THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT RHODES,
Grievant,

v. **Docket No. 2009-0014-MAPS**

WEST VIRGINIA DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

Grievant Robert Rhodes filed a grievance against his employer, Mount Olive Correctional Complex ("MOCC") on July 9, 2008. His statement of grievance reads:

> Exemptions do not apply to correctional officers as stated clearly in FLSA requirements - The act is discriminatory, arbitrary and capricious with specific intent to injure and or [sic] deprive an employee from equal opportunity to work overtime and to be compensated fairly and equal pursuant to existing law.
>
> For relief Grievant seeks:
>
> To be restored; made complete; made whole; made free from any act, practices or otherwise, any attempt, any state of mind, or cause of the past present, and future which are without case based upon and not governed by any fixed rule or standard or within the principle and nature of that considered only to do what law or any order prohibits - compliance to law - twice have I had to define written requirements.

A level 1 hearing was held on September 19, 2008. Upon receipt of the decision denying the grievance, Grievant appealed to level 2. A mediation was held on October 27, 2008. The case was then appealed to level 3. Grievant was represented by Jack Ferrell, Communications Workers of America, and Respondent was represented by John Boothroyd, Assistant Attorney General. The parties agreed to submit this case for decision based on the record developed below. This grievance became mature for decision on December 18, 2009, upon the parties' filing findings of facts and conclusions of law.

Synopsis

Grievant is a Correctional Officer VII and has the rank of Major. Respondent informed him that he was exempt from overtime pay based on the Fair Labor Standards Act ("FLSA"). Grievant asserts this decision is arbitrary and capricious. He argues he should receive overtime pay because he is a first responder, and the FLSA allows those classified as first responders to be paid overtime.

Respondent first asserts the affirmative defense of timeliness. As to the merits of this grievance, Respondent avers that when looking at Grievant's job duties, his primary duties are management related, and therefore, Respondent's decision to exempt Grievant from overtime pursuant to the FLSA is not arbitrary and capricious.

Respondent has not met its burden with respect to timeliness. Grievant has not met his burden of showing Respondent's decision was arbitrary and capricious. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a Correctional Officer VII and has the rank of Major at the MOCC.

2. Respondent informed Grievant on June 18, 2008, that he was considered exempt from overtime pursuant to FLSA. Grievant filed his grievance on July 9, 2008.

3. The classification specification for Correctional Officer VII states:

> **Nature of Work**
> Under limited supervision, performs administrative duties of the Chief Correctional Officer or functions in a specialized administrative capacity. The officer manages the enforcement of institution rules and regulations necessary for the control of offenders and the maintenance of public safety. The officer plans, directs and reviews the work of subordinates or performs

administrative duties related to the security or operation of a specialized unit. Performs related work as required.

Distinguishing Characteristics
Factors such as size of correctional officer complement or offender population are considered in determining assignment of a position to this rank. Holds the assigned rank of Major.

Examples of Work
Ensures security of perimeter and points of ingress/egress.
Identifies posts and ensures adequate coverage.
Ensures controls are in place regarding searches to detect and discourage the introduction, manufacturing and trafficking in contraband.
Functions as the designee for chief executive officer of the operational unit, as directed.
Maintains public safety and control of offenders through efficient management of correctional officer work force.
Conducts, assigns, supervises and/or evaluates required security audits and inspections and takes appropriate follow-up action.
Conducts, assigns, supervises and or evaluates inquiries or investigations and takes appropriate action.
Participates in or conducts segregation reviews.
Testifies at internal disciplinary hearings and in court.
Ensures monitoring of disruptive and high profile offenders.
Assists in selection, hiring and promotion of staff.
Prepares work schedules, makes required adjustments and maintains leave, overtime and attendance records.
Ensures equitable rotation of correctional officers.
Ensures subordinates complete required training.
Ensures performance evaluations are completed.
Delegates and monitors subordinates assignments.
Encourages staff mentoring, development and advancement.
Listens to problems and concerns of staff and resolves them through appropriate action.
Makes referrals to employee assistance programs.
Recommends staff commendations and disciplinary actions.
Recognizes and directs the response to potential or actual emergencies such as, but not limited to fires, physical altercations, disturbances or escapes in a manner consistent with policy, procedure and state law.
Ensures offender escort/transport security.
Ensures key and weapon control.
Handles and operates security/communications equipment and/or firearms as required and in a manner consistent with policy procedure.

Knowledge, Skills and Abilities
Knowledge of correctional security, treatment and support program operations.

Knowledge of policy directives of the agency and pertinent sections of the West Virginia State Code.
Knowledge of administrative and supervisory principles.
Ability to organize, plan, delegate and supervise to effectively utilize human and material resources.
Ability to follow and issue written and oral direction within a formal chain of command.
Ability to recognize, correctly assess, respond to and direct the action of subordinates during potential and actual emergencies such as, but not limited to fires, altercations, disturbances or escapes in manner consistent with policy and procedure which ensures public safety.
Ability to interact positively with staff, inmates and the general public.
Ability to run, jump, climb stairs and physically restrain violent residents.
Ability to safely handle and use firearms, chemical agents and mechanical restraints and to obtain certification in the use of this equipment.
Ability to conduct contraband searches according to established procedures.
Ability to use a computer terminal for entry of data by typing at a rudimentary level on a standardized format.

Minimum Qualifications/Training:
Graduation from a standard high school or the equivalent.

Experience:
Seven years of full-time or equivalent part-time paid experience as a correctional officer, probation/parole officer, military police officer, police officer, or in criminal justice or related field.

Substitution:
Successfully completed study from an accredited college or university in corrections, criminal justice or related field may substitute at the rate of thirty semester hours for each year of experience.

_____4. As Chief Correctional Officer at MOCC, Grievant is the highest ranking Correctional Officer and has charge over all the lower ranking officers. There are approximately 240 officers at MOCC.

5. Grievant's duties are primarily administrative.

6. Grievant is compensated on a salary basis and makes more than $455 per week.

7. Grievant is a point of contact for all discipline for the Correctional Officers assigned to the facility. In that position, Grievant ensures discipline given is appropriate.

8. On June 18, 2008, Grievant was informed via letter that his position was exempt from overtime.

Discussion

Timeliness

As a preliminary matter, DOH asserts this grievance is untimely. When an 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. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, 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).

W.VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee

> may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

Respondent notified Grievant that he would be classified as exempt from receiving overtime on June 18, 2008. He filed his grievance on July 9, 2008, this is within the statutory time frame. Therefore, Respondent's motion to dismiss based on timeliness is denied.

Merits

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

From the lower level record, it is difficult to discern what Grievant is arguing. The only testimony presented was Grievant's, and his testimony consisted of him providing his interpretation of the FLSA. It appears as though Grievant is asserting that, because the FLSA specifically refers to correctional officers in the first responder's section, Grievant should not be exempt from overtime pay, and Respondent's decision to deny him overtime pay is arbitrary and capricious.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*,

Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Respondent asserts it decided Grievant was exempt from overtime pay based on the executive exemption in FLSA which states:

> (a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100

Grievant, however, is saying that the first responder exemption applies to him. 29 C.F.R. § 541.3(b)(1), referred to as the first responder exemption, states:

> The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous material workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or

> supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

The FLSA goes on to state the reason these individuals are not exempt from overtime pay is because "their primary duty is not management of the enterprise in which the employee is employed." 29 C.F.R. § 541.3(b)(2).

29 C.F.R § 541.102 defines management as:

> Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked, and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Clearly, Grievant is considered "management" under this definition. He oversees the functioning of all the correctional officers at MOCC. The Grievant has the ability and responsibility to review the work of correctional officers and make recommendations regarding how the work is being carried out. He also has the responsibility for reviewing correctional officer conduct and performance and determining whether any action, including disciplinary action, is necessary.

It is not arbitrary and capricious for Respondent to review its overtime policy and change it to conform with the FLSA. Grievant has not met his burden of proof on this issue.

Grievant has also alleged Respondent's actions are discriminatory. Because he presented no evidence on this issue, it is considered waived and will not be discussed in this decision. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

Because Grievant has not his burden of proof in this matter, this grievance is DENIED.

Conclusions of Law

1. When an 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. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, 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).

2. Respondent did not meet its burden of proving the grievance was filed outside the statutorily prescribed time.

3. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough

evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Pursuant to the FLSA, management is exempt from overtime pay.

6. Grievant did not meet his burden of proving that Respondent's decision to follow the FLSA and exempt his management position from overtime was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 23, 2010

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Wendy A. Elswick
Administrative Law Judge