THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELLEN MOORE,
Grievant,

v. **DOCKET NO. 2011-0147-BRCTC**

BLUE RIDGE COMMUNITY AND
TECHNICAL COLLEGE,
Respondent.

DECISION

Grievant, Ellen Moore, an Administrative Secretary, Senior, filed a grievance against her employer, Blue Ridge Community and Technical College, on August 5, 2010. The statement of grievance reads:

> I believe Blue Ridge CTC has misinterpreted and misrepresented the Fair Labor Standards Act in regards to its new Administrative Procedure prohibiting adjunct teaching by a non-exempt classified employee.

As relief Grievant sought:

> that the Administrative Procedure made effective July 1, 2010, (Adjunct Faculty Teaching by BRCTC Administrators and Classified Staff) be deemed null and void. I would also request that classified non-exempt staff be able to serve as adjuncts utilizing a separate "Adjunct Faculty Appointment" form. This is the form that is used for all other adjuncts that teach for Blue Ridge CTC. . . . I should be compensated for those classes which were taken away from me for Summer II and Fall 2010 due to the new "Administrative Procedure" that went into effect July 1, 2010. If the Board interprets the FLSA the same as BRCTC, I would ask that I receive time and a half compensation for courses taught previously.

A hearing was convened at level one on July 22, 2010, and the grievance was denied at that level on August 2, 2010. Grievant appealed to level two on August 27, 2010,

and a mediation session was held on October 12, 2010. Grievant appealed to level three on October 27, 2010. A level three hearing was held before the undersigned Administrative Law Judge on March 23, 2011, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on April 19, 2011.

Synopsis

Grievant is a classified, non-exempt employee. She had also been teaching classes as an adjunct professor, employed by Respondent, and was paid for that work as an adjunct at the Bachelor of Arts degree level. Due to concerns about compliance with the requirements of the Fair Labor Standards Act, effective July 1, 2010, Respondent implemented an Administrative Procedure which precludes non-exempt employees from also being employed as adjunct professors. Grievant did not demonstrate that this new procedure violates any law, rule, regulation, or procedure, or that Respondent was otherwise required to allow non-exempt employees to be employed as adjunct professors.

The following Findings of Fact are made based upon the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, Blue Ridge Community and Technical College ("BRCTC"), since 2005, and is a full-time, classified, non-exempt

employee, working 37 ½ hours per week. She is an Administrative Secretary, Senior, employed in the Liberal Arts and Transitional Studies Department.[1]

2. Prior to July 2010, Grievant had, from time to time, taught some classes at BRCTC as an adjunct professor. She taught a total of 37 credit hours over the years, and was paid for this work as an adjunct professor at the Bachelor of Arts degree level.[2]

3. At a Human Resources Conference attended by Trudie Holder, Vice President of Human Resources and Administrative Services at BRCTC, in the Spring of 2010, Ms. Holder learned that some institutions of higher education were being audited by the Department of Labor, and that there was a concern that non-exempt employees who were serving as adjunct professors should be paid time and a half for the time they spent teaching and preparing for the classes they taught.

4. In response to the concern that BRCTC was not properly compensating non-exempt employees when they were serving as adjuncts, BRCTC adopted an Administrative Procedure effective July 1, 2010, which provides, in pertinent part, as follows:

> Blue Ridge CTC realizes that some non-exempt employees may be qualified to be an adjunct faculty member, but the Blue Ridge CTC cannot permit dual employment with the College. The Fair Labor Standards Act states that, "Employees that perform non-exempt work as his or her primary duty, he or she will be considered non-exempt and must be paid overtime for all hours worked over 40 in a week." Therefore, if a non-exempt employee were to be paid overtime for all hours worked over 40 in a week the salary would not be in line with the adjunct faculty salary schedule. Therefore, in order for a non-exempt employee to teach, his or her job responsibilities must include teaching.

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[1] The record does not reflect what Grievant's salary was during any applicable period of time.

[2] The record does not reflect what this translated into in terms of the actual amount Grievant was paid.

Discussion

Prior to addressing the merits, the undersigned must address Respondent's request that this grievance be dismissed as untimely appealed to level two, which was previously denied by the Grievance Board by Order dated November 30, 2010. The undersigned will not revisit this ruling, but merely notes this issue because the Order denying Respondent's motion was not specifically designated as an appealable Order. The undersigned hereby incorporates by reference the Grievance Board's November 30, 2010 Order Denying Motion to Dismiss in its entirety, and by this reference makes it part of this decision as though that Order were fully set forth in this Decision.

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant contends that the Administrative Procedure adopted by Respondent effective July 1, 2010, goes beyond what is required by the Fair Labor Standards Act ("FLSA"), and should therefore be overturned. Grievant does not contend that the Administrative Procedure violates the provisions of the FLSA. Grievant seeks to have the undersigned make policy for Respondent. This type of relief is not available through the grievance procedure.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).
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>> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.
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> *Board, et al., v. W. Va. Dep't of Health and Human Resources,* Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001). Grievant was unable to present any law, rule or regulation which was violated by the Administrative Procedure at issue, or that would mandate that Respondent adopt a policy or procedure allowing non-exempt employees to teach as adjunct professors.

As to Grievant's alternate claim for time and a half for the classes she had taught in previous years as an adjunct, Grievant did not place into evidence any time sheets, pay stubs, or salary information which would prove that Grievant had at any time in the past worked more than 40 hours in any work week, and that she was not properly compensated for that time.[3]

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[3] Grievant submitted in her post-hearing written proposals that her class preparation time for the 37 credit hours she had taught through the years should be estimated to be 3 hours for each credit hour. This is an attempt by Grievant to submit evidence into the record after the record had been closed, while she was not under oath, and not subject to cross-examination. For these reasons, this information cannot be considered by the undersigned.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

3. Grievant did not demonstrate that the Administrative Procedure at issue violates any law, rule or regulation, or that any law, rule or regulation requires it to be changed.

4. Grievant did not demonstrate that she did not receive proper compensation for her past employment as an adjunct professor.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 22, 2011