THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

THOMAS PORTER, JR.,

Grievant,

v. **Docket No. 06-DOH-459D**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Thomas Porter, Jr. ("Grievant"), employed by the Division of Highways ("DOH"), filed a level one grievance on October 11, 2006, in which he alleged

I was available for work October 9, 2006, and was not called or informed by Craig Sperlozza that work was available. I had informed Craig Sperlozza on Thursday October 5, 2006, that I did want to work. I was not called.

For relief, Grievant requested compensation for the ten hours he did not work on October 9, 2006. Mr. Sperlozza denied the grievance at level one, and Grievant appealed to level two on October 18, 2006. A level two conference was conducted by Assistant District Engineer Lloyd Adams on October 27, 2006. By letter dated November 13, 2006, Grievant claimed default as no decision had been issued. By letter dated December 10, 2006, Grievant requested a default hearing from the Grievance Board. DOH conceded the default at level two, and a remedy hearing was subsequently conducted on February 26, 2007, in the Grievance Board's Westover office. Grievant represented himself, and DOHwas represented by Barbara Baxter, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

Synopsis

DOH argues that it would be contrary to law and clearly wrong to compensate Grievant for working Columbus Day when he failed to confirm that a crew would be working, or to sign up for work that day. Grievant relies upon a DOT procedure governing overtime in support of his claim that he should have been called and offered the voluntary overtime. Grievant clearly was aware of the possibility that work might be available on Columbus Day, bus failed to confirm that work was scheduled the two working days prior to the holiday. It was not the practice of the supervisor to call employees to notify them the voluntary work was available, and DOH has no rule or policy which requires such notice. Therefore, it would be clearly wrong to compensate Grievant for a day he did not work when he did not make a reasonable effort to notify his employer that he wanted to work on a holiday. The following facts essential to this case are undisputed.

Findings of Fact

___1. Grievant has been employed by DOH at all times pertinent to this grievance.

2. In Fall 2006, DOH employees were permitted to work four, ten hour days. Some overtime work was also permitted as funding allowed.

3. On Thursday, October 5, 2006, Supervisor Craig Sperlozza asked his crew if they were interested in working Saturday and/or Monday. Since Monday was a state holiday (Columbus Day) he was not yet certain whether they would be permitted to work.

4. Grievant verbally responded to Mr. Sperlozza that he would probably be interested in working Monday.

5. On Friday, October 6, 2006, Mr. Sperlozza had confirmed that it would be permissible to work on Monday, and placed a sign-up sheet for those employees who wanted to work the holiday.

6. Grievant did not work on Friday or Saturday, and did not call to confirm that work was available on Monday, October 9, 2006.

7. It is the employee's responsibility to inquire whether voluntary overtime is available. Mr. Sperlozza does not call employees to inquire whether they want to work voluntary overtime.

8. Grievant declined the offer of an equivalent amount of overtime lost due his not working on October 9, 2006.

9. Grievant was compensated for holiday pay on October 9, 2006.

Discussion

When a default has occurred it is presumed that the employee prevailed on the merits of the grievance, and a determination must be made as to whether the remedy is contrary to law or clearly wrong in light of that presumption. If the remedy is found to be contrary to law, or clearly wrong, it may be modified to comply with the law and to make the grievant whole. *W. Va. Code* § 29-6A-3. This Grievance Board has placed the burden of proof on the respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. *Lohr v. Div. of Corr.*, Docket No. 99-CORR-157D (Nov. 15, 1999).

It is the position of DOH that the requested remedy is contrary to law and clearly wrong because Grievant was never entitled to the overtime, and failed to sign up to work the holiday. DOH denies any obligation to call Grievant regarding voluntary overtime, and notes that Grievant declined an offer to make up the hours he could have worked on the holiday.

Grievant was certainly not required to work on Columbus Day. He knew on Thursday that working on October 9 was a possibility, and indicated an interest, yet he did not call in on Friday or Saturday to confirm that he wanted to work. DOH is not obligated by rule or policy to contact employees to work voluntary overtime. Grievant was paid for the holiday, and was not prohibited from working on that day. Additionally, he declined the offeredopportunity to make up the time. To grant him additional compensation for time not worked would be clearly wrong.

Further, Grievant's argument that the failure to call him was a violation of DOT Procedures, V-3, C-10, “Attendance, Leave and Overtime,” Section D, Paragraph 5, is inaccurate. That provision states:

In the case of agencies that must modify holiday schedules to accommodate around the clock shifts or other special needs, the organization manager, or designee, may implement altered holiday schedules. Each agency should notify employees in advance of altered holiday work schedules and should schedule the altered holiday as close as possible to the officially scheduled holiday.

This procedure applies to special situations which mandate employees work on a holidays. Again, this was voluntary overtime, and no one was required to work on the holiday.

In conclusion, the undersigned finds the evidence presented by DOH is clear and convincing, and the relief should not be granted in this case. To rule otherwise would be contrary to law and

clearly wrong.

The above-discussion will be supplemented by the following conclusions of .aw.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. *W. Va. Code* § 29-6A-3(a)(2).

2. The Grievance Board has determined a respondent's standard of proof that the relief sought is clearly wrong or contrary to law, once a default claim is proven, is byclear and convincing evidence. *Lohr v. Div. of Corr.*, Docket No. 99-CORR-157D (Nov. 15, 1999). *See W. Va. Code* § 29-6A-3.

3. DOH has proven by clear and convincing evidence that Grievant failed to ascertain that overtime was being worked on Columbus Day, or to sign up for work that day.

4. To grant the relief sought in this case would be contrary to law and clearly wrong.

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.

DATE: MARCH 16, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE