W. RICHARD WHITE,

Grievant,

v. **Docket No. 00-DOH-313D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

On September 27, 2000, Respondent West Virginia Division of Highways ("DOH") filed a "Notice of Appeal on Default Claim and Request for Hearing" before this Grievance Board. Respondent requested a hearing be held for the purpose of determining whether a default had occurred in the processing of this grievance. The requested hearing was scheduled for November 9, 2000, in the Grievance Board's Elkins office.

At the November 9 hearing, Respondent was represented by counsel, Jennifer Francis, (See footnote 1) who conceded on the record that a default had, in fact, occurred. (See footnote 2) Accordingly, evidence was taken regarding Grievant's requested remedy in light of the presumption that he had prevailed on the merits of his grievance. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on December 20, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by DOH in the HE5 classification as a Director of Engineering, a professional position. He has been employed in that capacity since November 16, 1998.

2. Pursuant to an unwritten DOH policy, professional employees are not paid for working overtime hours. Professional employees receive "compensatory time" for hours worked in excess of forty per week, meaning that they receive time off at a later date, which is not charged to their annual leave.

3. Since he became a Director of Engineering, Grievant has received compensatory time for all overtime hours he has worked.

4. Bob Amtower is an HE5 and works in a different district from Grievant. He was also reclassified sometime in 1998.

5. Due to a clerical error, Mr. Amtower received overtime pay for his excess hours after being reclassified as a Director of Engineering. This error was corrected on April 1, 2000, when it was discovered by DOH officials.

6. As of April 1, 2000, Mr. Amtower receives compensatory time instead of overtime pay. DOH did not ask Mr. Amtower to reimburse the overtime pay he had received prior to correction of the error.

7. As relief in this grievance, Grievant requests to be paid for all overtime hours he worked between November 16, 1998, and April 1, 2000, and that his work hours be reduced accordingly.

Discussion

Once it has been determined that the employer has defaulted in processing a grievance pursuant to the provisions of W. Va. Code § 29-6A-3, it is presumed that thegrievant has prevailed upon the merits of the case. Respondent then has the burden of establishing by a preponderance of the evidence that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W.Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). This Grievance Board has recently determined that the employer must prove its case by clear and convincing evidence, which requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. In the case of a default matter, this requires the employer to prove by this standard that the basic facts underlying the presumption are not true. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

In the instant case, Respondent does not dispute that Mr. Amtower received overtime pay due to a clerical error, while Grievant received compensatory time in lieu of overtime pay. However, Respondent contends that it would be clearly wrong and contrary to law to grant Grievant the same pay, which was issued to Mr. Amtower contrary to DOH policy and federal wage and hour laws. The Federal Fair Labor Standards Act ("FLSA") requires employers to pay employees time and one-half

wages for all hours in excess of forty hours per week. However, administrative and executive employees are exempt from this requirement. See 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994). Grievant does not appear to dispute his status as an administrative/executive employee.

Mistakes by employers do not usually entitle a grievant to relief. Crosston v. W. Va. Dep't of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997); See Goins v. Raleigh CountyBd. of Educ., Docket No. 97-51-116 (Oct. 17, 1997); Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995). Specifically this Grievance Board has held that it is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. Crosston, supra. In misclassification grievances, it is well- recognized that the appropriate remedy in a case where an employee is comparing himself to other employees who are misclassified, is not to similarly misclassify the grievant. Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995). Similarly, when an employee has erroneously received pay to which he was not entitled, it would clearly be wrong to also award such pay to another employee who files a grievance.

Accordingly, Respondent has established by clear and convincing evidence that it would be clearly wrong and contrary to law to grant Grievant's requested remedy.

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code §29-6A-3(a)(2); Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999).

2. The language of W. Va. Code §29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer did not timely respond to the complaint, resulting in a default.

3. To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), arespondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

4. Administrative and executive employees are exempt from the requirement that employers provide overtime pay for all hours worked in excess of forty hours per week pursuant to the Federal Fair Labor Standards Act. See 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).

5. Grievant falls within the administrative and executive exemptions of the Federal Fair Labor Standards Act and is not entitled to overtime pay.

6. Respondent has proven by clear and convincing evidence that Grievant is not entitled to overtime pay, that the overtime compensation awarded to Bob Amtower was an error, and that the remedy requested by Grievant would be clearly wrong and contrary to law.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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 W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealingparty 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: January 17, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself.

Footnote: 2

There is no record of the lower level proceedings, and it is unknown at what level the default occurred.