an April 19, 1994, request for information. Grievants informally discussed this situation with their immediate supervisor on February 8, 1994. A formal complaint was filed at level one on March 2; by memorandum dated April 14 J.P. Duffield, Maintenance Manager, denied the grievance. An evidentiary hearing was held at level two on April 25, 1994, and the matter was denied by decision dated May 3, 1994. Grievants elected to bypass consideration at level three as is permitted by W.Va. Code §18-29-4(c).

Footnote: 2Respondent does not dispute, however, that Grievants were "paid down" to 37.5 hours in January 1991 but were immediately allowed to resume the unrestricted accumulation CTO until Grievant Douglas submitted a leave request

for February 1994. No explanation was provided for this inconsistent practice.

Footnote: 3Code §21-5C-3(f)(3) provides that county and municipal employees may accrue up to 480 hours of CTO if the employee's work is a public safety activity, an emergency response activity or a seasonal activity. Other employees of county or municipal governments may accrue up to two hundred forty hours of CTO. Also, a draft of the Declared Emergency Policy which was to become effective July 1, 1994, states than an uncited "[f]ederal law restricts CTO accumulation to 480 hours (320 hours worked)." Of course, Grievants are neither county nor municipal employees and it does not appear that accumulation in excess of 480 hours is at issue since the time is to be used within 60 days. The issue of whether an administrative body may set limitations more restrictive than those of the federal government was not addressed and is not controlling to the outcome of this decision.