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**WEST VIRGINIA EDUCATION AND
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RON MITCHELL

v.

Docket No. BOR-88-071

WEST LIBERTY STATE COLLEGE

D E C I S I O N

Grievant, Ron Mitchell, has been employed by West Liberty State College (WLSC) since 1972 and is classified as a plumber. In April 1988 he filed a level four grievance alleging that the institution violated provisions of the Fair Labor Standards Act (FLSA) and Board of Regents (BOR) Policy Bulletin No. 62 when it failed to allow him to elect a manner of compensation for overtime work performed. A level four hearing was conducted August 4, 1988 (T4.___) and the parties submitted briefs September 12 and 13, 1988.¹

¹The level two hearing was conducted April 1, 1988 and references thereto shall be cited (T2.___).

Grievant is one of two plumbers in the 24 member maintenance department supervised by Fred Hicks, Physical Plant Director. On occasion over the years, grievant had been required to work beyond his normally scheduled workday or called out on his off-time to correct a maintenance problem arising on campus. He testified at level four that he was not aware that he could refuse to work overtime when asked to do so. A form entitled "Overtime Earnings" is presently in use by the college when overtime work is performed. On the left-hand side of the form the employee must log overtime hours after the performance of the work and he or she must indicate a preference for compensatory time off or paid overtime before signing the document. The employee then files the form with the appropriate department head for calculations and it is routed to the Business Office only when wages are to be paid.

Grievant contends that campus officials wrongfully denied him the opportunity to elect whether to receive compensatory time off or wages for overtime work performed. At level four grievant specifically cites an instance of work performed January 11, 1988 for which he earned 14½ total compensated hours.² He

2

A review of the level two transcript indicates that grievant had simultaneously filed four grievances with respect to four separate instances and his representative alluded to a November 1987 incident. However, the institution's level two hearing examiner deemed that the other three grievances were not appealed to level two as grievant had not separately signed each form indicating disagreement with the adverse decisions at level one. (T2.2-4). For purposes of this grievance, administrative notice can be taken that grievant protested several incidents regarding the overtime compensation issue.

stated that department officials filled in compensatory time as the preferred method of payment and he was denied his choice. Grievant noted that he and other employees required to work on graduation day, May 14, 1988, were paid overtime wages, not compensatory time. (Grievant Exhibit 4, 8/4/88).³

For relief, grievant asks that he receive cash wages for the overtime work performed January 11, 1988⁴ and that the institution comply with relevant law and policies allowing an employee his choice of overtime compensation.

At level two L.A. Orsini, Business Manager at WLSC, stated that in November 1987 he issued a directive that, due to a shortfall of college funds, compensatory time off only would be given for overtime work "in a situation where there were no funds available." (T2.13). Mr. Orsini appeared to base his convictions that such actions were proper on the institution's part because the payment of compensatory time was legally permissible. (T2.14). Mr. Hicks stated that he had been following

³ College officials said graduation day was deemed a "special day" and overtime wages were paid for that day only upon an order from the president of WLSC. (T4.19).

⁴ Grievant submitted the original yellow portion of the two-page duplicate form for the day in question. The election portion of the document was not filled out nor the "Calculations." The respondent submitted a xerox copy of what was presumably the second page of the form (white copy) and "Time Off" was checked and the calculations were completed by Mr. Hicks. A note appeared at the bottom of the copy, "Time Taken 7½ Hr.-1-15-88."

"college operational rules" as per the instructions of the business manager to use only compensatory time for overtime payment and the grievance naming him was therefore improperly filed. (T2.15).

Testimony at level four differed somewhat. Counsel for the respondent proffered the WLSC Personnel Policy and Procedure, Bulletin Nos. 13, "Compensatory Time" and 14, "Overtime," effective November 1, 1985. Relevant portions of the Overtime policy are as follows:

VIII. When a non-exempt employee is required to work in excess of 7½ hours per day, the employee has a choice of two methods for being compensated for that time:

A. The employee can be paid for the hours worked in excess of 7½....

B. The employee can be given time off equal to the actual hours worked beyond 7½ hours per day provided that time off can be granted before the end of that employee's regularly scheduled workweek. (Emphasis added).

When questioned by respondent's counsel whether those policies were "current policy in the current handbook" and whether the handbook was provided to the grievant, Mr. Hicks replied "yes." (T4.11, 12; BOR Exhibit No. 2, 8/4/88). Mr. Hicks then testified that a decision to change the overtime policy occurred in early 1987 as a result of ongoing discussions between him and Mr. Orsini regarding the school's financial problems. (T4.12). He

stated that, although he could not recall the exact date, he and Mr. Orsini met with the maintenance workers in early 1987 and told them that the school could no longer afford to pay overtime.

Mr. Orsini testified that the new policy was to be applied campus-wide but it had never been reduced to writing. He said that he appeared personally at the meeting with Mr. Hicks' maintenance workers because that department was the largest on campus and was most likely to be called upon for emergency overtime work. He, too, could not recall the date of the meeting and no written memorandum memorialized the event. Mr. Orsini admitted that, generally, employees were given written notice of personnel actions involving their wages, but most likely when a directive came from an outside source, such as withholdings for the State unemployment tax imposed in 1987.

The respondent contends that grievant was not "forced" to work overtime for compensatory time; that he was given adequate notice of a new policy in effect to pay only compensatory time, to which he offered no protest; and that his performance of overtime work without protest constituted an agreement to do so for the designated time off in lieu of wages. Respondent argues that the institution complies with Federal regulations and BOR policy with respect to overtime compensation and urges that the grievance be denied.

The evidence in this case seriously undermines the respondent's stated position that a new overtime policy was properly established in 1987 at the college to supersede Policy Bulletin Nos. 13 and 14. The weight of the evidence does support grievant's contention that he was wrongfully denied his choice of compensation for overtime work he was required to perform. The respondent disclosed that its written policy bulletin and employee handbooks which permit employee election of overtime compensation are current. It is difficult to reconcile the paradox created when one policy which bestows a benefit is current but another policy which denies a benefit is instead applied.

With respect to this grievance, the reliance of both parties on FLSA and BOR standards and policies is misplaced. The relevant and controlling policy to be applied in this instance is that currently in place at the institution as an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Hooper v. Jenson, 328 S.E.2d 519 (W.Va. 1985); Clarke v. West Virginia Board of Regents, 301 S.E.2d 618 (W.Va. 1983).

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant is one of two plumbers assigned to the 25 member maintenance crew at WLSC.

2. The grievant is required to work overtime on occasion; the request might be that he work beyond his work day or he may be called out from home to handle an emergency situation on campus.

3. The school's current policy language alludes to overtime work as an employee requirement and grievant believed he could not refuse to perform overtime work when he was requested to respond to an emergency.

4. WLSC experienced financial problems in 1987 and administrators determined it would not pay overtime wages when funds were not available.

5. At some unrecorded time either in the spring or fall of 1987, maintenance employees were informed in some manner of college operational policy to pay only compensatory time off for overtime work performed.

6. On May 15, 1987 the BOR published Policy Bulletin No. 62 which stated that the means of compensation for overtime hours must be by mutual agreement between the supervisor and the employee prior to performance of the work.

7. WLSC did not amend its overtime policy, set forth in its employee handbooks, that an employee could elect the method of payment for overtime work to reflect, explain or incorporate the "mutual agreement" provision of the BOR policy and FLSA regulations.

8. Unsophisticated workers are unlikely to have access to official BOR policies and would rely on college policy found in their current handbooks and forms.

9. Current forms in use at WLSC clearly allow an employee to choose the manner of compensation for overtime work. Copies of overtime forms signed by grievant and submitted by the respondent reflect questionable record-keeping practices as many of the forms were not completed in the calculation section. Many were not checked off at the portion of the form whereby the election for compensation is made.

10. A new practice at WLSC in which administrators dictate the means by which employees will be compensated for required overtime work is not in conformance with current written school policy and cannot be construed as an agreement between employer and employee when employees believe overtime work is required of them as per policy language.

11. Grievant desires overtime wages for work performed January 11, 1988 just as he was paid overtime wages for work performed on May 14, 1988.

CONCLUSIONS OF LAW

1. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Thomas v. Ohio County Board of Education, Docket No. 35-86-236-3.

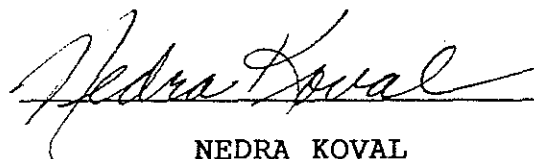
2. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979); Powell v. Brown, supra; Hooper v. Jenson, 328 S.E.2d 519 (W.Va. 1985) and Clarke v. West Virginia Board of Regents, 301 S.E.2d 618 (W.Va. 1983); Talerico v. Harrison County Board of Education, Docket No. 17-88-021-3; Swain v. Berkeley County Board of Education, Docket No. 2-86-167-2.

3. Current written policy at WLSC provides employee election of compensatory time off or overtime wages and must be applied unless alternative procedures are properly established.

Accordingly, the grievance is **GRANTED** and West Liberty State College is Ordered to pay grievant overtime wages for overtime hours worked January 11, 1988 which have not been used by grievant for compensatory time off and to comply with the current written Policy Bulletin No. 14 and practices set forth in the employee handbook with respect to compensation of overtime work performed.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED: September 30, 1988

A handwritten signature in cursive script, reading "Nedra Koval", is written over a horizontal line.

NEDRA KOVAL
Hearing Examiner