CURLEY BELCHER, .

.

Grievant, .

.

v. . Docket No. 94-DOH-341

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS, .

.

Respondent.

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. This matter became mature for decision on November 28, 1994, upon receipt of the parties' written post-hearing comments.

DISCUSSION

DOH argues that this Grievance Board does not have jurisdiction over a grievance alleging violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., citing this Board's prior holding in Campbell v. West Virginia Department of Natural Resources, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991). However, on November 29, 1993, Kanawha County Circuit Judge

Charles E. King, Jr., issued a Final Order reversing this Grievance Board's ruling in Fry v. West Virginia Department of Health, Docket No. 91-HHR-334 (Oct. 18, 1991). (See footnote 1) This Board's holding in Fry followed Campbell in determining that the Legislature did not intend the state employee grievance procedure to serve as an additional forum for the adjudication of federal and state wage and hour claims.

In his decision, Judge King noted the following definition of "grievance" in W. Va. Code § 29-6A-2(i):

> "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

Judge King rejected this Board's analysis in Campbell, finding that the foregoing language "plainly states that a grievance mayconstitute a claim by a state employee alleging a violation, misapplication or misinterpretation of the policies or rules under which an employee works regarding compensation, hours or terms and conditions of employment." He also noted that "where the language of a statute is free from ambiguity, the plain meaning of the statute is to be accepted without resort to the rules of interpretation," citing Kinsey v. Kinsey, 143 W. Va. 574, 103 S.E.2d 409 (1958), and State v. Garner, 148 W. Va. 92, 133 S.E.2d 82 (1963).

Further, Judge King pointed out that it is not "within the purview of the Court to create an ambiguity in a statute where none exists to read into it by interpretation or construction a meaning which is refuted by the clear language of the statute itself," citing Kinsey, supra; Garner, supra; and Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1968). Likewise, he observed that "where the language of a statute is clear and unambiguous, Courts may not read into the statute any qualifications or limitations not so expressed in its language," citing State v. Bragg, 152 W. Va. 372, 163 S.E.2d 685 (1968). Accordingly, he overturned this Board's decision in Fry, and by implication, Campbell, concluding that "to rule otherwise would render the language contained in Code, § 29-6A-2(i) meaningless."

Subsequently, on August 23, 1994, Kanawha County Circuit Judge Irene C. Berger issued a Final Order overturning this Grievance Board's decision in Campbell. (See footnote 2) Judge Berger, without making anyreference to Judge King's holding in Fry, applied a similar analysis, concluding: "Petitioners' claims for overtime pay is (sic) encompassed in the plain language of the statute and therefore the West Virginia Education and State Employees Grievance Board has jurisdiction over said claims."

This Grievance Board adheres to the doctrine of stare decisis (See footnote 3) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. However, rulings by one or more circuit courts of appeals are not considered precedential and are followed in future cases only to the extent that their logic and reasoning are compelling. Inthat regard, the articulated logic and sound reasoning expressed in the foregoing circuit court decisions persuasively support revisiting the legal conclusions reached by this Board in Campbell and its progeny.

Both Judges King and Berger concluded that the definition of "grievance" in § 29-6A-2(i), encompassing "any claim ... including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment," contemplates claims for overtime pay under the FLSA would arise under the grievance procedure administered by this Board. As recently noted by the West Virginia Supreme Court of Appeals, "where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." State ex rel. Frazier v. Meadows, 454 S.E.2d 65, 69 (W. Va. 1994), citing State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968).

The state grievance procedure contains a provision specifically excluding certain matters

as follows:

> Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, retirement or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

W. Va. Code § 29-6A-2(i). Clearly, overtime pay is a matter in which authority to act is vested with the employer. Thus, wage and hour matters are not expressly excluded from the grievance procedure. Under the maxim of statutory construction, expressio unius est exclusio alterius, "the express mention of one thingimplies the exclusion of another," such failure to exclude matters covered by federal law is indicative of the Legislature's intent to include such matters in the scope of the grievance procedure. See Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984); Layne v. Hayes, 141 W. Va. 289, 90 S.E.2d 270 (1955).

Generally, the West Virginia Supreme Court of Appeals has recognized that § 29-6A-1 contains a broad delegation of jurisdiction. Thus, grievances relating to claims of employees working out of classification are included in this Board's jurisdiction. Parsons v. W. Va. Bureau of Emp. Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Further, this Grievance Board's authority to adjudicate grievances extends to awarding damages against a state agency. Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992). Employees of county boards of health, as members of the state merit system, may employ the grievance procedure for state employees. W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Serv., 451 S.E.2d 768 (W. Va. 1994). Most recently, this Board was found to have jurisdiction over claims relating to discrimination, harassment and favoritism under W. Va. Code § 18-29-2(a), (See footnote 4) despite a potential "overlap" with the West Virginia Human Rights Act. Vest v. Bd. of Educ., No. 22547 (W. Va. Sup. Ct. Feb. 17, 1995).

Vest acknowledges that the grievance procedure, along with another statute, such as the Human Rights Act, "may, in a given case, provide alternative remedies to aggrieved persons." This conclusion directly undermines one of the premises for this Board's ruling denying jurisdiction over FLSA matters in Campbell, the existence of another forum more appropriate

for resolution of wage and hour disputes. Thus, Vest specifically contemplates an overlapping jurisdictional arrangement where this Grievance Board may decide grievances involving subjects which are covered by other statutory schemes. (See footnote 5) In such circumstances, "[a] grievance decision in favor of the grievant may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and it does so by a procedure that is much faster and less expensive." Vest, supra, at 8.

Further, this Board's decision in Campbell specifically noted that: "[c]laims based upon a violation of the employer's own policies are grievable and not subject to dismissal on jurisdictional grounds." Campbell, supra, at 6 n. 5. In that regard, § 15.07 of the West Virginia Division of Personnel's Administrative Rule states:

> Overtime Work and Holiday Work: An appointing authority or his designated representative may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered necessary to the public interest. Compensation shall be made in accordance with the Fair Labor Standards Act of 1986 and WV Code §21-5(C)-1 et seq. (sic)

Thus, not only would the instant grievance arguably fall under this Board's jurisdiction as provided in Campbell, but the exemption could potentially subsume the rule, if all FLSA-based grievances cited to this Administrative Rule.

Consistent with the plain language of § 29-6A-2(i) and the foregoing decisions, the undersigned administrative law judge finds that this Grievance Board's earlier ruling in Campbell v. West Virginia Department of Natural Resources, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991), was clearly in error. Accordingly, Campbell is hereby overruled. Likewise, Fry v. West Virginia Department of Health, Docket No. 91-HHR-334 (Oct. 18, 1991), and other rulings by this Grievance Board which followed Campbell in holding that this Board has no jurisdiction over grievances claiming wage and hour law violations under the FLSA or comparable state statutes are hereby overruled.

In view of the foregoing jurisdictional ruling, Grievant's claims may be addressed on their merits. 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 supervises. DOH takes the position thatGrievant is exempt from overtime under the FLSA on the basis that he is an "executive" employee.

As a result of other grievances pending before this Board in which the FLSA is at issue, the undersigned administrative law judge has learned that the West Virginia Division of Personnel (DOP), in the context of its Classification and Compensation Plan, renders determinations in regard to whether employees in various classifications are "covered" or "exempt" under the FLSA. In that regard, County Highway Maintenance Assistant I is coded by DOP as "C" or "covered," apparently indicating that employees holding positions in Grievant's classification are generally not considered exempt from the overtime provisions of the FLSA. Inasmuch as the parties to this grievance have not had an opportunity to comment upon, challenge or rebut this information, it appears appropriate to REOPEN the Level IV hearing in this matter for the purpose of taking additional evidence on the merits of Grievant's claim.

Moreover, inasmuch as DOP appears to be a participant, at least to some extent, in making determinations regarding whether employees are either covered by or exempt from FLSA overtime provisions, it appears DOP is an indispensable party to this claim. Accordingly, pursuant to Rule 4.11 of the Procedural Rules of the West Virginia Education and State Employees Grievance Board, the Division of Personnel is hereby officially JOINED as a party respondent.

The instant case shall hereinafter be styled and referred to as Curley Belcher v. West Virginia Department of Transportation/Division of Highways and Department of Administration/Division of Personnel, Docket No. 94-DOH-341.

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

CONCLUSIONS OF LAW

1.

> "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified

> **incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.**

W. Va. Code § 29-6A-2(i) (emphasis added).

2. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." State ex rel. Frazier v. Meadows, 454 S.E.2d 65, 69 (W. Va. 1994), citing State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968).

3. Under W. Va. Code § 29-6A-2(i), the West Virginia Education and State Employees Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq.

4. This Grievance Board's prior decisions in Campbell v. West Virginia Department of Natural Resources, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991), and Fry v. West Virginia Department of Health, Docket No. 91-HHR-334 (Oct. 18, 1991), holding that this Board does not have jurisdiction over grievances concerning wage and hour claims, are clearly in error. Therefore, those decisions are hereby overruled. See Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974).

Accordingly, this Grievance Board has jurisdiction over the instant grievance pursuant to W. Va. Code § 29-6A-2. Consistent with the foregoing decision, this matter will be REOPENED for the purpose of taking supplemental evidence at Level IV on the merits of this grievance. A Scheduling Conference for the purpose of setting a date, time and place for a supplemental hearing on the merits of this Grievance is hereby set for May 5, 1995, at 9:30 a.m. This conference call will be initiated by this office. Unless advised otherwise in writing by May 4, 1995, it will be assumed that Grievant's representative will be available at (304) 345-1983, that DOH's representative will be available at (304) 558-3242, and that DOP's representative will be available at (304) 558-3950, at the scheduled time of the conference call. Any requests to reschedule this conference should be submitted in writing not later than May 3, 1995, with a copy served on the other parties.

LEWIS G. BREWER

Administrative Law Judge

Dated: April 27, 1995

Footnote: 1Fry v. W. Va. Dept. of Health, Civil Action No. 91-AA-230 (Nov. 29, 1993).

Footnote: 2Campbell v. W. Va. Dept. of Natural Resources, Civil Action No. 91-AA-202 (Aug. 23, 1994).

Footnote: 3Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).

Footnote: 4W. Va. Code §§ 18-29-1, et seq., contains the grievance procedure for education system employees. Provisions in that procedure generally parallel the state employee grievance procedure. See Hays v. W. Va. Div. of Employment Sec., Docket Nos. 91-ES-505 & 92-ES-003 (Dec. 31, 1992).

Footnote: 5Along these lines, it is noted that unions representing employees of the federal government, who likewise have access to the Department of Labor to seek enforcement of the FLSA, nonetheless routinely grieve FLSA issues before independent arbitrators. See e.g., 2750th Air Base Wing, U.S. Air Force v. AFGE Local 1138, 79 Lab. Arb. (BNA) 1178 (1982) (Smith, Arb.); U.S. Marine Corps Supply Center v. AFGE, 65 Lab. Arb. (BNA) 59 (1975) (King, Arb.).