ROBERT SMITH,

Grievant,

v. **Docket No. 05-42-216**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Robert Smith ("Grievant") initiated this grievance on April 19, 2005, alleging discrimination due to the receipt of overtime pay by another employee for the same duties Grievant performs as a softball coach. Grievant seeks to receive the same pay for coaching as the softball coach at Tygart Valley High School. The grievance was denied at level one on April 19, 2005, and, after a hearing conducted on May 5, 2005, at level two on June 14, 2005. Level three consideration was waived, and Grievant appealed to level four on June 23, 2005. On July 19, 2005, the parties advised the Grievance Board that they wished to have this matter decided on the record developed below. Accordingly, this matter became mature for consideration on August 15, 2005, the deadline for the parties' fact/law proposals. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence and appear to be undisputed by the parties.

Findings of Fact

1. Grievant is employed as a classroom teacher and also serves as softball coach at Elkins High School, pursuant to an extracurricular contract.

2. The softball coach at Tygart Valley High School is regularly employed as a service employee. (See footnote 2)

3. Respondent's supplemental salary schedule provides for a $1,323 annual supplement to be paid to high school softball coaches.

4. Because he is not employed in a professional capacity, the coach at Tygart Valley is paid

overtime wages during any week in which his total hours exceed 40. For the 2004-2005 school year, he received an additional $661 in overtime pay as a result of his coaching duties.

5. Since he is a professional employee and considered "exempt" from overtime pay requirements, Grievant only received the $1323 supplement for his coaching duties during the 2004-2005 school year.

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 (2004); 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). See W. Va. Code § 18-29-6.

Grievant contends that he is entitled to receive the same pay as Tygart Valley's softball coach for performing exactly the same work and that Respondent's failure toprovide him with this compensation is discriminatory. Respondent counters that it is merely following the requirements of both state and federal law, which mandate overtime pay for non-exempt employees. Grievant does not appear to dispute his own status as an exempt employee, nor does he contend that the other coach is not an employee who is entitled to overtime pay under the applicable laws.

The Federal Fair Labor Standards Act (FLSA) establishes minimum pay and maximum work hour standards for employees, and in 29 U.S.C. 8 § 213(a)(1), "any employee employed in a bona fide executive, administrative, or professional capacity" is exempted from those requirements. Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. "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." White v. Dep't of Transp./Div. of Highways, Docket No. 00-DOH- 313D (2001), citing 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; and Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).

Indeed, the United States Department of Labor ("DOL") has determined that "teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge,

and if they are employed and engaged in this activity as a teacher in an educational establishment." U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, "Fairpay Fact Sheet by Exemption," www.dol.gov/esa. There being no specific contention by Grievant that he is entitled to overtime pay under the FLSA, or that the professional exemption does not apply to him,the undersigned is unable to conclude that he is eligible for overtime pay as a result of his coaching activities. Similarly, Grievant has made no allegation that Tygart Valley's softball coach is *ineligible* for overtime pay. However, the DOL's website also advises that, when an employee "works at two or more different types of work" at differing rates of pay, but for the same employer, his or her rate of pay is averaged and the number of hours worked is combined for all jobs performed. Id., "Fact Sheet #23: Overtime Pay Requirements of the FLSA."

As to Grievant's claim of discrimination, that term is defined 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." W. Va. Code § 18-29-2(m). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]" Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added). Under the circumstances presented, Grievant has not established he is similarly situated to the employee to whom he compares himself. For salary purposes, professional and service employees are treated differently under the FLSA, a legal mandate which Respondent must follow. Moreover, it is the combination of the service employee's hours worked in his capacity as a regular employee, together with his time spent coaching, that is used to calculate his overtime wages. Therefore, Grievant cannot be compared to an employee who is performing totally different duties during the regular workday, which forms the basis for calculating overtime. Grievant has not established discrimination under the facts as presented, because he and theservice employee are not similarly situated in the eyes of the federal law regarding overtime entitlement.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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 (2004); 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). See W. Va. Code § 18-29-6.

2. Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. “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.” White v. Dep't of Transp./Div. of Highways, Docket No. 00-DOH-313D (2001), citing 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; and Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).

3. Grievant has failed to prove discrimination, because he is not similarly situated to the service employee to whom he compares himself. See W. Va. Code § 18- 29-2(m); Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004). 4. Grievant, who is a professional employee of Respondent, has failed to establish that he is entitled to overtime pay as a result of his duties as a teacher and softball coach.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Randolph County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. 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: August 31, 2005

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself at level two, and at level four he was represented by John Estep of AFT-West Virginia. Respondent was represented by Superintendent Glen Karlen.

Footnote: 2

This individual's classification was never identified, but there appears to be no dispute regarding his non-exempt status, as discussed infra.