CURLEY BELCHER, .

.

Grievant, .

.

v. . Docket No. 94-DOH-341B

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS AND DEPARTMENT OF .

ADMINISTRATION, DIVISION OF .

PERSONNEL, .

.

Respondents. .

D E C I S I O N

Curley Belcher (Grievant) filed this grievance against the West Virginia Department of Transportation, Division of Highways (DOH) on November 12, 1993, alleging he "has not been paid overtime as required by law." After his grievance was denied at Levels I and II, a hearing was held at Level III on June 29, 1994. On July 22, 1994, Fred VanKirk, DOH Commissioner, denied the grievance at Level III. Grievant timely appealed to Level IV where an evidentiary hearing was conducted in this Board's office in Charleston, West Virginia on November 1, 1994.

On April 27, 1995, this Grievance Board issued a decision in this matter finding jurisdiction over grievances by state employees alleging violations of the federal Fair Labor Standards Act (FLSA). Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27,1995). However, the merits of the instant grievance were reopened to permit clarification of the role of the West Virginia Division of Personnel (DOP) in determining the applicability of FLSA overtime provisions to state employees in Grievant's classification of employment. (See footnote 1) Following a May 5, 1995, conference call

with the parties and receipt of a submission from Lowell D. Basford, DOP's Assistant Director for Classification and Compensation, dated May 11, 1995, the merits of this case became mature for decision on or about May 24, 1995, upon receipt of a joint stipulation between the parties.

DISCUSSION

Grievant alleges that he is a "working supervisor" who spends a considerable portion of his time, as much as sixty-five per cent (65%) of each day, operating equipment and performing work that is comparable to that performed by the seven employees he directly supervises. DOH takes the position that Grievant is exempt from overtime under the FLSA on the basis that he is an "executive" employee, regardless of the amount of time he spends doing the same work that is performed by non-exempt employees. The parties have stipulated that "there is no official designation by the State Personnel Board of whether the position of Assistant County Superintendent is exempt or non-exempt for overtime purposes under the Fair Labor Standards Act."

The FLSA requires that employers compensate each employee for his or her hours of work in excess of forty hours per week at a rate of not less than one and one-half times the regular rate at which he or she is employed. 29 U.S.C. § 207(a)(1). This Grievance Board must necessarily look to the federal courts for guidance in interpreting and applying the FLSA. Federal court decisions have noted that the remedial nature of the FLSA requires that exemption provisions be narrowly construed and any asserted exemption carefully scrutinized. A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945). Consequently, an employer seeking to avoid payment of overtime compensation on the basis of an exemption has the burden of proving entitlement to the exemption as an affirmative defense. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Dept. of Labor v. City of Sapula, Okla., 30 F.3d 1285, 1287 (10th Cir. 1994); Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451 (4th Cir. 1963). See Beechwood Lumber Co. v. Tobin, 199 F.2d 878 (5th Cir. 1952). Indeed, DOH has the burden of showing that Grievant fits "plainly and unmistakably within [the exception's] terms." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Reich v. State of Wyo., 993 F.2d 739, 741 (10th Cir. 1993). See Russell v. Mini Mart, Inc. 711 F. Supp. 556, 558 (D. Mont. 1988). The issue of whether an employee comes within one of the FLSA's exemptions is ordinarily a question of fact. Wainscoat v. Reynolds Electrical & Eng. Co., 471 F.2d 1157, 1161-62 (9th Cir. 1973).

The Secretary of Labor has promulgated regulations under 29 U.S.C. § 213(a) which define "bona fide executives" for thepurposes of determining exempt status. Title 29, Code of Federal Regulations,

Section 541.1, contains two tests for determining when an employee is an "executive." The "long test" contains six factors and applies to salaried employees who earn not less than $155.00 per week. The "short test" contains only two requirements and applies to salaried employees who earn not less than $250.00 per week.

Because Grievant makes at least $250 per week, (See footnote 2) the "short test" must be applied in determining whether Grievant qualifies as an "executive" employee exempt from overtime pay requirements. See 29 U.S.C. § 213(a)(1). In particular, 29 C.F.R. § 541.1(f) defines bona fide executive employees to include an employee compensated at a rate of not less than $250 per week "and whose primary duty consists of the management of the enterprise in which the employee is employed ... and includes the customary and regular direction of the work of two or more other employees therein...." Both parties argue that their respective positions in this matter are supported by the United States Court of Appeals ruling in Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982). Under the terms of that ruling, which clarified the exemption allowed under § 213(a)(1), the undersigned administrative law judge finds that Grievant is exempt from FLSA overtime coverage.

Grievant is employed by DOH as an Assistant County Supervisor. Grievant is seeking over $4,000 in overtime pay for the period between July 1, 1991, and June 30, 1993. Since July 1, 1993, DOH has been voluntarily paying overtime to Assistant County Supervisors as a matter of fairness, despite maintaining that such positions are FLSA-exempt. L III HT at 20-21.

Under the "General Summary" section of Grievant's official Position Description (PD) the "general function and purpose" of Grievant's job is described as "maintain and repair highways and supervise crews sent out to see that job is done." A Ex 1 at L III. Under the "Description of Work" section of his PD, Grievant states:

> I assign the work crew out in the morning instructing them on equipment and materials to be used. I fill out daily work reports and review other forman's (sic) reports correcting them as necessary.

A Ex 1 at L III.

Grievant described his duties as spending the first 15 to 20 minutes of each workday instructing one or more foremen under his immediate supervision on the work they are to perform during that

day. Grievant then proceeds to work, often filling in for absent employees by operating equipment or setting up traffic control signs and assisting crews in directing traffic at work sites. Grievant testified that he usually does not hear from his foremen for the rest of the day, unless they need to clarify his instructions or something unexpected develops. Grievant admitted that the PD he filled out in 1991 either inflated or exaggerated thesupervisory duties he performed in an attempt to maintain or upgrade his position classification.

Grievant testified that while filling in on a work crew operating a piece of equipment, he will take instructions from the foreman in terms of when and where to operate the equipment. However, if something is being done wrong or not being done at all, Grievant will correct the situation. Likewise, if an emergency arises, Grievant will reassume his supervisory role and issue new instructions. Grievant usually drives a radio-equipped pickup truck to the worksite so he can be reached by his foremen who have radios in their vehicles. Naturally, if Grievant is working away from his truck, he would not be in a position to respond to the radio and clarify his instructions or issue new instructions.

Essentially, Grievant is responsible for over 300 miles of roads maintained by personnel from the Chapmanville Substation where Grievant is the Assistant County Supervisor. Grievant does not deny that he has been delegated supervisory authority sufficient to qualify as an "executive" within the meaning of the FLSA. However, Grievant maintains that because he routinely "fills in" to work on a crew performing work normally done by non-exempt employees, he is no longer working in a supervisory capacity as defined by the FLSA.

The Burger King decision, in finding the position to be exempt under the FLSA, noted that "one can still be 'managing' if one is in charge, even while physically doing something else." Burger King, at 226. Thus, Grievant remains "in charge" of the personnelat the Chapmanville Substation, while spending a majority of his working hours performing routine, non-exempt work. See Rau v. Darling's Drug Store, Inc., 388 F. Supp. 877 (W.D. Pa. 1975). Burger King has been followed in regard to other retail establishment managers who spend more than fifty per cent of their time performing non-exempt work. Murray v. Stuckey's, Inc., 939 F.2d 614 (8th Cir. 1971); Horne v. Crown Central Petroleum, Inc., 775 F. Supp. 189 (D.S.C. 1991); Russell v. Mini Mart, Inc., 711 F. Supp. 556 (D. Mont. 1988). Moreover, the Burger King approach has been endorsed in a case involving city fire captains, a position factually similar to that held by Grievant. Masters v. City of Huntington, 800 F. Supp. 363 (S.D. W. Va. 1992). There, the District Court concluded: "[W]hile station captains do

perform many of the same chores as firemen under their command, while performing such work they are not thereby relieved of their obligation to supervise those employees nor is the fact of their command of the station house affected." Id. at 366.

Accordingly, DOH has met its burden of persuasion by demonstrating that Grievant has supervisory responsibility over a recognized subdivision, the Chapmanville Substation, and customarily and regularly directs the work of more than two employees at that location, notwithstanding that he frequently spends more than fifty per cent of his work day filling in for absent employees and performing non-exempt work. See Burger King, supra; Masters, supra.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by DOH as the Assistant County Maintenance Supervisor in charge of the Chapmanville Substation.

2. Grievant has authority to direct the work of 5 to 7 employees, including one or more foremen who, in turn, supervise employees working on a highway maintenance crew.

3. Grievant earns at least $250 per week, exclusive of board, lodging or other facilities.

4. Grievant spends more than fifty per cent (50%) of his time performing routine, non-exempt work such as operating equipment or controlling traffic as part of a highway maintenance crew.

5. Since July, 1993, DOH has been voluntarily paying overtime to Assistant County Maintenance Supervisors, including Grievant, while maintaining that such positions are exempt from mandatory overtime under the FLSA.

6. The State Personnel Board elected not to include an FLSA designation in the official Classification and Compensation Plan for the classified service which was approved by the Governor on March 31, 1994.

CONCLUSIONS OF LAW

1. While a Grievant is obligated to prove the allegations in his complaint by a preponderance of the evidence (Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988), an employer seeking to avoid payment of overtime compensation on the basis ofan exemption provided in the FLSA has the burden of proving entitlement to the exemption as an affirmative defense. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Dept. of Labor v. City of Sapula, Okla., 30 F.3d 1285, 1287 (10th Cir. 1994); Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451 (4th Cir.

1963).

2. The FLSA exempts an employee "employed in a bona fide executive ... capacity" from the minimum wage and overtime provisions of the Act. 29 U.S.C. § 213(a)(1).

3. Employees compensated at a rate of at least $250 per week are exempt from FLSA overtime provisions provided: (1) such employee's primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and (2) includes the customary and regular direction of the work of two or more other employees therein. 29 C.F.R. § 541.1(f). See Donovan v. Burger King Corp., 672 F.2d 221, 223 (1st Cir. 1982).

4. An "employee can manage while performing other work," and performing such other work "does not negate the conclusion" that such employee's "primary duty is management." Burger King at 226.

5. Under the particular facts and circumstances present here, Grievant is a "working supervisor" whose primary duty as an Assistant County Maintenance Supervisor for DOH is management of the five to seven employees assigned to the Chapmanville Substation, notwithstanding that Grievant spends more than fifty per cent (50%) of his time performing routine, non-exempt work. See Burger King, at 226-27; Masters v. City of Huntington, 800 F. Supp. 363(S.D. W. Va. 1992); Rau v. Darling's Drug Store, Inc., 388 F. Supp. 877 (W.D. Pa. 1975).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-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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LEWIS G. BREWER

Administrative Law Judge

Dated: June 30, 1995

Footnote: 1As part of the earlier decision in this matter, DOP was joined as an essential party pursuant to Rule 4.11 of this Grievance Board's Procedural Rules.

Footnote: 2Grievant testified that he makes $250 a week. L III HT at 9. In addition, his 1991 Position Description indicates that his salary is $1698 per month, well over $250 per week. A Ex 1 at L III.