MICHAEL HAWRANICK, et al.,

Grievants,

v. **Docket No. 98-HHR-010**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU OF PUBLIC HEALTH,

Respondent.

D E C I S I O N

Michael Hawranick, Clyde Emigh, Jennifer Miller, G. Michael Mower, Charles Robinette, Bradley Reed and Craig Cobb (Grievants) filed virtually identical grievances against Respondent West Virginia Department of Health and Human Resources on various dates between November 14 and December 15, 1996, alleging that they had not received proper overtime pay during flood disasters they had worked earlier in 1996. Grievants' immediate supervisors were without authority to grant the relief requested, and this matter proceeded to Level III where the grievances were consolidated and a Level III evidentiary hearing conducted on July 15, 1997. An undated Level III decision denying the grievance was issued in January 1998 by Dr. Henry G. Taylor, Commissioner of the Bureau of Public Health. Grievants appealed to Level IV on January 15, 1998. Following a pre-hearing telephone conference and two continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston,West Virginia, on April 23, 1998. (See footnote 1) The parties agreed to a briefing schedule at the conclusion of that hearing, and this matter became mature for decision on June 15, 1998, following receipt of their written arguments.

Most facts in this matter are undisputed. The following findings of fact are made from the evidence developed in the record through Level IV.

FINDINGS OF FACT

1. Grievants are employed by the West Virginia Department of Health and Human Resources (HHR) in the Office of Environmental Health Services within the Bureau of Public Health.

2. Grievants Hawranick, Cobb, and Reed are classified as Engineer I's. Grievants Mower, Robinette, Miller, and Emigh are classified as Engineer II's.

3. HHR considers the positions occupied by Grievants to be exempt from overtime compensation under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq. On various occasions before 1996, FLSA-exempt HHR employees within the Office of Environmental Health Services were paid overtime for all hours spent in excess of forty hours per week while working on disaster relief matters, primarily floods.

4. In June 1991, the West Virginia Division of Personnel admonished HHR for routinely paying overtime to FLSA-exempt physicians at Welch Emergency Hospital. See R Ex H. Subsequent to receiving that correspondence, HHR attempted to discontinue any past practice of paying overtime to FLSA-exempt employees. 5. Following extensive flooding in central West Virginia in January 1996, Grievants were assigned to disaster relief duties working under the direction of the Federal Emergency Management Agency (FEMA). In the course of performing their assigned duties, Grievants worked in excess of forty hours per week during January, February, and March 1996. At the time Grievants performed these emergency duties, they were aware that HHR had paid overtime to Engineers who worked on flood disaster relief efforts in the past, and their immediate supervisors instructed them to keep records so they could obtain appropriate compensation once the emergency ended.

6. Joseph Shock was Director of the Office of Environmental Health Services from February 1989 to July 1997. At the time Grievants were assigned disaster relief duties in January 1996, Mr. Shock expected Grievants to receive overtime pay for all overtime hours worked, and he specifically instructed that appropriate records be maintained to support such payments. See G Ex B. However, Mr. Shock did not promise or guarantee Grievants they would receive any overtime pay.

7. Consistent with guidance from Michael McCabe, Director of HHR's Office of Personnel Services, Mr. Shock issued a memo on May 29, 1996, instructing all FLSA- exempt employees who participated in the January 1996 flood relief effort to document that over 50 per cent of the duties they

performed in a 7-day work week constituted non-exempt work, in order to receive overtime compensation for hours worked in excess of 40 hours per week. See R Ex A. This was the first time Grievants became aware that the past practice of compensating HHR's FLSA-exempt employees for all overtime worked during disaster relief efforts would no longer be followed. 8. By July 1996, all of the required documentation had been provided by Grievants to Mr. Shock's office. The documentation was reviewed by Mr. McCabe for compliance with the “fifty per cent rule” under the FLSA. See Ex 8 at L III. Based upon that review, the approved overtime hours were compiled by Carolyn Zirkle, Mr. Shock's Administrative Secretary, and forwarded to HHR's payroll office for payment on August 12, 1996. See R Ex F.

9. Other FLSA-exempt state employees, including employees of the Division of Highways in the Department of Transportation, and the Office of Emergency Services in the Department of Military Affairs and Public Safety, who worked along side Grievants during the 1996 flood relief effort, were compensated for all overtime hours, whether the duties performed were exempt or non-exempt.

10. One FLSA-exempt employee who works in HHR's Office of Medical Services received overtime compensation for all hours worked during the 1996 flood relief effort. Mr. McCabe advised the Payroll Office in HHR's Division of Finance that such payment was improper under HHR policies. However, no action was pursued to recover the allegedly erroneous payment.

11. By August 30, 1996, Grievants had received all overtime pay to which HHR had determined they were entitled, in accordance with its general policy governing overtime for FLSA-exempt employees. See Exs 7A & 7B at L III. Grievants were not advised that their supervisors were involved in any continuing effort to obtain further overtime compensation for the 1996 flood relief effort.

12. On November 14, 1996, Grievants Cobb and Emigh initiated grievances at Level I regarding HHR's failure or refusal to pay overtime for work performed during the1996 flood emergency. The remaining Grievants initiated virtually identical grievances shortly thereafter, with the last grievance being filed by Grievant Hawranick on December 5, 1996.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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); Payne v. W. Va. Dept. of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

HHR contends this grievance is untimely, because it was not initiated within the time limits contained in W. Va. Code § 29-6A-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employees have the burden of demonstrating a proper basis to excuse their failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. MasonCounty Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93- BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The relevant time period ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

In this particular matter, Grievants were put on notice that they would not be receiving overtime in accordance with HHR's purported past practice in May 1996, when Mr. Shock advised them to document the overtime they had already worked for reimbursement in accordance with the fifty per cent rule. Thereafter, despite Grievants' protests and the sympathetic correspondence generated by their supervisors, there was no indication that HHR management was wavering in its interpretation of current policy. Ultimately, Grievants were paid everything that HHR determined they should receive under the terms of the policy Grievants are challenging. (See footnote 2) Once Grievants received

overtime pay for flood relief duty on August 30, 1996, and that pay did not include compensation for the hours they are now seeking, the event upon which the grievance is based occurred. Pursuant to W. Va. Code 29-6a-4(a), Grievants were required to initiate their grievances within ten days, unless otherwise prevented or excused from doing so. Grievants waited well beyond the ten day limit to file their grievances, and have offered no explanation to establish a proper basis for permitting this amount of time to elapse between the employer's action and initiation of their grievances. See Sayre, supra; Jack, supra. In these circumstances, these grievances must be deemed untimely, and the undersigned is without authority to rule on the merits of their complaints.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this decision.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving their 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); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 29-6A-4 provides that a grievance must be filed within ten days of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. 3. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

4. Because Grievants did not file their grievances until more than two months following the events upon which the grievances are based, the grievances were not timely filed pursuant to W. Va. Code § 29-6A-4.

Accordingly, the grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit

Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7(c) (1998). 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 7, 1998

Footnote: 1

Grievants were represented by Victor R. Wilford, the immediate supervisor of all Grievants except Ms. Miller. Respondent was represented by Assistant Attorney General Sarah L. Brack.

Footnote: 2

Grievants do not claim that this rule was factually misapplied to the work they performed while assigned to support FEMA. This grievance contends that, for various reasons, their overtime recovery should not be limited by the FLSA. Grievants recognize that they may routinely be expected to work overtime without compensation, noting that exceptions have historically been permitted by HHR management in emergency or disastersituations.