

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHANNON M. HOCKENSMITH and
JOSHUA N. XAVIER,
Grievants,**

v.

Docket No. 2020-0661-CONS

**TAX DEPARTMENT,
Respondent.**

DECISION

Grievants, Shannon Hockensmith and Joshua Xavier, are employed by Respondent, Tax Department in the classification of Tax & Revenue Auditors. They are assigned to the Tax Department Auditing Division. Both are “field-based” auditors. Ms. Hockensmith filed a level one grievance form on September 5, 2019, and Mr. Xavier filed a level one grievance form on November 18, 2019. Both Grievants allege that a Tax Department policy related to travel time violates the Department of Administration (“DOA”) travel regulations and subjects Grievants to discrimination by not including travel time from their homes to the places where they are conducting audits as work time for purposes of compensation. Grievants seek, “Compensation for all additional time spent traveling outside of normal work hours.”

A level one hearing was held on September 25, 2019, and a decision denying the grievance was issued on October 16, 2019. A level two appeal was filed on November 1, 2019. The two grievances were consolidated by order dated December 16, 2019. A January 24, 2020. A mediation was conducted on January 24, 2020, and Grievants appealed to level three on February 4, 2020.

A level three hearing was conducted at the Charleston Office of the West Virginia Public Employees Grievance Board on September 10, 2020. Grievants appeared *pro se*, and Respondent was represented by Cassandra L. Means, Assistant Attorney General. The matter became mature for decision on October 9, 2020, upon receipt of the Respondent's Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants allege that any work-related travel they incurred during a specific three-month period identified herein, should have been counted as additional work time entitling them to additional pay or compensatory leave. They argue that Respondent inaccurately designated them as "professional employees" exempt from the overtime and wage provisions of the federal Fair Labor Standards Act. 29 U.S.C. § 201, *et seq.* and therefore denied them travel time benefits set out in the FLSA. Grievants also argue that Respondents improperly discriminated against them by treating them differently regarding to travel time.

Grievants' positions clearly met the "professional employees" for exemption from coverage under the FLSA. Consequently, the various provisions under that Act which Grievants allege Respondent was violating have no bearing since those provisions were not applicable to Grievants' positions. Grievants did not prove that they were similarly situated to Revenue Agents or that the different treatment of office-based auditors and field-based auditors vis-à-vis travel were not based on actual differences in their job responsibilities.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Hockensmith has been employed by the Tax Department since 2008. She is employed by Respondent, Tax Department, in the Auditing Division as a Tax & Revenue Auditor 3.

2. The Division of Personnel classification specifications for the Tax and Revenue Auditor 3 provides that employees so classified:

Performs advanced level tax field auditing involving the onsite examination of highly complex accounting systems, accounts, journals, payroll records, invoices, inventories and budget financial records of businesses, corporate accounts and local government entities to determine proper reporting and payment of taxes and compliance with federal, state and local rules and regulations.¹

3. Grievant Xavier has been employed by the Tax Department in the Auditing Division since June 2019. His position is classified as a Tax & Revenue Auditor 1.

4. The Division of Personnel classification specifications for the Tax and Revenue Auditor 1 provides that employees so classified:

Performs entry-level professional auditing work examining the accounting systems, accounts, journals, invoices, inventories and budget and financial records of small and medium sized businesses, corporations, or local government entities.²

5. Both Grievants are field-based employees. Their official workstations are their homes and they travel to taxpayer locations to conduct on-site audits. Grievant Hockensmith resides in Barboursville, West Virginia. Grievant Xavier resides in Martinsburg, West Virginia.

¹ Respondent Exhibit 1.

² Respondent Exhibit 2.

6. Due to the nature of their work, field-based Tax & Revenue Auditors travel often. The Tax Department attempts to limit daily travel to fifty miles from the auditor's home, but longer travel distances do occur.

7. When auditors travel more than fifty miles to an audit location, they are eligible for overnight accommodations consistent with the State of West Virginia Travel Rules.

8. Field-based Tax & Revenue Auditors receive a mileage-based travel reimbursement for each mile they travel to the point of audit and back to their home.

9. Prior to December 2017, the Auditing Division credited sixty minutes of each workday for field auditors for travel time. This included thirty minutes in the morning and thirty minutes in the evening. Auditors were not paid additional salary or given compensatory time for any additional travel which was required for the auditor to reach and return from any particular audit location.

10. Under this policy, if an auditor's regular work schedule were from 8:30 a.m. until 4:30 p.m. they were not expected to arrive at the audit site until 9:00 a.m. and could leave for the day at 4:00 p.m. This was true if it took the auditor thirty minutes or more to travel to the worksite. If the commute was longer than thirty minutes the auditor was required to leave their home at whatever time was necessary to reach the audit site by 9:00 a.m. and stay at the site until 4:00 p.m.³ If it took less than thirty minutes the auditor was expected to leave their home at 8:30 a.m. and start work upon their arrival.

³ Obviously, if all necessary work were completed at the site prior to 4:00 p.m. the auditor could leave and finish the workday at their home office.

11. In December 2017, the federal government issued a proposed rule to change the salary threshold for overtime exemptions to the Fair Labor Standards Act (“FLSA”). If this rule went into effect the salaries for the auditors would be below the threshold and they would be entitled to overtime pay.

12. In an effort to address the proposed federal policy the Tax Department changed the travel policy for field auditors. Under the new “portal-to-portal” policy, field auditors could count all travel time as worktime regardless of the amount of travel time between the auditor’s residence/workstation and the audit site.

13. Under the new policy, a field auditor was on the clock when they left their home until they returned to their home regardless how long they had to travel to the client audit site. For example, if an auditor had a standard schedule of 8:30 a.m. to 4:30 p.m., their workday would start when they left their home at 8:30 a.m. If it took two hours to get to the audit site, the auditing work on site would start at 10:30 a.m. The auditor could then leave the audit site at 2:30 p.m. to be home by 4:30 p.m., the end of the workday. If the field auditor stayed longer at the audit site, they would accumulate work time that could be taken off later in the week.

14. This travel policy reduced audit productivity because the auditors were spending less time on task at the client worksite. Additionally, some auditors were not staying at the location when the worksite was more than fifty miles from their home office so they could accumulate more travel time and travel reimbursement.

15. The anticipated federal law did not go into effect due to litigation. It was eventually withdrawn by the Federal Department of Labor.

16. The Auditing Division revisited the travel policy in summer of 2019. It was found that the efficiency of the audits had suffered under the policy resulting in the Respondent incurring significantly more travel and time expenditures.

17. Respondent decided to restore the original travel policy and sent a memorandum to all field auditors that beginning September 3, 2019, any travel to or from client audit site exceeding sixty minutes per day would not be counted as part of the field auditor's workday.⁴

18. Subsequent to the filing of this grievance, the federal government implemented an increase to the salary threshold for professional employees to remain exempt from the overtime provisions of the FLSA. The new salary threshold is above the minimum pay grade for employees in the Tax and Revenue Auditor 1 classification.

19. Pursuant to the new rule, the Tax Department again reevaluated the travel policy and decided that all Tax & Revenue Auditors would be overtime eligible effective January 4, 2020.⁵

20. The parties agree the January 2020 change in the travel policy constituted a return to the previous travel policy and rendered Grievants' request for prospective reinstatement of the policy moot. Only travel time between September 3, 2019, and January 3, 2020, remains at issue.

⁴ They arrived at the thirty minutes one-way commute time by informally surveying the office-based Tax & Revenue employees concerning the length of their daily commutes and adopting a similar time for the field-based auditors.

⁵ All steps in the Tax & Revenue Auditor series were included in the change to avoid the problems that would be created by inconsistent treatment of employees in the Tax & Revenue Auditor employees who were all in the same classification series.

21. In addition to the field-based auditors like Grievants, Respondent's Audit Division also employs office-based Tax and Revenue Auditors. They are in the same general classification as Grievants but perform their work differently.

22. As the title implies, office-based auditors report to a standard office workplace where they perform nearly all their duties. Office-based auditors review electronic business records submitted by clients in their Tax Department offices and have limited work/business travel.

23. None of the commute time of an office-based auditor is included in their workday. Their regularly scheduled workday begins when they arrive at their offices and ends when they leave their offices. What little travel that is necessary for office-based auditors is done during their regular work schedule, and they are not reimbursed for travel expenses or receive meal per diems as are received by the field-based auditors.

24. Because field-based auditors perform much of their duties from a home office, Respondent pays for their internet connection at their home. Given the different nature of their work, office-based auditors do not receive that benefit.

25. Respondent employs Revenue Agents in its Compliance Division. An employee in the Revenue Agent 1 classification is charged with collection of delinquent taxes and the enforcement of other aspects of the State's tax laws.⁶ They are not involved in auditing tax returns.

⁶ Grievants Exhibit 6, DOP classification specifications for the Revenue Agent 1 classification.

26. The minimum qualifications for the Revenue Agent 1 classification require that a candidate has a four-year college degree in any field, with a minimum of six semesters in accounting. Revenue Agent 1s are paid in paygrade 11 (\$26,406- \$48,851).⁷

27. Due to their lower salaries and the nature of their work, the Revenue Agents were not exempt professional employees pursuant to the FLSA during the period of September 3, 2019 and January 3, 2020. Accordingly, all work-related travel they were required to perform was considered “portal to portal” and included in their regularly daily work schedule. They were entitled to additional pay or compensatory leave for any work hours over forty in a given work week.⁸

28. Employees of the Tax and Revenue Auditor 1 classification are charged with:

[P]rofessional auditing work examining the accounting systems, accounts, journals, invoices and budget and financial records of small and medium sized business, corporations or local governmental agencies.⁹

29. The minimum qualifications for a Tax & Revenue Auditor requires the candidate to hold a four-year college degree with a major in “accounting, auditing, business administration, economics, finance, finance management or a closely related field, as well as at least twelve semester hours of accounting. A Tax & Revenue Auditor 1 is paid in paygrade 14 (\$31,146 - \$57,620).¹⁰

30. Grievant, Shannon Hockensmith, was required to travel twenty-two hours for business outside of her regular daily work schedule between September 3, 2019 and

⁷ *Id.*

⁸ This remains the case for Revenue Agents.

⁹ Respondent Exhibit 1, DOP classification specifications for Tax & Revenue Auditor 1.

¹⁰ *Id.*

January 3, 2020. Grievant, Joshua Xavier, was required to travel eight hours for business outside his regular daily work schedule during the same period.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievants allege that during the three-month period in question they were inaccurately designated as "professional employees" exempt from the overtime and wage provisions of the federal Fair Labor Standards Act. 29 U.S.C. § 201, *et seq.* The pertinent provisions of the FLSA provide the following:

§541.300 General rule for professional employees.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis pursuant to §541.600 at a rate of not less than \$684 per week¹¹ (or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or \$380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities; and

¹¹ \$35,568 annually.

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

§541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Id. During the pertinent period, the salary minimum for the exclusion was \$455 weekly or \$23,660 annually.

At pay grade 14, the minimum salary for a Tax & Benefit Auditor 1, was \$31,146 annually. This is well above the minimum salary threshold necessary to meet the “professional employees” exception. Additionally, the minimum requirement of college degree in a specialized area indicates positions in the classification require advanced knowledge which “must be customarily acquired by a prolonged course of specialized intellectual instruction.” *Id.* Grievants’ positions clearly met the “professional employees” requirements for exemption from coverage under the FLSA. Consequently, the various

provisions under that act which Grievants allege Respondent was violating have no bearing since those provisions were not applicable to Grievants' positions. Grievants did not prove by a preponderance of the evidence that Respondent's travel policy violated the FLSA work/travel regulations.

Grievants next argue they are being subject to discrimination because, during the three-month period in question, the Revenue Agents and office-based auditor were treated differently regarding travel time than field-based auditors like them. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant's argue that Respondent erroneously do not identify Revenue Agents as professional employees under the FLMA. They allege that if the Revenue Agents and office-based auditors are all professional employees they are similarly situated and must be treated the same regarding travel time. Whether all positions are labeled professional employees does not necessarily make them similarly situated.

Revenue Agents perform completely different and less complex duties from auditors. They are organized in the Compliance Division as opposed to the Audit Division where the auditors are organized, and they are engaged in tax collection which does not require the specialized training required for auditing. Finally, their duties can generally be performed within the office setting and require minimal travel. They are in a separate classification from Grievants. Grievants are not similarly situated to Revenue Agents so the different treatment they receive related to travel does not result in discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

Grievants are similarly situated to the office-based Tax & Revenue Auditors. Both groups are in the same classification, must have the same training, and perform the same auditing functions. In effect, their jobs are the same in virtually all respects except in how the audits are performed. Field-based Tax & Revenue Auditors are based in their home offices. They routinely travel to the client's location to perform their audit functions. Their duties are very travel intensive. In recognition of the travel requirements, Respondent provides the field-based auditor with mileage reimbursement, per diem meal payments and over-night accommodations for trips which are more than 50 miles one-way.

Office-based auditors do most of their work by electronically downloading business and financial records from clients and doing the audit work on their computers in their offices. These employees very rarely travel in the performance of their work. When they do, it is generally for very short distances which do not take much time. The travel begins and ends after the auditors report to work and before they leave for home. In recognition of the way these employees perform their duties, Respondent counts any travel they

perform as part of their workday and does not provide mileage reimbursement or meal expenses.

Undoubtedly, these employees are generally similarly situated, and they were treated differently regarding travel. However, this difference is related to the actual job responsibilities of each group. The responsibilities of the field-based auditors are integrally intertwined with the necessity for extensive travel. Conversely, the office-based auditors rarely travel to do their jobs. Because of this significant difference in how the two groups perform their duties any difference in their treatment regarding travel is based upon their basic job responsibilities. Grievants did not prove by a preponderance that, during the three-month in question, they were subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d). Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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).

2. Grievants' positions clearly met the "professional employees" exemption from coverage under the FLSA. Consequently, the various provisions under that act which Grievants allege Respondent was violating have no bearing since those provisions were not applicable to Grievants' positions. 29 U.S.C §§ 541.300 & 541.301. Grievants did not

prove by a preponderance of the evidence that Respondent's travel policy violated the FLSA work/travel regulations.

3. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievants did not prove by a preponderance that during the three-month in question they were subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

Accordingly, the 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 (2018).

DATE: November 24, 2020.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**