JOHN DILLON,

Grievant,

v. **Docket No. 95-06-056**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Dillon, grieves the failure of Cabell County Board of Education ("CCBOE") to grant him overtime compensation for setting up and operating electronic equipment at school closing meetings. CCBOE argues Grievant is in a management position, and, therefore, is not entitled to overtime pay. This grievance was denied at all three lower levels. A hearing was held on May 17, 1995, and this case became mature for decision on June 21, 1995, after the submission of proposed findings of fact and conclusions of law.

The material facts are not in dispute and are set out below.

Findings of Fact

1. John Dillon, Grievant, has been employed by CCBOE for 14 years. His current title is Coordinator of Technical Services.

2. In 1989, Grievant filed a grievance alleging a violation of W. Va. Code §18A-4-5b and requesting to be reclassified at an H-57 level and to be paid the same as the other coordinator, Mr. Garland "Skip" Parsons. At that time Grievant argued he managed a department and supervised three individuals. This grievance was granted at Level IV, and Respondent was directed to compensate Grievant "on the basis of the same pay scale" as Mr. Parsons, the Coordinator of Maintenance. Dillon v. Cabell County Bd. of Educ., Docket No. 89-06-702 (Feb. 28, 1990)(Dillon I). This grievance was appealed to Circuit Court and remanded, and the decision became final in September, 1990. Shortly thereafter Grievant received a substantial pay increase and was placed at the H-57 pay scale.

3. In 1994, Grievant submitted time sheets requesting overtime pay for setting up and operating the electrical equipment at school closing meetings.

4. Grievant performs the same duties at Board meetings, but does not submit requests for overtime, as he sees these as part of his regular and required duties. Level III Trans. at 37.

5. Grievant's job description requires him to "[s]et up electronic equipment for meetings, etc." Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994)(Dillon II) at 8. (See footnote 1)

6. CCBOE's past practice and procedure is to not pay managerial employees overtime.

7. At times, managerial employees, including Grievant, have received additional pay in response to special projects, postings, and circumstances.

8. Grievant has received overtime for working school closings in the past, but was unclear as to whether this occurred after September, 1990.

9. Mr. Parsons does not receive overtime pay. Prior to March, 1983, Mr. Parsons did receive overtime pay, but on May 10, 1983, he received a promotion to the position of Coordinator of Maintenance and an increase in salary with the understanding that his new position was a managerial one which required being on-call, but did not include overtime pay. Level III Trans. at 27-28; Resp. Exs. 1 & 2.

10. Grievant is aware of, but has not followed, CCBOE's policy requiring overtime to be rotated among the employees in his department. Unrebutted testimony is that his employees do not want to work overtime, so he does not require them to do so.

Issues

Grievant argues a "[v]iolation of 18-29-2 section a in terms of employment and compensation." Grievance Form. Grievant argues Mr. Parsons signed a waiver of his right to overtime when he was promoted to coordinator, but he has not signed a waiver, thus he is entitled to overtime pay. Grievant also argues that because CCBOE's policy to not pay overtime is unwritten, and at times managerial employees have received overtime pay, it is not a valid policy. Grievant also argues CCBOE is not allowed to change his compensation without his written consent.

Respondent argues Grievant is in a managerial position and as such does not receive overtime compensation. This policy does notapply to extra-duty and extra-curricular assignments. Respondent

also argues Mr. Parsons' agreement with CCBOE was not a waiver, but an agreement indicating Mr. Parsons' promotion to a managerial position. As a coordinator, Mr. Parsons would receive additional compensation, but would no longer receive overtime. Respondent points out Grievant's compensation was changed at his request and as the result of a successful grievance. Respondent also argues the grievance should not be granted because of Grievant's failure to follow the Board's overtime policy (See footnote 2).

Discussion

Grievant is clearly in a managerial position as he is "assigned to direct a department or division." W. Va. Code §18A-4-8. Grievant testified he did not know he was currently being paid as a managerial employee. Level III Trans. at 34. This statement is self-serving and difficult to accept as Grievant had requested in a prior grievance, that he won, that he be reclassified with a salary increase because of his coordinator duties. Since that grievance, Grievant has been reclassified and paid as a managerial employee. CCBOE did not change the conditions of his employment without his consent. The change in Grievant's employment came about as a result of his grievance requesting reclassification and additional compensation; thus, there can be no violation of W. Va. Code §18A-4-8. It is also noted Grievant is paid at the H Pay Grade level as required by W. Va. Code §18A-4-8a.

Additionally, Grievant has failed to prove Mr. Parsons' agreement with CCBOE constituted a waiver. Mr. Parsons testified he no longer received overtime pay because he was in a managerial position. Further, Mr. Jefferson, Grievant's prior supervisor and current Superintendent, stated managerial positions, such as Grievant's, do not receive overtime pay. He noted there are times when there are special projects, postings, or instances, when CCBOE has had difficulty getting people to work, and overtime has been paid. The fact that some managerial employees, including Grievant and Mr. Parsons, may have received overtime pay in these instances is not persuasive and does not change the outcome of this grievance. (See footnote 3)

Also not persuasive is Grievant's argument that "setting up" for Board meetings is within his job description, but "setting up" for school closing meetings is not. Grievant's job description states he is to "[s]et up electronic equipment for meetings, etc.," not just regularly scheduled Board meetings. Dillon II, supra. Grievant's argument that these school closing meetings are different because they last longer is without merit. Setting up equipment for meetings falls within Grievant's duties; whether

these are regular board meetings or school closing meeting makes no difference.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusion of Law

1. Grievant has the burden of proving his case by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-237 (Jan. 23, 1989).

2. Grievant has failed to demonstrate CCBOE violated any statute, rule, regulation, or policy when it did not pay him overtime for setting up electronic equipment for school closing meetings.

Accordingly. this grievance **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 1995

Footnote: 1Grievant filed another grievance in 1993 seeking to be reclassified from a pay grade H-57 to a pay grade H-61. This grievance was denied.

Footnote: 2Because of the decision reached in this grievance, this issue need not be addressed.

Footnote: 3Rather, this tends to indicate Grievant may have been compensated when he was not entitled to such overtime compensation as a managerial employee.