PAUL PARRY,

Grievant,

v. **Docket No. 00-CORR-102**

DIVISION OF CORRECTIONS/

MT. OLIVE CORRECTIONAL COMPLEX

and DIVISION OF PERSONNEL,

Respondent.

D E C I S I O N

Grievant, Paul Parry, is employed by the Division of Corrections ("CORR") at the Mt. Olive Correctional Center ("MOCC") as a Major and the Chief Correctional Officer. His lengthy Statement of Grievance reads in pertinent part:

> **On 02 February 2000, I received a Memorandum from Howard Painter, Warden of Mount Olive Correctional Complex. (See footnote 1) The memorandum stated that I do not qualify for overtime pay. I was promoted to Correctional Officer VII on 16 April 1999. I have received overtime pay for hours worked in excess of (40) forty since said date. The Correctional Officer VII that worked at Mount Olive prior to this Grievant did also receive overtime pay for all hours in excess of (40) forty.**

Grievant alleged discrimination and retaliation had occurred. Relief sought was back pay including interest; to be treated fairly in accordance with the West Virginia Code and the Fair Labor Standards Act ("FLSA"); harassment, discrimination, and retaliation to cease; and attorney fees and court costs. (See footnote 2) Grievant later amended his relief sought to include compensation for overtime he would have worked and placement in the proper paygrade, fifteen. (See footnote 3) Grievant also added the following statement, "back pay at a minimum of (5%) above current base pay for all hours worked since 16 April 1999. To include all overtime worked and any overtime that Grievant may have worked had he not been placed on overtime restrictions since filing said grievance." (See footnote 4)

This grievance was filed on February 3, 2000. Grievant's immediate supervisor, Associate Warden William Vest felt he could not give an appropriate answer on the issue due to a conflict of interest. (See footnote 5) Grievant filed to Level II where the grievance was denied on February 22, 2000, by Warden Howard Painter. Grievant filed to Level III, a hearing was held on March 7, 2000, and the grievance was denied on March 9, 2000. This decision was then appealed to Level IV and the scheduled hearing was continued many times at the request of the parties. The Division of Personnel ("DOP") was joined as a party on April 7, 2000. A Level IV hearing was held on March 27, 2001. (See footnote 6) This case became maturefor decision on April 27, 2001, after receipt of CORR's proposed findings of fact and conclusions of law. (See footnote 7)

Issues and Arguments

Grievant makes multiple arguments. First, he asserts his overtime was removed in retaliation for testifying in a grievance hearing. Second, he has been discriminated against because he is being treated differently than others. Third, because he has little to no discretionary authority, it is incorrect to classify him as an exempt employee, not eligible for overtime pursuant to the Fair Labor Standards Act.

Respondent CORR maintains Warden Painter found out in a grievance hearing that Grievant was receiving overtime contrary to DOP's guidelines and took immediate action to stop this infraction. Respondent CORR argues there is no retaliation or discrimination as its actions were required by DOP's regulations and guidelines. CORR also maintains no other Major/Correctional Officer VII receives overtime. Further, CORR notes Grievant is the top uniformed officer at MOCC, and as such is in an administrative/managerial position and is an exempt employee.

Respondent DOP points to its regulations and Grievant's class specification and notes Grievant's high level of responsibility at MOCC. DOP maintains Grievant is correctly classified exempt, he misunderstands the term "discretionary authority", and is applying too restrictive a definition to this term. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently classified as a Major/Correctional Officer VII, and he is employed as the Chief Correctional Officer at MOCC. He is the highest ranking uniform officer at MOCC, and he is in charge of security. He directly and indirectly supervises approximately 200 hundred employees.

2. Grievant's supervisor is Associate Warden Vest.

3. Grievant recommends the hiring and firing of personnel under his command.

4. Grievant has the right to impose low level disciplinary action without consultation with anyone.

5. Grievant approves annual leave, completes performance evaluations on employees, responds to grievances, and schedules post assignments. Other supervisors under him cannot approve annual leave.

6. Grievant is considered a part of the executive staff.

7. Grievant's primary duties are those of management, and he performs these managerial tasks 80 percent of the time. He regularly exercises discretionary authority.

8. Occasionally, because of the staffing problems at MOCC, Grievant assigns himself to stand post, and he performs the duties of a lower level Correctional Officer. He assigns himself to these duties at his discretion. Even when he is working in this capacity, he is still the Chief Correctional Officer and responsible for his other management duties. 9. Grievant's position is designated as exempt from overtime by DOP, because of the duties identified in the above Findings of Fact.

10. Contrary to this designation, Grievant received overtime time pay, as a Major/Correctional Officer VII, from the time of his promotion until February 1, 2000.

11. Grievant testified at a grievance hearing three months prior to the removal of his overtime. He was worried about the possibility of retaliation and informed the administrative law judge assigned to the case of these concerns.

12. On February 1, 2000, Grievant testified in another grievance regarding Unit Managers. It was either shortly before or during this hearing that Warden Painter discovered Grievant was receiving overtime.

13. On February 1, 2000, Warden Painter wrote Grievant informing him he had just found out that morning that Grievant was receiving overtime, and as the highest ranking uniformed officer, he met the FLSA test for management personnel, and did not qualify for overtime. The letter went on to inform Grievant that Warden Painter had informed payroll that effective immediately he was not to receive this overtime pay, and if Grievant had questions to make arrangements to see him.

14. This grievance was filed two days later.

15. Associate Warden Vest used to hold the title of Chief Correctional Officer while he was classified as a Correctional Officer VI. On October 22, 1998, after he had been promoted to Correctional Officer VII on October 1, 1998, he filed a grievance stating he had been working out of classification, and he requested he receive the difference in pay, including overtime. 16. Associate Warden Vest's first level supervisor, Associate Warden M. V. Coleman, responded to the grievance noting, he would recommend a settlement agreement to grant Grievant the difference in pay from the time he started performing the duties until October 16, 1998. He informed then Chief Correctional Officer Vest that as a Correctional Officer VII he would not be eligible for overtime pay.

17. Associate Warden Vest's grievance was settled on October 30, 1998, when the parties signed an agreement granting Associate Warden Vest the difference in salary between Correctional Officer VI and Correctional Officer VII. This agreement did not state Associate Warden Vest was entitled to any overtime pay. Associate Warden Vest was also paid back pay for his overtime during the period of time when he was working as a Correctional Officer VI.

18. After this settlement agreement and his promotion, Associate Warden Vest continued to receive overtime. Payroll employees questioned Associate Warden Vest's receiving overtime pay after he was classified as a Correctional Officer VII, but they were directed to continue this compensation by the then Associate Warden of Administration, Linda Coleman.

19. Associate Warden Linda Coleman did not have the authority to approve this payment, which is contrary to DOP's guidelines and regulations.

20. Warden Painter was not aware Associate Warden Linda Coleman had approved this payment of overtime after Associate Warden Vest became a Correctional Officer VII.

21. No Majors/Correctional Officers VII receive overtime pay. 22. Some officers with the working title of Chief Correctional Officer do receive overtime, but they are classified as Correctional Officer VI or lower.

Discussion

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.121(2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The issues raised by Grievant will be discussed separately.

A. Whether Grievant should be classified as an exempt employee?

Mr. Lowell Basford, the Assistant Director of Classification and Compensation for DOP, and accepted as an expert by the parties, testified Grievant was an exempt employee and as such was not eligible to receive overtime. This assessment is based on Grievant's classification, Position Description Form, and his level within the administrative hierarchy. Mr. Basford testified Grievant performed all the duties identified on theExecutive Exemption Test. This test is provided by the FLSA, and it is used to assess whether an employee should be paid overtime.

Mr. Basford also spoke to Grievant's contention that he had no discretionary authority because all of his actions are completely governed by MOCC's rules and regulations. Mr. Basford explained Grievant was misinterpreting the term and assuming discretionary authority meant final authority. Grievant has the authority to, and indeed does, make day to day decisions within the rules and regulations that govern MOCC. (See footnote 8) **Grievant does not function as a robot, and all the questions that arise during the day do not have**

specific answers in these rules and regulations. The rules and regulations furnish Grievant with guidance during the performance of his duties.

Mr. Basford noted that within the rank structure at MOCC, Grievant is the highest ranking uniformed officer at MOCC, and he is responsible for the supervision of over 200 employees. Clearly, rank is very important within the paramilitary structure MOCC follows. Grievant's rank is accompanied by discretionary authority.

Further, Personnel's interpretation and explanation of issues in classification and compensation should be given great weight unless clearly wrong. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification and compensation with a substantial obstacle to overcome. In this case Grievant has not met his burden of proof and demonstrated he should be classified as an non-exempt employee.

B. Retaliation

Grievant alleges he was retaliated against for testifying in a grievance hearing three months earlier. Grievant did testify in a grievance hearing on the day he was informed he would no longer receive overtime. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate prima facie case of reprisal, a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**
>
> **3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred. Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant established a prima facie case of reprisal. It is clear Grievant testified in a grievance hearing on February 1, 1999, and on that same day he was told he would no longer receive overtime. However, the scenario Grievant presents, that this retaliation was for his testimony three months earlier, is unlikely and implausible. It does not make sense CORR would wait three months, and then remove Grievant's overtime on the day he testified in another grievance.

Even though Grievant has established a prima facie case, Respondent has demonstrated legitimate, non-retaliatory reasons for its decision to cease Grievant's overtime compensation. Warden Painter credibility testified that he did not know Grievant was receiving overtime, and when he found out, he took steps to stop it. This action was appropriate given DOP's rules and regulations. Associate Warden Linda Coleman's decision to pay Associate Warden Vest overtime after his promotion was an ultra vires act. To continue to pay Grievant overtime would have been illegal and an ultra vires act. This Grievance Board has discussed the issue of ultra vires acts at some length. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Resources, Docket No. 99- HHR-228 (Nov. 30, 1998).

This rule is clear. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers[,] and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v.

Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (1985)(citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). See also, Parker, supra. It is well settled that a supervisor's oral representations or prior acts are not binding on an agency, where the supervisor does not possess authority to make that determination. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). See Chapman v. Dep't of Transp., Docket No. 97-DOH-261 (Nov. 24, 1997); Fraley v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993); Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993). Although this is a harsh rule, it is oneespoused by the West Virginia Supreme Court of Appeals and, of course, by this Grievance Board in earlier decisions.

Accordingly, Associate Warden Linda Coleman's approval, without appropriate authority, of Associate Warden Vest's overtime constituted an ultra vires act, and as such cannot be utilized to grant Grievant his requested relief. As previously stated, "[u]ltra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie, supra; Parker, supra. Two wrongs do not make a right.

C. Discrimination

W. Va. Code 29-6A-2(d) defines discrimination as "any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing." To prove discrimination a grievant is required to establish a prima facie case which consists of demonstrating:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and, (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the Respondent can rebut by presenting a legitimate, nondiscriminatory reason forthe action.

However, the Grievant may still prevail if he can demonstrate the reason given by the Respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89- 50-260 (Oct. 19, 1989). The only evidence to support Grievant's claim that he was treated differently is the evidence Associate Warden Vest received overtime pay while he was a Correctional Officer VII. The evidence is clear Associate Warden Vest should not have received this pay, that no one with the authority to do so approved this compensation, and this compensation was not included either in the recommendation made by Associate Warden M. V. Coleman or the settlement agreement signed by Associate Warden Vest and Warden Painter. In fact, it appears Associate Warden Vest may have been the one to tell Associate Warden Linda Coleman he was to continue to receive overtime. Resp. Ex. No. 5, at Level II; Test. Kim Boggs, Level II Hearing.

Grievant also presented evidence to demonstrate that other Chief Correctional Officers received overtime pay. The evidence demonstrated these other Chief Correctional Officers were not Majors/Correctional Officers VII, were ranked at a lower level, and were not classified as exempt by DOP. The above discussion will be supplemented by the following conclusions of law.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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).

2. Personnel's interpretation and explanation of issues in classification and compensation should be given great weight unless clearly wrong. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

3. Grievant did not meet his burden of proof and demonstrate DOP's assessment that he should be classified as an exempt employee was clearly wrong.

4. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure

either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**
>
> **3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**
>
> **5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.**

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

5. Grievant established a prima facie case of reprisal, as he demonstrated the removal of his overtime, "the adverse action", followed "within such a period of time that retaliatory motivation can be inferred."

6. Respondent demonstrated a legitimate nondiscriminatory reason for removing Grievant's overtime. To continue to pay Grievant this compensation would constitute an ultra vires act, as MOCC cannot pay a Major/Correctional Officer VII, an exempt employee, overtime as this is against DOP's regulations.

7. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95-HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W.Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998).

8. W. Va. Code 29-6A-2(d) defines discrimination as "any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing." To prove discrimination a grievant is required to establish a prima facie case which consists of demonstrating:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and, (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the Respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the Grievant may still prevail if he can demonstrate the reason given by the Respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89- 50-260 (Oct. 19, 1989). 9. Grievant did not meet his burden of proof and establish a prima facie case of discrimination.

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." Any 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 appealing party 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 11, 2001

Footnote: 1

This memorandum was dated February 1, 2000.

Footnote: 2

This Grievance Board does not award attorney fees, and there were no court costs.

Footnote: 3

The testimony at Level III was clear that Grievant's pay grade had been increase by the Division of Personnel, like many other CO classifications, to fifteen during a reclassification. Pursuant to Division of Personnel rules and regulations, Grievant did not receive a pay increase, as his salary was above the minimum of the pay range. This issue will not be discussed further.

Footnote: 4

No data was presented to clarify why Grievant should receive a five per cent pay increase; thus, Grievant has not met his burden of proof on this issue of relief.

Footnote: 5

Associate Warden Vest was the Correctional Officer VII referred to in Grievant's Statement of Grievance.

Footnote: 6

Grievant was represented by a co-worker, Steven Berryman, DOP was represented by Attorney Robert Williams, and MOCC was represented by Attorney Leslie Tyree.

Footnote: 7

Grievant's representative and DOP's attorney elected not to submit these proposals.

Footnote: 8

It is noted all state employees are subject to their agency's rules and regulations. This fact does not mean they have no discretionary authority.