DALIP SARIN,

Grievant,

v. **Docket No. 02-DEP-326**

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION/

OFFICE OF MINING and RECLAMATION,

Respondent.

D E C I S I O N

Grievant, Dalip Sarin, filed this grievance against the West Virginia Department of Environmental Protection ("DEP") on July 22, 2002. Grievant works as an Engineer IV in the Office of Mining and Reclamation ("OMR"). He filed the following Statement of Grievance:

> I have not been paid for overtime work performed by me during the period from 1996 - 98. Melinda Campbell wrongly interpreted that my first claim was in July, 2001. As a matter of fact, my supervisor returned approved time sheets in July, 2001. The same supervisor told me that I was not entitled for overtime and that he would not return time sheets. Supervisor did not submit overtime time certification based on time and activity reports to the Division of Personnel.

RELIEF SOUGHT: To be paid for overtime not paid so far in full. (See footnote 1)

A Level III hearing was held on August 14, 2002, and a Level III decision denying the grievance was issued on October 2, 2002. Grievant appealed to Level IV on October 3, 2002, and a Level IV hearing was held on November 4, 2002. The deadline for theparties' proposed findings of fact and conclusions of law was November 27, 2002, at which time this grievance became mature for decision. (See footnote 2)

Issues and Arguments

Grievant asserts he is entitled to overtime from 1996 - 1998. (See footnote 3) He also argued, at hearing, that he should have received interest on the overtime he was paid for 1998 -2001, or in the alternative, that this overtime payment should have been paid at his current rate instead of the rate he was earning when the overtime was earned. This assertion was not in Grievant's Statement of Grievance, Respondent objected to this change, and the issue of interest on overtime from 1998 - 2000, will not be addressed.

Respondent argues Grievant was an exempt employee during 1996 - 1998, and thus was not allowed to earn overtime. Further, Respondent avers the Fair Labor Standards Act's ("FLSA") statute of limitations at 29 U.S.C. 255 prevents, or bars, the payment of additional overtime. Respondent also notes there is no requirement to payinterest on Grievant's prior overtime payment, and Grievant did not cite to any authority for this requested interest.

Respondent noted Grievant could have filed a complaint about overtime either under the grievance procedure or with the Department of Labor, but he did not do so until 2002. Further, Grievant never questioned his prior status as an exempt employee from 1996 - 2000, until he filed this grievance. Indeed, Grievant requested and received reclassification to an Engineer IV.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has worked for DEP in the OMR for many years. He began as an Engineer III and was later reclassified as an Engineer IV in 1994. (See footnote 4) Grievant possesses two advanced degrees in engineering.

2. As an Engineer IV, Grievant engages in professional work and uses his professional judgment and knowledge to perform the duties of his position. Resp. Ex. No. 8, at Level III; Resp. Ex. No. 3, at Level IV.

3. In 1996, OMR supervisors were asked to complete the FLSA test to assess whether their employees were exempt or nonexempt, for overtime purposes.

4. Grievant's supervisors concluded Grievant was exempt. Grievant did not grieve this decision. Resp. Ex. Nos. 2 & 6, at Level III. 5. Sometime during 1996 - 1998, Grievant brought up the issue of overtime with his supervisors, and he was told he was not entitled to overtime

because he was classified as exempt. Grievant's testimony.

6. The Division of Personnel's ("DOP") Classification and Compensation Plan, updated November 15, 2002, identifies the Engineer IV classification as exempt.

7. During the 1996 - 1998 period, Grievant worked many hours on the Logan Dam project. Even though there were no provisions for overtime or compensatory time, Grievant had a "Gentlemen's Agreement" with his supervisor, Lewis Halstead, to take compensatory time, off the books, as needed. Grievant used some compensatory time in lieu of sick leave and annual leave, from 1997 to 1999. (See footnote 5)

8. In 2000, after DOP rewrote its regulations on overtime and compensatory time, DEP revised its own rules on these issues. Grt. Ex. Nos. 6 & 7, at Level III. All employees were reassessed as to their status. Almost all DEP employees were reclassified as nonexempt. In 2000, Grievant was reclassified as nonexempt by DEP.

9. In April or May of 2001, Grievant requested his time sheets for 1995 - 2000. Grievant had routinely made copies of his time sheets immediately after they had been signed by his supervisor. (See footnote 6) 10. Grievant received the time sheets for 1997 - 2000 on July 23, 2001, from the main office. (See footnote 7) The time sheets for the other years were not available.

11. Some time thereafter, Grievant requested overtime from his supervisor for 2000 and 2001. This overtime was paid. (See footnote 8) He did not grieve or otherwise question the fact this payment did not contain interest.

12. On February 14, 2002, Grievant wrote Melinda Campbell, Assistant Services Manager in DEP's Human Resources Section, requesting overtime for 1996 - 1999. He noted other employees within the agency had been paid overtime during this period.

13. Ms. Campbell responded the next day indicating overtime could not be paid without a signed overtime sheet. She also informed Grievant that while his time sheets may reflect hours worked greater than 40, Grievant may not have been "subject to overtime" during that period of time. She also noted this was the procedure used with all employees who receive overtime. She suggested Grievant complete overtime sheets and give them to his Division Director, and if and when they were signed, she could proceed with payment. Grt. Ex. No. 5, at Level III.

14. On February 15, 2002, Grievant responded, insisting he should be paid based on the time sheets, and Ms. Campbell had these documents. Ms. Campbell replied she did not receive time

sheets, but if Grievant wished to send them, she would computethe amount, and see if he was subject to overtime during that period. Grt. Ex. No. 10, at Level III.

15. On March 11, 2002, Ms. Campbell wrote Matt Crum, Director of OMR, about Grievant's overtime claim, and noted Grievant had already received overtime for 2000 and 2001. She incorrectly indicated the three-year statute of limitations should be applied to this request. (See footnote 9)

16. Ms. Campbell took the date of July 2001, as the first request for payment, as this was when Grievant had first received the time sheets and notified her of the issue. She calculated overtime could potentially start from July 1998, and Grievant could receive additional monies for 1999 and part of 1998, as he had already been paid for 2000 and 2001.

17. Director Crum relied on the information from Ms. Campbell, and on April 1, 2002, informed Grievant he was authorizing additional overtime payments from July 1998 to December 1999. (See footnote 10)

18. Grievant disagreed with this decision, believing he should receive overtime at least back to 1996. He filed this grievance on July 22, 2002.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va.Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

Grievant alleges he is entitled to additional overtime based on two grounds. One, DEP incorrectly calculated the statute of limitations, and two, he was not an exempt employee. Both claims are without merit.

I. Statute of limitations

29 U.S.C. § 255 is the statute of limitations on payments of overtime. It operates to limit the available remedy and is very clear.

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), the Walsh-Healey Act (41 U.S.C. 35 et seq.), or the Bacon-Davis Act (40 U.S.C. 276a et

> seq.) - (a) if the cause of action accrues on or after May 14, 1947 -may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(Emphasis Added.)

First, the issue of whether the three year or two year limitation should apply will be addressed. For the three statute of limitations to apply, the violation must be "willful". A willful violation requires the employer to either know or show reckless disregard that its behavior was prohibited by the FLSA. McLaughlin v. Richland Shoe, Co., 486 U.S. 129 (1988). Grievant did not demonstrate the failure to pay him overtime was willful. At the time Grievant was classified as exempt, this decision was based on his education, training,and duties. Accordingly, the three year statute of limitations was incorrectly applied, and the two year statute of limitations should have been used. Since DEP is not requesting the repayment of this money, no further discussion is needed here.

Next, the question is whether the statute of limitations should be applied to allow Grievant to receive overtime back to 1996. This statute clearly states the action must be commenced within two years from the time the cause of action accrued. For Grievant to receive overtime for 1996, he would have had to file in 1998. This he did not do. An examination for the facts reveals Respondent has been perhaps overly generous with Grievant, and certainly he is not entitled to any more overtime.

II. Exempt status

From 1996 to 2000, Grievant was classified as exempt. His supervisor applied the test set out in the FLSA and decided he was a professional employee. Given Grievant's classification, job duties, and numerous degrees, this assessment cannot found to be arbitrary and capricious, and indeed appears to have been correct. Additionally, if Grievant wanted to contest his status, the time to grieve or question this issue would have been during the years he had this status, not years after he was given it, and years after it had been changed.

Grievant's argument on his status is essentially, if he does not agree with the assessment, it must be an error. He also maintains an employee can only be assessed as a professional if he or she has a Ph.D. This assertion is, quite simply, erroneous. Grt. Ex. No. 8, at Level III; Grt. Ex. No. 9, at Level IV.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. The statutory limitation for filing an overtime time claim is two years unless the violation is willful; in that case the employee has three years to file a claim. 29 U.S.C. § 255.

3. For the three statute of limitations to apply, the violation must be "willful". A willful violation requires the employer to either know or show reckless disregard that its behavior was prohibited by the FLSA. McLaughlin v. Richland Shoe Co., 486 U.S. 129 (1988).

4. Grievant did not demonstrate the failure to pay him overtime was willful.

5. Grievant's request for overtime for 1996 to 1998, is barred by the statute of limitations in 29 U.S.C. § 255.

6. Grievant was correctly assessed as an exempt employee from 1996 - 1998.

Accordingly, this 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 (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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated; January 13, 2002

Footnote: 1

On October 3, 2002, Grievant added the following relief: "Including interest and liquidated damages under WV law." Respondent objected to this change.

Footnote: 2

Grievant represented himself, and DEP was represented by Assistant Attorney General Steven Dragisich.

Footnote: 3

At hearing, Grievant wanted to amend his grievance to add overtime for 1995. This change in the Statement of Grievance was objected to by Respondent, and it was not allowed. Additionally, at the Level IV hearing, Grievant wanted to add the issue of discrimination. Grievant then reported this issue was currently before the circuit court. Respondent also objected to this change in the grievance. Given Respondent's objection and the fact this issue is currently before the circuit court, the allegation of discrimination was not added to the Statement of Grievance. Grievant also indicated he would accept compensatory time in lieu of overtime. Respondent objected to this request as it was not part of the original grievance.

Footnote: 4

This reclassification date was unclear from the record, and Grievant could have been reclassified in 1996 instead of 1994.

Footnote: 5

Grievant's supervisor had kept "sticky notes" from Grievant about this compensatory time for many years, but threw most of these notes away once Grievant was no longer his supervisee.

Footnote: 6

Grievant completed compensatory time sheets, apparently from the time sheets he had been provided or the time sheets he had retained from the period in question, to submit at the Level IV hearing. These compensatory time sheets were not in existence during 1996 - 1998, as compensatory time was not allowed during these years. These sheets, of course, were not signed by his supervisor.

Footnote: 7

Although told repeatedly that his supervisor did not have these documents and was not responsible for Grievant's receiving them, Grievant continued to believe these were in his supervisor's possession the whole time, and Mr. Halstead just would not give them to him.

Footnote: 8

Although unclear from the record, it was assumed this payment was based on Grievant's change in status from exempt to nonexempt in 2000.

Footnote: 9

See page 7 infra. Respondent is not seeking the repayment of these monies.

Footnote: 10

From the information in the record, it appears the compensatory time Grievant took in 1999, was not subtracted from the overtime amount paid to Grievant.