THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELANIE B. DEWESE,
Grievant,

v. **Docket No. 2009-1263-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant Melanie B. Dewese filed a grievance against her employer, Department of Health and Human Resources ("DHHR"), on March 2, 2009. Her statement of grievance reads, "Mandated Overtime [sic] subsequently told to flex it off." Grievant seeks "to be made whole and payment for overtime."

A level one hearing was held on March 24, 2009. Upon denial at the lower level, Grievant appealed to level two. Mediation was conducted on June 15, 2009. Grievant then successfully appealed to level three, and a hearing was held at the Grievance Board's Beckley office on December 15, 2009. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by B. Allen Campbell, Supervising Senior Assistant Attorney General. This case became mature on January 19, 2010, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as an Economic Service Worker and as such, sees clients during the day. Grievant's regular working hours are 8:30 a.m. to 4:30 p.m. Grievant avers that clients sometimes come in close to 4:30 p.m., and she meets with them. This, she asserts, necessitates that she stay beyond 4:30 p.m. She is then required to take

compensatory time[1] for the time she works over her usual hours. Grievant avers Respondent should not require her to take compensatory time, and instead should pay her the overtime. She also argues that nothing in Respondent's policy prohibits Grievant from refusing to take compensatory time in lieu of paid overtime, nor does Respondent's requirement that employees take compensatory time have any basis in the Fair Labor Standards Act ("FLSA").

Respondent asserts Grievant has not met her burden of proof. Respondent avers Grievant has not shown that Respondent has violated any law, rule, regulation or policy.

Grievant has failed to meet her burden of proof. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent in its Mercer County Office as an Economic Service Worker ("ESW").

2. Respondent's Mercer County office is open to the public between the hours of 8 a.m. and 5 p.m.

3. The ESW's working at the Mercer County office have staggered schedules, with three working 8:00 a.m. to 4:00 p.m.; two or three assigned 9:30 a.m. to 5:30 p.m.; and the rest working 8:30 a.m. to 4:30 p.m.

4. Grievant works 8:30 a.m. to 4:30 p.m. Currently her caseload is between 650-700 cases.

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[1]The term "compensatory time" is to be used interchangeably with "flex time." "Compensatory time" tracks the language of the FLSA.

5. Occasionally, Grievant is required to meet with clients who come to the office close to 4:30 p.m. This necessitates that she stay beyond her regularly scheduled office hours.

6. Pursuant to DHHR Policy Memorandum 2102, when it is necessary for employees to work outside of their assigned hours, they are typically asked to take compensatory time. For example, if an employee were required to work over one hour on Monday, the employee would be allowed to take an hour off before the end of the workweek on Friday.

7. The compensatory time is taken in the same week as the additional hours were worked.

8. If it is not possible for the employee to take compensatory time, he/she then receives overtime pay consistent with the FLSA.

9. Grievant has been asked to take compensatory time instead of being paid overtime, and she has complied with this request.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 her burden. *Id*.

Grievant has been asked to take compensatory time for the additional hours she has worked. This compensatory time is taken in the same week as the extra hours worked. Respondent has followed this process based on DHHR Policy Memorandum 2102, paragraph IX, § H, which states:

> Full-time and part-time employees of the Department may be required to work any day of the week or any shift of the day. Every effort should be made to adhere to established work schedules. However, there are times when it is necessary to revise or rearrange a schedule because of unexpected shortages of staff and similar factors. In fact, a change may be made within the same workweek in which it is to be implemented. Such a change is to be defined for the present purpose as a schedule adjustment. When the total actual work hours in the workweek do not exceed 40 hours, overtime is not required nor is the employer required to grant compensatory, annual or sick leave, including prior approved leave.

Grievant asserts that Policy Memorandum 2102 has no basis in the FLSA. However, 29 CFR 553.21 § 7(o)(1) states:

> Employees of a public agency which is a State, a political subdivision of a State, or an Interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.[2]

Clearly, Respondent is in compliance with the FLSA.[3] While it is understandable that Grievant would rather be paid overtime at time and a half, Respondent is violating no law or policy by having her take compensatory time in the same week that she works past

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[2]The sections following 29 CFR 553.21 § 7(o)(1) provides some limitations on compensatory time.

[3]There was no evidence presented concerning the amount of compensatory time Grievant received per hour she worked outside of her regular schedule. Therefore, the undersigned will not discuss whether Respondent is in compliance with the FLSA regarding the appropriate amount of compensatory time given. In addition, the FLSA puts a cap on the amount of hours where compensatory time may be taken. *See* 29 CFR § 553.21 § 7(o)(3)(A). Since there was no evidence presented on this issue, it will not be discussed.

her regularly scheduled hours. Grievant has failed to meet her burden of proof in this matter. Therefore, this grievance is DENIED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 her burden. *Id*.

2. With some restrictions, the FLSA permits state agencies to allow employees to take compensatory time in lieu of overtime for time worked over regular business hours.

3. Grievant did not meet her burden of proving that Respondent's policy was contrary to law, rule, regulation, or policy.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 27, 2010

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Wendy A. Elswick
Administrative Law Judge