THE WEST VIRGINIA PUBLIC EDUCATION GRIEVANCE BOARD

BRUCE DOTSON, et al.,

Grievants,

v. **Docket No. 07-DOH-036**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, thirty-seven employees of the Division of Highways ("DOH") in District Three, filed a level one grievance on August 14, 2006, in which they alleged discrimination when classified exempt employees were paid overtime while they were denied the opportunity to work additional hours. For relief, Grievants requested that "all cost to be paid; 10% pay raise, a better plan for overtime paid out." The level one evaluator lacked authority to grant the relief requested. The parties agreed to waive the level two conference, and the grievance was denied at level three following an evidentiary hearing. The grievance was appealed to level four on February 1, 2007, and a hearing was conducted in the Grievance Board's Charleston office on April 13, 2007. Grievant's were represented by Gordon Simmons, Steward, UE Local 170, WV Public Workers Union, and DOH was represented by Barbara Baxter, Esq. Proposed findings of fact and conclusions of law were to be submitted by April 30, 2007; however, neither party elected to file the post-hearing proposals. Upon the resignation of ALJ Campbell, the grievance was transferred to the undersigned on August 14, 2007. The following facts are derived from a preponderance of the credible evidence made part of the record at level two and level four.

Findings of Fact

1. Grievants are employed by DOH in various job titles; however, all are classified as non-exempt from the payment of overtime when they work more than forty hours per week.

2. On October 5, 2005, the Office of the Legislative Auditor issued the “West Virginia Division of Highways Special Report on Overtime and Additional Compensation for the Period July 1, 2003 - June 30, 2005.” In this Report it was stated that

For the period of July 1, 2003, through June 30, 2005, the DOH paid 441 employees $2,023,922.27 in overtime and additional compensation in excess of what was required by the FLSA, State law or by Department of Transportation policy. Of this amount, $1,133,409.13 was paid at an overtime rate (One and one-half times an employee's regular hourly rate multiplied by extra hours worked). Most of this overtime and additional compensation was paid to employees classified as either Highway Engineers ($1,024,006.05, 50.60% of total) or Highway Administrators ($807,592,99, 39.90% of total).

3. As a result of this finding, the Auditor recommended that DOH adopt a policy dealing with the conditions in which exempt employees receive overtime. DOH agreed to comply with the recommendation.

4. The Report further noted that DOH expended approximately $36.65 million for fiscal years 2004 and 2005 in overtime and additional compensation, in excess of regular employee pay.

5 During the same time period, DOH attempted to regulate non-essential overtime to non-exempt employees, limiting it to emergencies, Snow Removal Ice Control, flood restoration work, and similar situations. 6. Grievants have had their schedules adjusted to give them time off on Friday when they completed forty hours earlier in the week. Some requests for Grievants to work overtime have been denied; however, they have also received some overtime compensation.

Discussion

In non-disciplinary matters, Grievants must prove all the allegations constituting their 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievants contend that DOH engaged in discrimination when it allowed exempt employees to earn overtime compensation during the same period of time their requests to work beyond the standard forty hours were denied. DOH argues that Grievants do not have standing, and have not shown an "injury in fact", and that a general claim of unfairness does not constitute an injury. DOH further asserts that consistent with policy, overtime was permitted for emergency work.

"'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to inwriting by the employees." *W. Va. Code* § 29-6A-2(d). A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

Overtime is a very lucrative source of supplementing income, and Grievants' concern that exempt employees were allowed this opportunity, while their own was limited, is understandable. However, Grievant's have failed to meet their burden of proving discrimination in this case for two reasons. First, Grievants are comparing themselves to a group of employees who hold upper-level administrative and professional positions. The Grievants do not share the same classification or job responsibilities as these employees, and they are not similarly-situated. Second, several Grievants testified that they had earned overtime, if not as much as they wanted, between 2003-2005. Thus, they were not excluded from the opportunity to work, but were limited as to the extent. Although Grievants perceive unfairness in this situation, they have failed to establish that DOH engaged in discrimination.

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

Conclusions of Law

1. In non-disciplinary matters, Grievants must prove all the allegations constituting their

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 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., 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).

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4. Grievants have failed to prove discrimination by a preponderance of the evidence in this case.

Accordingly, this grievance is **DENIED**. Any party or the 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)(*but see Executive Order No. 2-07*, May 8, 2007). 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: AUGUST 29, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE