

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NEAL CORCORAN,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 86-0175-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(c), Stats. of respondent's decision of appellant's noncontractual grievance. On February 5, 1987, the Commission overruled respondent's objection to subject matter jurisdiction. At a prehearing conference held on March 11, 1987, the parties stipulated as follows:

The parties agreed that since the facts appeared to be undisputed, a hearing could be waived and this matter could be submitted on briefs on the following issues:

Whether the respondent's decision to give appellant compensatory time off instead of pay for the hours in question constituted an abuse of discretion in applying Subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, the rules of the secretary promulgated under ch. 230, Stats., or written agency rules, policies, or procedures; and, if so, what is the remedy, if any.

Mr. Corcoran indicated at the prehearing conference that "his arguments are already set forth in his appeal and the documents submitted by letter of January 6, 1987...." Respondent submitted a brief on the merits on April 14, 1987, and appellant did not reply.

The following findings are based on documents submitted by the parties, and do not appear to be in dispute.

FINDINGS OF FACT

1. The appellant at all relevant times has been employed at the Wisconsin Correctional Institution (WCI), Waupun, in the position of recreation director, with permanent status in the classification of Recreation Director. This position is unrepresented -- i.e., not part of a collective bargaining unit.

2. On August 14, 1986, appellant submitted at the first step a noncontractual grievance concerning payment of overtime for extra hours he worked during the period July 31, 1986 - August 2, 1986, during a lockdown. The full text of the grievance and the employer's decision at steps one - three is as follows:

a) FIRST STEP

I was assigned to the kitchen during WCI lockdown. My duties were cleaning pots & pans. I worked with 3 teachers assigned to the same duties (F. Sieracki, J. Vail, N. Lehner). All teachers were paid for the hours worked over the normal 40 hours. From 07/31/86 thru 98/02/86 I worked 20 hours overtime. On leave balance statement I received 08/14/86, I have been granted compensory [sic] time.

Relief Sought:

I wish to be paid for the hours I worked. I supervised no one and was assigned out of my normal work area.

Employer's Decision:

Per memo of G. Weeks of 7/31/86 on overtime, Supervisory Employee's were to Receive Compensatory Time Off, per page 2, Paragraph 9 -- Thus; Grievance Denied [dated August 15, 1986]

b) SECOND STEP

I was assigned to the kitchen during WCI lockdown. My duties were cleaning pots & pans. I worked with 3 teachers assigned to the same duties (F. Sieracki, J. Vail, N. Lehner). All teachers were paid for the hours worked over the normal 40 hours. From 07/31/86 thru 98/02/86 I worked 20 hours overtime. On leave balance statement I received 08/14/86, I have been granted compensory [sic] time.

Relief Sought:

I wish to be paid for the hours I worked. I supervised no one and was assigned out of my normal work area. Memo of Glenn Weeks of 07/31/86 on overtime, paragraph 9, page 2 did not apply to me during this emergency lockdown period as I was directed to do same duties as paid teachers.

Employer's Decision:

The State of Wisconsin Compensation Plan allows for professional supervisory employees to be compensated in cash or equivalent time off for overtime work. It was Management's decision in the above cited circumstances to grant equivalent time off on an hour for hour basis. [dated August 26, 1986]

c) THIRD STEP

I was assigned to the kitchen during WCI lockdown. My duties were cleaning pots & pans. I worked with (3) teachers assigned to the same duties (F. Sieracki, J. Vail, N. Lehner). who were paid for the hours worked over the normal 40 hours. From 07/31/86, thru 98/02/86 I worked 20 hours overtime. On leave balance statement I received on 08/14/86, I have been granted compensatory time.

Relief Sought:

I wish to be paid for the overtime hours I worked. I supervised no one during this period and was assigned out of my normal work area. I wish to be treated equally for duties performed.

Employer's Decision:

We concur [sic] with the answer that you received at the second step of this grievance. Grievance denied. [dated September 25, 1986]

3. The July 31, 1986, memo of Glenn Weeks referred to above contains, in pertinent part, the following:

RE: OVERTIME RULES

Guidelines for overtime payments and compensatory time earned are as follows:

\* \* \*

9. When employes in Professional Supervisory and Professional Confidential Supervisory position who are assigned to pay range 1-15 or lower are directed by their appointing authority to work overtime in order to supervise employes who are being paid in cash or compensatory time off for overtime hours shall be compensated on an hour-for-hour basis in equivalent time off.

\* \* \*

SUPERVISORY CATEGORIES

CLASSIFICATION

CATEGORY

\* \* \*

Recreation Director

Professional

4. In addition to the foregoing grievance, the appellant participated in a group "complaint" to the WCI Superintendent, Warren Young, which was filed on August 19, 1986. This document objected to the categorization of a number of positions, including complainant's, as "professional" in the context of overtime administration. The "complaint" alleged that said categorization was contrary to the criteria set forth in the State of Wisconsin Personnel Manual Chapter 516, Administration of the FLSA Overtime Provisions for State Classified Employees.

5. Supt. Young responded by memo of August 27, 1986, that the challenged categorizations had been made by the Department of Employment Relations (DER), and if the complainants wished to pursue the matter, they should do so with Barbara Horton, Administrator, Division of Classification and Compensation, DER.

6. The complainants, including appellant, subsequently pursued the matter with Ms. Horton, and she issued a decision on November 4, 1986, holding that, based on their position descriptions, they were properly exempt from overtime compensation requirements of the Fair Labor Standards Act (FLSA), as meeting the duty and discretion tests for "executive" and "administrative" positions (appellant's position fell in the latter category).

7. On December 5, 1986, appellant submitted a complaint to the U.S. Department of Labor which set forth his disagreement with the aforesaid decision by Ms. Horton, and which contained, in part, the following:

I do concur that the job classification of Recreation Director does meet the duty and discretion test... for an executive employee. However, I disagree that it meets the requirements of Subchapter 516-020 paragraph B-2, the salary basis test, which must be met to establish an exemption from the overtime provision of the Federal Fair Labor Standards Act. In addition, from July 30, 1986 thru August 9, 1986, the Waupun Correctional Institution and the State of Wisconsin blatantly discriminated against me by

paying the premium rate of time and one-half to those supervisors who were listed on the Personnel Manager's memo... as non-professional. Yet each and every one of those non-professional supervisor classifications as listed meets the duty and discretion test of an executive supervisory employee.

8. On September 18, 1986, appellant requested of management that he be permitted to carry forward to July 1, 1987, his compensatory hours earned since April 15, 1986, or until a disposition was reached on his challenge to the denial of salary payment for the overtime hours worked during the lockdown.

9. Management denied this request and appellant was required to utilize those hours in 1986.

10. The State of Wisconsin Personnel Manual, Chapter 516, Administration of the FLSA Overtime Provisions for State Classified Employees

(Respondent's Exhibit 1), contains, in part, the following provisions:

516.080 Employees Occupying Multiple Positions

A. Categorizing Employees as Exempt or Nonexempt

1. Unless a joint employment situation exists, employee categorization must be based on the total employment situation with a single agency. In a joint employment situation, employee categorization must be based on the total employment situation with the jointly employing agencies.
2. In evaluating the total employment situation, appointing authorities should evaluate all work performed (for the agency or in a joint employment situation) during the work week or work period. The percentage of time spent performing nonexempt work is important in determining the exempt or nonexempt status of an employee who performs both exempt and nonexempt work. See 516.020 B. (executive, professional and administrative exemptions) and C. (special types of exempt employees) for clarification of how to categorize an employee engaged in both exempt and nonexempt work. The position occupied at the time each duty was performed is not relevant. An employee could be exempt even if one job is as an LTE if the employee's salary from the permanent job meets both the minimum salary and the salary basis tests and if the percentage of exempt work performed by the employee in both jobs is sufficient to meet the duty and discretion test.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(c), Stats.
2. The complainant has the burden of proof.
3. The complainant has satisfied his burden of proof.
4. The respondent's decision to give appellant compensatory time off instead of pay for the hours in question on the bases stated in the decision of his grievance constituted an abuse of discretion in applying the State of Wisconsin Personnel Manual, chapter 516, Administration of the FLSA Overtime Provisions for State Classified Employees.
5. The appropriate remedy is to remand this matter to the respondent to make a determination as to appellant's status as exempt or nonexempt during the period in question in accordance with §516.080 A. of the foregoing manual.

DISCUSSION

It is important to keep in mind that the extra hours appellant worked during the lockdown triggered two separate proceedings by the appellant:

1) A "complaint" was submitted to Superintendent Young, Administrator Horton, and the U.S. Department of Labor. This proceeding, which is not before the Commission on this appeal, primarily has to do with the relatively broad issue of whether appellant's position should have been placed in the professional, exempt category.

2) A non-contractual grievance was pursued through three steps within DHSS and then appealed to this commission. This has to do with the matter of appellant's entitlement to be paid for the extra hours he worked during the lockdown. The basis for the grievance is appellant's assertion that during this period he worked outside his usual assigned duties, he did the same work as three teachers, and he supervised no one.

Since the broader question set forth in paragraph 1) was not raised in the noncontractual grievance, it appears to be pending in front of the U.S. Department of Labor, and the appellant has not sought to argue it here, the commission will not address it.

With respect to the narrower question of appellant's status during the 20 hours worked during the lockdown, the Commission determines there was an abuse of discretion in the application of the policy on the administration of overtime as set forth in the State of Wisconsin Personnel Manual.

In his grievance, appellant alleged that during the lockdown he was assigned duties (cleaning pots and pans) outside his usual assigned duties, that he did the same work as certain teachers, and that he supervised no one.

The employer's response at step one merely adverted to paragraph nine of Mr. Weeks' July 31, 1986 memo in denying the grievance. However, the response as stated essentially begged the question presented, since the memo by its terms only applied to employes who were assigned to supervise certain categories of other employes, and appellant alleged he supervised no one.

Management's decision at the second step to deny the grievance was stated as follows:

The state of Wisconsin Compensation Plan allows for professional supervisory employees to be compensated in cash or equivalent time off for overtime work. It was management's decision in the above cited circumstance to grant equivalent time off on an hour for hour basis.

This decision again failed to address the basis of appellant's grievance.

At the third step, management simply confirmed without elaboration the prior disposition of the grievance.

If the respondent had addressed the basis of appellant's grievance, it is possible he would have been determined to have been in a non-exempt status during the period in question. The appellant's position on the grievance may be construed in legal effect as an agreement that during the lockdown he was given a de facto acting assignment to a different position (presumably a de facto position) in food service. The overtime policy appears to contemplate that where an employe is assigned to multiple jobs, the entire situation must be analyzed each pay period to determine his or her status:

576.080 A.

2. In evaluating the total employment situation, appointing authorities should evaluate all work performed (for the agency or in a joint employment situation) during the work week or work period. The percentage of time spent performing nonexempt work is important in determining the exempt or nonexempt status of an employe who performs both exempt and nonexempt work. See 516.020 B. (executive, professional and administrative exemptions) and C. (special types of exempt employes) for clarification of how to categorize an employe engaged in both exempt and nonexempt work. The position occupied at the time each duty was performed is not relevant. An employe could be exempt even if one job is as an LTE if the employe's salary from the permanent job meets both the minimum salary and the salary basis tests and if the percentage of exempt work performed by the employe in both jobs is sufficient to meet the duty and discretion test. (emphasis added)

There is nothing in this policy that would prohibit a change in an employe's status for a limited period when he or she was assigned on a temporary basis to different duties.

Given the foregoing and the way in which the respondent answered the grievance, it must be concluded the respondent abused its discretion in its application of the overtime policy to the appellant's grievance, which involved denying his grievance without addressing a potentially valid argument involving appellant's temporary assignment to other duties.

Because of the manner in which the respondent decided the grievance, and the nature of the record before the Commission, the question of whether appellant was entitled to have been in a nonexempt status during the period in question cannot be answered. The matter will be remanded to the respondent for further proceedings on the grievance and to decide whether appellant was entitled to cash compensation for the period in question based on the arguments contained in his grievance, discussed above.

To avoid possible confusion, the Commission addresses two additional matters.

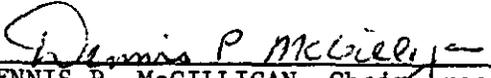
First, in light of the Commission's approach to this case, it has not reached respondent's argument that in no event is appellant entitled to further compensation, since he has already utilized compensatory time off for the 20 hours in question.

Second, in the opinion of the Commission, this decision is a final resolution of this appeal, and in the event appellant should desire to contest further action by respondent on his grievance, he should pursue independently any remedies at that time.

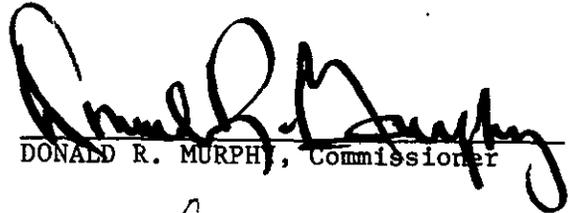
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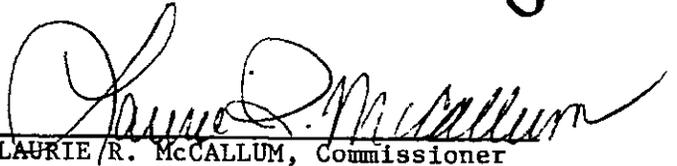
This matter is remanded to the respondent for further proceedings not inconsistent with this decision.

Dated: April 29, 1987 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

AJT:jmf  
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DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

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