DARYL SMITH, Jr.

Grievant,

v. **Docket No. 05-20-446**

KANAWHA COUNTY BOARD
of EDUCATION,

Respondent.

DECISION

Grievant, Daryl Smith, Jr., is employed as Supervisor of Maintenance with the Kanawha County Board Of Education ("KCBOE"). Grievant filed two grievances which were consolidated at Level II. (See footnote 1) First, Grievant contends there is an inequality because his subordinates receive overtime pay, but he does not. Second, he contends that, as the individual charged with supervising the capital improvement projects, he should be paid overtime because these improvements are done outside the normal working hours. He requests that he be paid the overtime rate for hours worked beyond the forty-hour work week. The first grievance was initiated on October 13, 2005. The second grievance, concerning the capital improvements project was initiated on October 17, 2003. Being denied at Levels I and II and bypassing Level III, Grievant appealed to Level IV. A hearing was held on February 2, 2006. (See footnote 2) Grievant appeared *pro se*, and Respondent was represented by James Withrow, General Counsel for KCBOE. This case became mature on February 2, 2006, as both parties declined filing proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant argues that there is an inequality between his employees and himself because his subordinates are paid overtime. At Level II, Grievant conceded that under the Fair Labor Standards Act ("FLSA") 201 U.S.C. § 201 et. seq., he was exempt from both minimum wage and overtime. His testimony changed at Level IV, and he now asserts that under the FLSA he is not exempt because he does not meet the specific requirements placed in the code. In addition, he asserts overseeing the capital improvements project requires him to work outside the normal working hours.

Respondent argues Grievant is an exempt employee and is not entitled to overtime because, as

the supervisor, he meets the requirements of exemption set forth in the FLSA. 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 employed as Supervisor of Maintenance with the KCBOE and has held that position for three years.

2. As Supervisor of Maintenance, Grievant supervises approximately twenty-two employees and is paid a salary.

3. Grievant also oversees capital improvement projects. These projects are done after normal work hours.

4. Grievant does not get paid overtime, but his subordinates do. As a result, his subordinates receive more money in a pay period than he does.

5. Grievant attempts to limit the number of overtime hours worked to approximately 10 hours a week.

6. In the job description for “Supervisor _ Electrical Shop” under the section labeled “Duties,” the employee is required to be “On call as needed.” Grievant's Exhibit 1.

7. Under the section labeled “Principal Accountability,” in the job description, it is clear the supervisor is “To implement a system to monitor productivity, and to supervise subordinates.” Grievant's Exhibit 1.

8. Grievant completes at least one formal evaluation for each employee he supervises, and on the evaluation form, he recommends whether to continue the employee's employment.

9. Grievant conceded at the Level II hearing that it was not illegal for him to be exempt from receiving overtime.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant's assertion that he is not equal with his subordinates because he is not being paid overtime must fail, as must his complaint about completing capital improvement projects without the benefit of overtime. Grievant relies on *W. Va. Code* § 18A-4- 8(h)(i)(78) which defines Supervisor of Maintenance as skilled personnel, not as professional personnel. Grievant argues this point because the FLSA provides exemption for positions classified as administrative, professional, computer, and outside sales. What must be understood, however, is that the job title does not dictate whether an employee is exempt under the FLSA. To be exempt from minimum wage and overtime, an employee must meet the requirements placed under either administrative, professional, computer or outside sales. Although the *West Virginia Code* does not consider Grievant's position to be professional, it is considered an exempt position for purposes of the FLSA because he satisfies all the requirements listed under the Executive Exemption. According to the FLSA to be exempt from both minimum wage and overtime pay, all the following tests must be met:1) The employee must be compensated on a salary basis at a rate of not less than $455 per week;

2) The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

3) The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

4) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

29 C. F. R. V § 778.

Grievant had conceded at Level II that it was not illegal for Respondent to refuse to pay overtime, but agreed Respondent could voluntarily elect to pay it. He changed his argument at Level IV, arguing that he was not exempt under FLSA because he did not have the authority to hire or fire other employees, or his suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status were not given particular weight, and therefore he did not meet all the requirements established by the federal law.

Respondent at Level IV countered that argument by demonstrating that Grievant was charged

with the responsibility to perform at least one evaluation on each of his subordinates. On that evaluation form, Grievant had a voice in whether the employee should be allowed to continue employment. Therefore, his opinion was given weight, and he met the criteria required to make him exempt from the FLSA. Unfortunately, for Grievant, the frequent expectation for supervisors is that they will have to work greater than a forty hour week. That is one reason why they receive a salary and are not able to earn overtime. Grievant does not receive an hourly wage. Supervisors and professionals are expected to work the amount of time necessary to get the job done. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. *West Virginia Code* § 18A-4-8(h)(i)(78) does classify the Supervisor of Maintenance as skilled personnel, not professional, but job titles do not determine exempt status. To determine whether an employee is exempt, the specific job duties assigned and the salary provided must meet the requirements listed under either administrative, professional, computer, and outside sales exemptions of the FSLA.

3. Grievant meets all the requirements set forth under the title Executive Exemption.

4. Under the FLSA 29 U.S.C. § 201 et. seq., Grievant is exempt from both minimum wage and overtime pay, and Respondent is not required to pay him overtime. 5. Supervisors are expected, within reason, to work until the job is completed, and supervisors are frequently required to work greater than a forty hour week.

6. The fact that a supervisor works greater than forty hours to complete his or her assigned duties does not entitle him to overtime pay.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, and such appeal must be filed within thirty 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.

DATE: April 5, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

On March 21, 2006, Grievant filed a third grievance claiming default at Level IV because his decision was not issued within 30 days of the hearing. Default cannot be claimed at Level IV. W. Va. Code §18-29-4(d)(2) requiring the hearing examiner to respond within 30 days of the hearing does not apply to Administrative Law Judges because neither party has control over this separate state agency. Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998), aff'd Harrison County Cir. Ct. Civil Action No. 95-C-485-1 (Nov. 10, 1998).

Footnote: 2

This case was originally assigned to ALJ Marteney, but due to administrative reasons, it was transferred to the undersigned who has reviewed the entire file.