THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLEN BLON, et al.,
Grievants,

v. **DOCKET NO. 2011-1492-CONS**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievants, Glen Blon, Sr., and Glen Blon, Jr., each filed a grievance against their employer, West Virginia University, on April 18, 2011, contending generally that overtime pay has been improperly calculated, and seeking to have hours worked on a holiday included in the calculation of overtime hours, as has been done in the past.[1] William Exline filed a similar grievance on May 18, 2011, and Ron Lemley did likewise on May 25, 2011. The grievances were consolidated, and were dismissed at level one as untimely filed by Order dated August 25, 2011. A hearing was not held at level one prior to this ruling, and no evidence was taken on these grievances at any time. Grievants appealed to level two on or about September 2, 2011.

On or about September 16, 2011, Glen Blon, Sr., Glen Blon, Jr., and William Exline each filed a grievance against their employer, West Virginia University, contending generally that overtime pay has been improperly calculated, and seeking to have hours

[1] The statement of grievance for each grievance filed is quite lengthy and will not be reproduced here. The statements of grievance contained claims of discrimination which were not addressed in Grievants' Proposed Findings of Fact and Conclusions of Law, and are deemed abandoned.

worked on a holiday included in the calculation of overtime hours, as has been done in the past. On September 21, 2011, Michael Moneypenny filed a similar grievance against his employer, West Virginia University. On or about October 10, 2011, Glen Blon, Sr., Glen Blon, Jr., William Exline, and Michael Moneypenny filed nearly identical grievances against Respondent. These eight grievances were consolidated, and two days of hearing were held at level one on November 18, 2011, and February 17, 2012. Grievants' counsel at level one, Kathleen Abate, Esquire, advised the level one grievance evaluator on the first day of hearing that the grievances filed in September were being withdrawn, and the parties stipulated that the grievances filed on or about October 10, 2011, were timely filed. The consolidated grievance was denied at level one on March 9, 2012. Grievants appealed to level two on or about March 12, 2012.

All the grievances were consolidated at level two, and a mediation session was held on August 23, 2012. Grievants appealed to level three on or about August 29, 2012. After the level three hearing was set, the parties agreed to submit this matter for decision based on the record developed at level one. Grievants are represented at level three by Vincent Trivelli, Esquire, and Respondent is represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on April 1, 2013.

Synopsis

Grievants alleged that new guidelines for the calculation of overtime were in conflict with WVU Policies on overtime, and that hours they worked on holidays should be included in the calculation of overtime, as had been done in the past. Grievants did not demonstrate that such a conflict exists. Grievants are paid at the rate of time-and-one-half

for hours actually worked on a holiday, the same rate they are paid for overtime hours worked, which is the rate of pay prescribed for overtime. Grievants did not demonstrate that Respondent's new Guidelines are in violation of any law, rule, regulation, or policy.

The following Findings of Fact are made based on the evidence presented at level one.

Findings of Fact

1. Grievant Blon, Sr., is employed by Respondent, West Virginia University ("WVU"), as a Trades Specialist Lead II in the Physical Plant, Unit 35, and is required to work on some holidays. He worked 8.75 hours on the Labor Day holiday, September 5, 2011, and during the week of September 4 through 10, 2011, he worked 55.25 hours. Grievant Blon, Sr., was paid time-and-a-half holiday pay for the 8.75 hours he worked on Labor Day, and he was paid for 5.5 hours of overtime.

2. Grievant Blon, Jr., is employed by WVU, as a Trades Specialist II in the Physical Plant, Unit 35, and is required to work on most holidays. He worked 12 hours on the Labor Day holiday, September 5, 2011, and during the week of September 4 through 10, 2011, he worked 55 hours. Grievant Blon, Jr., was paid time-and-a-half holiday pay for the 12 hours he worked on Labor Day, and he was paid for 3 hours of overtime.

3. Grievant Exline is employed by WVU as a Trades Specialist II in the Physical Plant, Unit 35, and is required to work on some holidays. During the week of September 4 through 10, 2011, Grievant Exline worked 41 hours. He was paid time-and-a-half as holiday pay for 8 hours worked on the Labor Day holiday, September 5, 2011, but he was not paid overtime for the 1 hour worked over 40 hours for the week.

4. Grievant Moneypenny is employed by WVU as a Trades Specialist II in the Physical Plant, Unit 35, and is required to work some holidays. During the week of September 4 through 10, 2011, he worked 56.5 hours. He was paid time-and-a-half as holiday pay for the 7 hours he worked on the Labor Day holiday, September 5, 2011, and he was paid for 9.5 hours of overtime. He was not paid overtime for the remaining 7 hours he worked over 40 hours for the week.

5. Grievants Blon, Sr., Blon, Jr., Exline, and Moneypenny are all non-exempt, benefits-eligible, full-time employees.

6. The record does not reflect the status of Grievant Lemley's employment, as no evidence was taken with regard to Grievant Lemley's grievance.

7. WVU has in place Guidelines for Handling and Processing Compensation for Working on a Holiday, revised October 30, 2009, and signed May 28, 2010. The Guidelines state that,"[b]enefits-eligible employees receive regular (i.e., straight time) pay for the holiday. A full holiday for a 1.0 FTE [full-time equivalent] employee is 7.5 hours." The Guidelines further state that when a non-exempt benefits-eligible employee is required to work on a holiday, the employee will be compensated as follows:

> . Will receive regular holiday pay based on FTE plus additional compensation at a rate of one and one-half (1.5) times the regular rate of pay for actual hours worked on the holiday; OR compensatory time off (CTO) calculated at a rate of one-and-one-half (1.5) times actual hours worked on the holiday.
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> . . .
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> . Actual hours worked on a holiday are excluded from any calculations for overtime for the remainder of the workweek.

(Footnote omitted.) These Guidelines were put in place in anticipation of a new time keeping system, and were first implemented in November 2010. Prior to this, hours worked on a holiday were included by WVU in the calculation of overtime pay.

8. Policy WVU-HR-55 addresses compensation of employees when they are required to work on a holiday, and provides, in pertinent part: "[i]f the employee is non-exempt, compensation in the form of substitute time off (STO) or additional pay at the rate of one-and-one half (1 ½) for actual hours worked on the holiday will be granted."[2]

9. Policy WVU-HR-31 provides, in pertinent part: "[o]nly actual hours worked beyond forty (40) within a workweek by a non-exempt employee qualify as overtime. Work release time and absences charged to leave accruals during the workweek are not calculated as actual hours worked for overtime. Overtime must be compensated: in wages at the rate of one and one-half (1 ½) the employee's regular rate of pay; or, in compensatory time off (CTO) at the rate of one and one-half (1 ½) the time worked over forty hours. Time worked between 37.5 and 40 hours within a workweek by a non-exempt employee must be compensated at the employee's regular hourly rate of pay."

Discussion

Respondent filed a Motion to Dismiss Grievant Lemley from this grievance, asserting his grievance was untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

[2] It appears from the record that an employee who must work on a holiday is also compensated for an additional 7.5 hours at his regular rate of pay.

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Grievant Lemley argued that he thought the payroll department had simply made an error on his paycheck which would be corrected, and that he filed his grievance as soon as he became aware that the reason his paycheck was less than anticipated was because of a change in the way overtime was calculated. Grievant Lemley further asserted that he filed his grievance when he became aware that he would have to work the Memorial Day holiday. As there is no evidence in the record with regard to Grievant Lemley, the undersigned has no basis upon which to dismiss his grievance as untimely filed.[3]

Grievants have the burden of proving their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov.

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[3] Given the outcome, it is unnecessary to address whether the grievances filed by the other Grievants in April and May of 2011 were untimely filed.

29, 1990). *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). "The 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).

Grievants argue that WVU Policy WVU-HR-55 requires that they be paid "at the rate of one-and-one-half times their normal hourly rate of pay for all hours actually worked in excess of 40 in a week," and that the new Guidelines are in conflict with the WVU Policy that has been applied for years to include hours worked on a holiday in the overtime calculation.[4] Respondent argued the new Guidelines are not in violation of any law, rule, regulation, or policy.

Grievants were paid at the rate of time-and-a-half for all hours worked over 40 in the week at issue, as is required by the WVU Policies at issue in this grievance. They were paid at the rate of time-and-a-half for the holiday they worked, whether it was called overtime or holiday pay. While it is understandable that Grievants are unhappy with the change in practice, Grievants have not demonstrated that the new Guidelines are in fact in conflict with the WVU Policies in place. Neither Policy cited in the Findings of Fact above addresses whether hours actually worked on a holiday are to be included in the calculation of overtime. WVU is not bound to continue to follow a practice simply because that is the way they have always done things, absent some violation of law, rule, regulation,

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[4] Grievants do not allege that the manner in which Respondent is calculating overtime violates the Fair Labor Standards Act. Accordingly, the undersigned will not address this issue.

or policy. *Bolton, et al. v. Barbour County Bd. of Educ.,* Docket No. 06-01-412 (Feb. 8, 2007). No such violation has been demonstrated here.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

3. Grievant Lemley's grievance was timely filed.

4. Grievants have the burden of proving their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

5. Grievants did not demonstrate that Respondent has violated any law, rule, regulation, or policy.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: May 13, 2013