SAMUEL DECAPIO and SHELDON BEAUTY,

Grievants,

v. Docket No. 03-DOH-357

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Samuel DeCapio and Sheldon Beauty ("Grievants"), employed by the Division of Highways ("DOH" or "Respondent") as Highway Administrators II, filed a level one grievance on April 24, 2003, in which they alleged

The state is unfair, unjust and discriminatory in their payment of overtime. I am subordinate to the Transportation Engineering Technologist and I report to the person in this position, who receives time and one-half for everything over forty (40) hours.

Relief sought: I am requesting compensation at the rate of time and one-half for everything over 40 hours. I am also requesting to receive retroactive pay at the rate of time and one-half for all hours worked overtime from 1-1-02 until this grievance is settled.

The grievance was denied at levels one through three, and appeal was made to level four on November 20, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on January 2, 2004, at which time Grievants represented themselves, and DOH was represented by Barbara Baxter, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before March 9, 2004.

The following facts of this matter are undisputed.

Findings of Fact

1 Grievants have been employed by DOH as Highway Administrator IIs at all times pertinent to this grievance. Grievant DeCapio is assigned as county supervisor in Hancock County, and Grievant Beauty is the county supervisor in Brooke County. Both positions have been classified as exempt, and Grievants do not receive overtime or compensatory time off for

time worked beyond forty hours per week.

2. Grievants' immediate supervisor is Cathy Sobel, a Transportation Engineering Technologist, who is classified as non-exempt and receives time and a half for overtime.

3. Joseph Reed, a Highways Administrator I, performs a variety of duties, including inspecting guard rails, completing FEMA reports, directing Division of Correction inmates with cleaning, and shoveling snow. Mr. Reed is classified as non-exempt and receives overtime compensation.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their allegations 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 and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). 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." Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

Grievants argue that DOH has erred by inconsistently applying the Fair Labor Standards Act to employees who perform substantially similar responsibilities, duties, andfunctions. They offer Ms. Sobel and Mr. Reed as examples of similarly situated employees who are classified as non-exempt. DOH asserts that Grievants are properly classified as exempt employees under the executive employee category.

The West Virginia Division of Personnel (DOP) has promulgated a policy titled the Fair Labor Standards Act for Public Employees in which commonly encountered aspects of the federal legislation is interpreted. In addition, DOH has issued its own Fair Labor Standards Exemption Policy, which mirrors that of the DOP and the FLSA. All three sources provide that employees are entitled to compensation at time and a half, or compensatory time off, for time worked beyond forty hours per week. However, certain employees are “exempt” from this requirement. They include administrative, executive and professional employees, volunteers, independent contractors, occasional or substitute employees, fire protection and law enforcement employees, hospital or residential care employees, prisoners, and trainees.

To qualify for the executive exemption, a worksheet attached to the DOP policy lists five tests which must be met:

1. Is the employee's primary duty the management of a customarily recognized department or subdivision?

2. Is the employee's primary duty the customary and regular director of two or more full-time employees, or the equivalent?

3. Does the employee have the authority to hire or fire other employees, or to make recommendations for similar human resource changes?

4. Does the employee customarily and regularly exercise discretionary power?

5. Does the employee perform at this level at least eighty percent of the time?

Addressing Mr. Reed first, he testified that he performs a variety of duties both labor and office oriented. He estimated that approximately half his time is spent on manual duties and the remaining half is consumed by office-related matters. Mr. Reed does not supervise any other DOH employees. Since he does not supervise, or otherwise engage in managerial duties at least eighty percent of the time, Mr. Reed does not meet the criteria for exempt status.

In reference to Ms. Sobel, the level three decision states, "[i]t is clear from the job description that the Technologist position meets the requirement for the primary duty to be managerial in the executive exemption portion of the policy." Jeff Black DOH Human Resources Director also testified that the duties and responsibilities of the Technologist position have changed, and need to be reviewed. Since DOH concedes that Ms. Sobel should be exempt, no further examination of her position is required at this time.

The job description for Highway Administrator II states the "Nature of Work" to be the administration of highway maintenance operations in a county in compliance with applicable rules and regulations. This employee directs and implements a scheduled highway maintenance program within an operating annual budget, supervises subordinate staff, conducts performance review of staff, disciplines employees, plans and directs and distributes work assignments. Grievants do not deny that at least eighty percent of their work time is devoted to managerial duties. Grievants are correctly classified as exempt from

overtime compensation. While Ms. Sobel has received overtime, that has been in error, and the Grievance Board has held that a mistake benefitting an employee does notentitle a grievant to similar relief. White v. Div. Of Highways, Docket No. 00-DOH-313D (Jan. 16, 2001). See Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Weaver v. Preston County Bd. of Educ., Docket No. 03-39-129 (Aug. 28, 2003); Kunzler v. Dep't of Health and Human Serv., Docket No. 97 HHR-287 (Jan. 18, 1996).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their allegations 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 and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Administrative and executive employees are exempt from the requirement that employers provide overtime pay for all hours worked in excess of forty hours per week pursuant to the Federal Fair Labor Standards Act. See 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).

3. Grievants fall within the administrative and executive exemptions of the Federal Fair Labor Standards Act and are not entitled to overtime pay.

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 (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.

DATE: MARCH 11, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE