THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KENDAL ASHWORTH,
Grievant,

v. **Docket No. 2009-1069-DOT**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/DIVISION
OF HIGHWAYS,
Respondent.

DECISION

Grievant Kendal Ashworth filed a grievance against his employer, Division of Highways, on December 13, 2009. The statement of grievance reads, "Not paid overtime worked." For relief Grievant seeks, "Backpay with interest, and to be made whole."

This case was dismissed at the level one hearing due to Grievant's failure to appear. The level one hearing was scheduled for May 1, 2009. Grievant's representative appeared, but Grievant inadvertently got the date wrong and believed the hearing to be on the following Friday. Grievant's representative called him, but the grievance evaluator dismissed the grievance because there was no response given to his show cause order. Respondent filed a Motion to Dismiss upon learning Grievant had appealed to level two.[1] The Motion was mailed on May 26, 2009. Mediation was held in this case on August 20, 2009. A level three hearing was held at the Grievance Board's Charleston office on December 4, 2009. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Barbara Baxter, Esq. This case became mature after the hearing, as the parties declined to file proposed findings of fact and conclusions of law.

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[1]Respondent's Motion to Dismiss will be ruled upon in the discussion section of this Decision.

Synopsis

Grievant went from being paid on an hourly basis to being a salaried employee. Grievant avers the hourly rate for his overtime is incorrect, and therefore, he has not been paid appropriately for the overtime worked.

Respondent argues that there are two types of hourly wages, an annual hourly wage and an hourly rate for each pay period. Respondent asserts because the various pay periods for state employees vary on the issue of work hours, the hourly rate for the pay period will be different. Respondent avers Grievant is paid time and a half for overtime, and that time and a half rate is based on Grievant's yearly average hourly rate. Therefore, Grievant has been paid appropriately.

Grievant has failed to meet his burden of proof. This grievance is denied.

Findings of Fact

1. Grievant is employed by Respondent.

2. Grievant was originally classified as a Transportation Crew Supervisor, and was paid hourly.

3. Sometime around the fall of 2007, Grievant was reclassified to the position of a Transportation Crew Supervisor 1, and became a salaried employee.

4. Grievant is occasionally required to work overtime. He is paid time and a half for overtime.

5. To be paid for overtime, Grievant must physically work over 40 hours per week.

6. Grievant is paid twice a month, once at the middle of the month and again at the end of the month.

7. The number of working hours in a pay period vary depending on the number of working days in the pay period.

8. The yearly hourly wage is calculated by the average of wages for the year.

9. There is also an hourly wage for each pay period. This hourly wage is determined by taking the employee's monthly salary and dividing it by two. That number is then divided by the number of hours in the pay period. Because the number of hours in a pay period fluctuate, the hourly rate per pay period will vary.

10. Grievant is paid time and a half for overtime work. That rate is based on the average hourly rate for the year.

11. Grievant was paid overtime based on his yearly hourly rate.

Discussion

Motion to Dismiss

Respondent's Motion to Dismiss is based on the fact that this grievance was dismissed at level one because Grievant failed to appear. The level one evaluator then entered a show cause order that was not answered by Grievant. However, Grievant's representative, who was present at the level one hearing, indicated on the record at level three that he called Grievant and learned Grievant had inadvertently calendared the hearing for the wrong date. The undersigned does not know whether this information was provided to the level one evaluator. Regardless, because this was an inadvertent error, Respondent's Motion to Dismiss is denied.

Merits

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts he is not being paid accurately for the overtime he has worked. Grievant has gone from an hourly employee to a salary employee. He decided to file this grievance when he looked at his pay stubs and noticed a difference in his gross and net pay.

Grievant is paid on the either the 15th or the 16th and the 30th or the 31st of each month. If payday should fall on a weekend or holiday, he is then paid the working day before. For this reason, the number of hours in a pay period could fluctuate dramatically. Grievant's hourly rate is determined each pay period by dividing his monthly salary by two and then dividing that number by the number of hours in the pay period. Because the number of hours in a pay period is fluid, Grievant's hourly salary for the pay period is also fluid. This hourly rate is used if Grievant has extra straight time for which he needs compensated. For example, if Grievant works Monday through Wednesday eight hours

each day, and then takes eight hours of vacation on Thursday, works eight hours on Friday, but then is called out for eight hours on Saturday, the eight hours of work on Saturday is not paid at time and a half. Instead, it is paid at straight time pay, as Grievant must actually work 40 hours to receive time and a half. The eight hours for Saturday would be paid at his hourly rate of pay for that pay period.

There is an average hourly rate for the year, and time and a half is based on that hourly rate. For example, if Grievant worked eight hours a day Monday through Friday, he would have worked 40 hours that week. If he were called out on Saturday and worked for eight hours, he would be compensated at time and a half based on the average hourly rate for the year.

It is completely understandable that Grievant would look at his check and be confused at seeing a different amount each payday. It is a very difficult and complex system, yet it is one that appears to have paid Grievant exactly what he was owed for the work he accomplished each pay period. Grievant has failed to meet his burden of proof in this matter. Therefore, this grievance is DENIED.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant did not meet his burden of proof in this matter.

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: March 24, 2010

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Wendy A. Elswick
Administrative Law Judge