

instruction or training in an educational establishment.

3. Grievants do not customarily and regularly exercise discretion and independent judgment on matters of significance.
4. Grievants do not perform administrative work at least 80% of the time.
5. Grievants do not customarily and regularly exercise discretionary power.
6. Grievants do not perform executive work at least 80% of the time.
7. Grievants do not have authority to hire and fire other employees.
8. Grievants do not receive overtime pay for their work in excess of 40 hours per week.

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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A- 6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievants allege that they should be paid overtime when they work more than 40 hours per week. ([See footnote 2](#)) CORR responds that Grievants are exempt from overtime pay because they fall under either the Administrative Exemption or the Executive Exemption of the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. 209-219. ([See footnote 3](#)) See W. Va. Code § 21-5C- 1, Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994). Grievants seek overtime pay for their future work in excess of forty hours per week.

An employer seeking to avoid payment of overtime compensation on the basis of an 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); Dep't 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).

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 has jurisdiction over grievances under the FLSA, Belcher v. W. Va. Div. of Highways, Docket No. 94-DOH-341B (June 30, 1995), and 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). Indeed, CORR 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).

Lowell Basford, Assistant Director of Compensation and Classification for the West Virginia Division of Personnel (DOP), credibly testified that state agencies must obey the FLSA; that the White Collar Exemption Work Sheet used by DOP is based upon the FLSA; that DOP used the job description for Correctional Unit Manager in determining that Grievants are exempt from the overtime pay requirement of the FLSA; and that, although Grievants' actual job duties are controlling under the FLSA, DOP does not check to see if their actual duties vary from their job description. Therein lies the rub, because Grievants presented ample credible evidence to show that their actual duties, as opposed to the duties described in their job descriptions, do not make them exempt from overtime pay under the FLSA.

The White Collar Exemption Work Sheet provides checklists of questions for each of four possible exemptions. To qualify for one of the exemptions, there cannot be a "no" answer to any question concerning each exemption.

Grievants' Immediate Supervisor, Teresa Waid, credibly testified that, with respect to the Administrative Exemption test, Grievants' primary duties do not consist of office or nonmanual work directly related to management policies or general business operations, or administrative functions related to academic instruction or training in an educational establishment; that Grievants do not customarily and regularly exercise discretion and independent judgment on matters of significance; and that Grievants do not perform administrative work at least 80% of the time. With respect to the

Executive Exemption test, Waid testified that Grievants do not have authority to hire and fire other employees; and that, due to chronic short-staffing at MOCC, Grievants do not perform executive work at least 80% of the time. See Reed v. W.Va. Div. of Corrections/Div. of Personnel, Docket No. 95-CORR-033 (Apr. 30, 1996).

With respect to both exemption tests, Waid credibly testified that Grievants routinely do such non-supervisory manual work as packing inmate property, searching cells, ordering cleaning supplies under Waid's supervision, and substituting for correctional officers; and that other MOCC supervisors do not routinely do such manual work.

With respect to both exemption tests, Grievants credibly testified that they do not exercise discretion and independent judgment on matters of significance; because their work is covered by numerous CORR and MOCC policies that must be strictly followed, giving as an example a policy precluding their exercise of discretion in so minor a matter as toilet paper distribution; that they routinely do the manual work described above; and that, due to chronic short-staffing at MOCC, Grievants do not perform administrative or executive work at least 80% of the time. Grievants also produced ample documentation, in the form of memoranda assigning their subordinates to security duties, of their claim that they often have no subordinates over whom to exercise any administrative or executive authority.

The testimony of Waid and Grievants established that Grievants must answer "no" to at least three questions under the Administrative Exemption, and to at least two questions under the Executive Exemption, so that neither exemption applies to them. See Jones v. W. Va. Div. of Corrections, Docket No. 98-CORR-356 (Mar. 30, 1999), Lohr v. W. Va. Dep't of Corrections, Docket No. 89-CORR-107 (Aug. 25, 1989). Grievants do not fit "plainly and unmistakably within [these exceptions] terms." Arnold, supra.

With respect to both exemption tests, a preponderance of the credible evidence of record, including the testimony of Grievants and Waid, established that the difference between their job descriptions and their actual duties is caused by MOCC's chronic short-staffing. This short-staffing has apparently been going on since MOCC opened. However, CORR introduced no evidence to show that its short-staffing of MOCC, which requires Grievants to spend much of their time performing the non-supervisory, manual duties of their oft-absent subordinates, absolves it of its statutory obligation to pay overtime to non-exempt employees under the FLSA.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.
2. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).
3. An employer seeking to avoid payment of overtime compensation on the basis of an 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); Dep't 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).
4. Grievants are entitled to overtime pay when they work more than 40 hours per week, unless they are subject to one of the exemptions under the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. 209-219.
5. Neither the Administrative Exemption, nor the Executive Exemption of the FLSA, applies to Grievants. See Jones v. W. Va. Div. of Corrections, Docket No. 98- CORR-356 (Mar. 30, 1999), Lohr v. W. Va. Dep't of Corrections, Docket No. 89-CORR-107 (Aug. 25, 1989).
6. Grievant's established, by a preponderance of the evidence, that they are entitled to overtime pay under the FLSA.

Accordingly, this grievance is **GRANTED**, and CORR is **ORDERED** to pay Grievants overtime for their future work in excess of forty hours per week.

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 (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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: June 21, 2000

[Footnote: 1](#)

This dispute was the subject of the Order Denying Default in Reynolds v. W. Va. Div of Corrections/Mount Olive Correctional Complex, Docket No. 99-CORR- 337/367D (Dec. 17, 1999).

[Footnote: 2](#)

Grievants adduced testimony at Level III tending to prove that the Chief Correctional Officer at MOCC was paid overtime, although performing greater supervisory duties than they. However, because the Chief Correctional Officer is not a Correctional Unit Manager, because Grievants have not raised a claim of discrimination, See Reed v. W.Va. Div. of Corrections/Div. of Personnel, Docket No. 95-CORR-033 (Apr. 30, 1996), and because of the outcome of this grievance, this issue will not be considered further.

[Footnote: 3](#)

This dispute was the subject of the Order Denying Default in Reynolds v. W. Va. Div of Corrections/Mount Olive Correctional Complex, Docket No. 99-CORR- 337/367D (Dec. 17, 1999). At Level III, CORR argued that Grievants fell under the Administrative Exemption Test. At Level IV, CORR argued that Grievants fell under the Executive Exemption Test. CORR's proposed findings of fact and conclusions of law do not argue that either test applies.