YVONNE CHASE

v. **Docket No. 94-BOT-053R**

WEST VIRGINIA BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Yvonne Chase, employed by West Virginia University (Respondent) as a Contract Accountant, filed a level one grievance on December 8, 1993, in which she alleged that she had been required to perform an extensive amount of overtime performing work not part of her duties as an accountant. She requested compensation at 1½ times her regular rate of pay for the additional hours worked, or that she be compensated at a higher wage for the work which she asserts would have been appropriately completed by her immediate supervisor. The grievance was denied at levels one and two, and the Board of Trustees waived consideration at level three. At level four, the Grievance Board determined that it lacked jurisdiction to adjudicate claims based upon the Fair Labor Standards Act (FLSA) and found that the Grievant had not worked out of classification.

By Order dated November 1, 1995, the Circuit Court of Kanawha County remanded the grievance to level four, ruling that the Grievance Board may determine whether or not the Grievant is entitled to compensation for hours worked in excess of her regular schedule, and whether the activities performed fell within Grievant's job description. Following additional evidentiary proceedings on April 17, 1996, and July 31, 1997, the grievance became mature with the submission of proposed findings of fact and conclusions of law by the parties on September 18, 1997. (See footnote 1)

The following findings of fact are made from the preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by Respondent for approximately thirteen (13) years, and has been classified as a Contract Accountant, pay grade fourteen (14), with the External Funds Accounting Department at all times relevant to this matter.

2. At the time the grievance arose, Grievant's primary duties involved the management of large scale contracts held by Respondent at the Concurrent Engineering Research Center (CERC). The position description for Contract Accountant does not classify it as supervisory or require that the incumbent provide training or instruction to other employees. The position description identifies Contract Account as “exempt” for purposes of FLSA status.

3. As an employee, Grievant is required to be on Respondent's premises five (5) days a week, seven and one-half (7 1/2) hours per day. She is subject to a written policy which provides that absences are chargeable to annual leave, personal leave, or may result in a loss of pay.

4. In late August 1993, Tina Ault-Hyken, Manager of External Funds Accounting and Grievant's immediate supervisor, assigned Grievant a project to develop and present a program regarding grants to university employees. The presentation of this training session was scheduled for October 28, 1993.

5. Grievant developed the entire program for presentation. She conducted the necessary research, organized the material, and produced visual aides. Two support employees were assigned to assist Grievant; however, it does not appear that the employees provided much, if any, independent assistance. The scheduled session was postponed due to Grievant's illness, but was presented on December 1, 1993.

6. Development of the training package required approximately forty-five (45) hoursto complete. Grievant was not provided release time to complete this project, but was required to continue to perform her regular duties, which at that time involved a special, contract-related project for the Federal Bureau of Investigation. In order to complete the training session presentation on time, Grievant was required to work approximately twenty (20) hours of overtime.

7. Grievant was denied compensatory time off, or overtime compensation, for the hours worked beyond her regular schedule in the preparation of the training session, although some accommodation in the form of compensatory time had been made for her in the past for such work.

8. Prior to this time, Grievant had not been required to develop and/or present training sessions; this activity had been the responsibility of Grievant's supervisor.

9. The position of Manager of External Funds Accounting, was compensated at pay grade seventeen (17) in 1993.

10. The grant training program was anticipated to be a semi-annual event.

Three issues must be addressed on remand. First, whether Grievant is entitled to overtime compensation under the provisions of the FLSA. Second, whether Grievant is entitled to compensation for work outside her classification. Third, whether Respondent has engaged in discrimination by paying other “exempt” employees overtime compensation.

I

Grievant concedes that Respondent's policies, rules and regulations adopt and incorporate by reference the policies of the FLSA, as well as other federal and state anti-discrimination statutes. However, she denies that she is “exempt” from the provisions of the FLSA as a “bona fide professional” because she does not meet both the salary basis and the duties test. Specifically, Grievant asserts that she does not meet the salary criterion because she is subject to loss of incomefor an absence of less than a full day. In support of her claim, Grievant cites Department of Labor regulations accompanying the FLSA:

[a]n employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 CFR Section 541.118(a). Grievant argues that this provision does not actually require a deduction be made for an absence of less than a day, but only that the employee's pay be subject to such a deduction. (See footnote 2) Additionally, Grievant argues that the five (5) day per week, seven and one-half (7 1/2) hour per day work schedule, Respondent's past practice of awarding compensatory time off for overtime worked, and inconsistent instructions concerning whether overtime hours are to be recorded, demonstrate that Respondent has no clear overtime policy and that Grievant is treated as an hourly worker. Because she is treated as an hourly worker, Grievant argues that Respondent is required to compensate her in compliance with FLSA for overtime hours worked, regardless of whether the work is deemed to be within or outside her job classification.

Respondent cites 29 C.F.R. Section 541.301(e)(1), which defines professions as those which meet the requirement for a prolonged course of specialized instruction and study, includingaccounting. Respondent also cites the matter of Knight, Vale and Gregory v. McDaniel, 680 P.2d 448 (Wash. App. 1984), which dismissed an FLSA claim because the defendant accountants, as professionals, were exempt from its provisions. Respondent generally denies that it reduces Grievant's wages for fractions of days she is absent from work, but argues that even if it is found to have such a policy, Grievant may still be exempted from the provisions of the FLSA.

Respondent cites Dist. of Columbia Nurses' Assoc. et al. v. Dist. of Columbia, 1988 W.L. 156191 (D.D.C.), in which the court held “[t]he effect of taking a deduction which is not permitted under these interpretations [29 C.F.R. Section 541.118(a)(6)] will depend upon the facts of the case.” Although the plaintiffs in that case argued that they were improperly classified as “exempt” and were denied overtime pay because they could have conceivably suffered a pay deduction based upon an absence of less than one day, the court held that based upon the fact that such a deduction was only made occasionally when an employee had exhausted her leave, and because the compensation scheme otherwise met the FLSA criteria, plaintiffs were paid on a salary basis. In the present matter, Respondent argues that based on this rationale, Grievant is still exempt from the FLSA.

To accept Grievant's argument would potentially render all public, and perhaps private sector employees “nonexempt”. Such a broad interpretation of the FLSA is not supported by the evidence. Grievant does not contest that she meets the duties test for a “bona fide professional.” She also meets the minimum weekly salary standard. Grievant's salary is not subject to reduction for absences, unless and until such time that all her accrued leave is expended. Although Grievant suggests that the District of Columbia Nurses' Assn. case is easily distinguishable from the present matter because the FLSA provides for a partial overtime exemption to private hospital and nursing home employees, the rationale that the employee's salary is generally not affected, except in caseswhere all leave time is exhausted, thereby affirming the employee's “exempt” status, applies equally well in the present matter. Therefore, it is determined that Grievant is not entitled to overtime compensation as an “exempt” employee under the provisions of the FLSA.

II

Grievant next argues that she is entitled to additional compensation because the job duties at

issue were outside her job description. She notes that training and supervision are not explicitly set forth in the position description of Contract Accountant, or included as an essential function in her job description, but are included in position descriptions of higher level positions, including that of Manager, External Funds Accounting. She further argues that training is traditionally a management function, and that Contract Accountant is not a management level position, therefore, she was working out of classification, and is entitled to appropriate compensation.

Grievant also argues that the additional work was assigned to her in violation of W. Va. Code §18B-7-9, which "discourages temporary, non-emergency institutionally-imposed changes in an employee's work schedule" and Code §18B-9-9, which provides that

[i]n accordance with the rules established by its governing board and by mutual agreement, the president of an institution, or a designated representative, and a classified employee at such institution may agree on duties to be performed by such employee in addition to those duties listed in the job description. The terms and conditions of any such agreement shall be in writing, signed by both parties, and shall describe the additional duties to be performed, the length of time such agreement shall be in force and the additional compensation to be paid.

Grievant argues that this provision clearly contemplates that any duties performed by an employee which are not described in her job description are to be completed only pursuant to a contract between the institution and the employee. Grievant asserts that the development and presentationof a grants training program for presentation to university employees was a non-emergency, institutionally-imposed change in her work schedule for which she is entitled additional compensation. Grievant concludes that the compensation should be at pay grade seventeen (17) because her supervisor previously completed this type of task.

Respondent argues that while her job description does not specifically address training, the grant training assignment was properly made to Grievant, and was a logical extension of her job duties. Respondent agrees that Grievant's principal area of responsibility pertains to contracts, but notes that her job description provides that she is responsible for the full spectrum of accounting duties, which includes grants. The delegation of this duty by Ms. Ault-Hyken to Grievant is entirely permissible, Respondent argues, even though Grievant had not been required to conduct such training in the past. Based upon Grievant's educational background and work experience, and the rational relationship of the assignment to her regular duties, Respondent asserts that Grievant was not

required to work outside her classification.

The Circuit Court offers some guidance on this issue, noting that the claim was previously denied by the Grievance Board based upon a determination that the assignment fell into the category “other duties as assigned by the incumbent's immediate supervisor as workload and time dictates.” The Court dismissed the reasoning that the language should be broadly construed, noting that such a construction would “constitute a carte blanche for an institution to impose additional duties on its employees without their consent and without compensation therefor. Employees would be required to work out of classification, and have no recourse. This is the very evil that W. Va. Code §18B-9-9 is designed to prevent.” The Court further instructed that “[a]n activity not explicitly set forth in a job description that bears a rational relationship to that job description may not constitute workingout of classification by the employee. However, if the activity is one that is explicitly set forth in the job description for another position or is one that is customarily performed by a person in another classification, the employee should be considered to be working out of classification.”

Grievant's Position Information Questionnaire (Level II- University Exhibit No. 3) lists her duties and responsibilities as follows:

50% of Time

Is responsible for ensuring that all financial requirements of all federal, state and private contracts are adhered to. This position's primary but not sole area (unit) of responsibility are contracts held at the Concurrent Engineering Research Center (CERC).

Is responsible for rendering any financial and cost information necessary to assist in the solicitation of contracts for West Virginia University. Insures that financial aspects of proposals are measurable and controllable.

Designs, implements, and maintains systems necessary to ensure that all charges make [sic] to contracts are consistent with the original intent of the signed agreement. This involves the prior review and approval of all transactions which obligate funds in behalf of the contract. If the incumbent feels an anticipated charge or event is questionable or disallowable, he/she will have the authority to either disallow or require transaction[s] to move any further.

Maintains a comprehensive schedule to ensure that expenditure data is collected and reported in an

accurate manner. Responsible for rendering on a timely basis mandatory invoices in accordance with the specific terms of each contract. Reviews and signs each invoices [sic] as certification that expenditures are correct and made for the purpose of, and in compliance with, the applicable terms and conditions of the contract.

Is responsible to ensure that all financial reporting responsibilities of awarded contracts are met either by the actual generation of the report or with the assistance of the Financial Analysis and Reporting unit of the institution.

5% of Time (each)

Serves as an intermediary between the funding agency and West Virginia University concerning financial information. Is responsible for the dissemination of information collected as a result of that intermediary responsibility.

Responsible for reviewing, correcting and releasing all present and future contract invoices into the CUFS Accounting system on a monthly basis.

40% of Time

Performs detailed audit of expenditures upon termination or completion of contract period. Responsible for the validity and propriety of the final invoice, reconciling receipts with invoice expenditures. Responsible for assuring that reimbursement was not made for costs not clearly supported by documented records or contract funds that were expended in an unauthorized way, and that expenditures conform with the funding agency approved budget.

Responsible for verifying that overhead and fringe benefit calculations are in accordance with the terms of the contract. Stays current on any changes to requirements and implements changes where and when needed.

Reviews newly awarded contracts to identify and interpret all vendor financial requirements. Responsible for reviewing award, noting expenditure restrictions, either direct or indirect, cost sharing requirements, purchases requiring prior approval, required interim financial reports, and budget conformity, so that personnel may be apprised in advance of those types of restrictions.

Responsible for receiving, and accounting for all contracts' funds within the predefined scope of authority. Advises operating personnel when cumulative expenditures approach find limits. Puts systems in place to preclude inadvertent overexpenditure of funds.

Monitors the University ledger for contract accounts for receivables due from each agency. Responsible for maintaining a receivable data base and analyzing it to determine the appropriateness of each. Must react to each receivable as circumstances dictate. Variable which must be considered include the age of the receivable, the dollar amount involved, the agency, agency practices, University policy and state law. Prepares a report of the same which is utilized by centraladministration in their analysis of expected University cash flow. Must be prepared to report the information by any criteria requested.

Directs work efforts of an Accountant III.

Other duties as assigned by the incumbent's immediate supervisor as workload and time dictates.

Although Grievant is capable, and acquired the knowledge necessary to prepare the training session, her PIQ establishes that she does not regularly work with grants, but almost exclusively directs her efforts toward the contract management aspect of funding. This was supported by her testimony that she had to contact individuals to obtain necessary information for the preparation of the session. While generally a part of the accounting process, the development and presentation of a training session regarding grants required that Grievant become involved in an area (grants) and an activity (training) which are not part of her job description. However, an essential function for the position of Manager is “[p]rovides professional and technical expertise regarding the financial management of all gifts, grants, and contracts for the West Virginia University Research Corporation . . . .” Therefore, contrary to Respondent's assertion, provision of the training in question was included in Ms. Ault-Hyken's position description. Because Grievant was required to work out of classification while preparing and presenting the grant training session, she is entitled to compensation at pay grade seventeen (17) for the time in question.

III

Grievant also alleges that Respondent's decision to deny her compensation is arbitrary and

capricious and discriminatory. In support of this claim, she notes the inconsistent application of policy as evidenced by a listing of “exempt” employees who had received compensation in additionto their regular salary payments. Respondent offered the testimony of Jesse Mancini, Comptroller, who stated that the vast majority of the supplemental compensation fell into one of the following categories: 1) payroll payments for initial payments to employees when salary deadlines were missed, final payments to employees for annual leave and longevity and back pay settlements; 2) athletic support: to employees who work athletic events and sport camps; 3) departmental consulting: employees that provided intra-university consulting services (i.e. services provided to departments other than the employees' assigned department); 4) status change: to employees transferring from a nonexempt position at some point during the year; 5) declared emergency: employees who worked during a declared emergency such as a heavy snow; and 6) interim upgrades. Mr. Mancini stated that $196,365 of the $217,052 in supplemental payments fell into one of these categories and that the remaining $20,660 is not categorized, because it is impossible to account for every dollar at an institution of the size of WVU.

W. Va. Code §18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a prima facie case of discrimination, a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Although Grievant has proven that a number of exempt employees received supplemental compensation, she failed to establish a prima facie case of discrimination because she did not establish that any one of them had received the compensation for overtime work. Therefore, it cannot be determined that any one of the employees was treated with preference.

Consistent with the foregoing findings of fact and discussion it is appropriate to make the following

formal conclusions of law.

Conclusions of Law

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); See W. Va. Code §18-29-6.

2. School personnel laws and regulations are to be construed strictly in favor of the employee. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. W. Va. Code §18B-9-9 provides that employees of an institution of higher learning may agree to perform duties in addition to those listed in her job description, but that the terms and conditions of any such agree must be in writing, signed by both parties, and describe the additional duties to be performed, the length of time the agreement is to be in force and the additional compensation to be paid.

4. Grievant has proven by a preponderance of the evidence that the development and presentation of a training session regarding grants to university employees were not duties or responsibilities stated in the position description for Contract Accountant, but were included in theposition description for Manager of the External Funds Accounting Department.

5. Grievant worked outside her classification for approximately forty-five (45) hours.

6. Grievant failed to prove by a preponderance of the evidence that she was a non- exempt employee under the FLSA, or that she was otherwise entitled to compensation at a rate of time and one-half for the hours worked beyond her regular scheduled work-week.

7. Grievant failed to prove by a preponderance of the evidence that Respondent's failure to compensate her for the additional work resulted in discrimination, as defined by W. Va. Code §18-29-2(m).

Accordingly, the grievance is **GRANTED** to the extent that Grievant's work on the training session was outside her classification of Contract Accountant, and Respondent is Ordered to compensate Grievant for the forty-five hours required to develop the training package, plus the time required to present the session, at pay grade seventeen, with pre-judgment interest, less appropriate set-off. It is the position of the Grievance Board that it is without authority under W. Va. Code §29- 6A-10 to

award attorney fees at level IV.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: 2-25-98 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Proceedings were delayed when continuances requested by both parties were granted for good cause shown.

Footnote: 2

In her post-hearing submission, Grievant notes that she is also subject to regular and recurring deductions for part-day absences under Respondent's snow policy. This policy was not addressed previously and cannot be considered when ruling on the issue of whether Grievant is "exempt".