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DONALD R. HOLT, et al.,

Appellants,

v.

SECRETARY, Department of
Transportation,

Respondent.

Case No. 76-88

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OFFICIAL

OPINION AND
ORDER

Before: James R. Morgan, Calvin Hessert, and Dana Warren, Board Members.

NATURE OF THE CASE

This matter is before the Board pursuant to §16.05(7), Wis. stats. as an appeal of a non-contractual grievance at the fourth step. At the first prehearing conference the parties stipulated to the following issues:

- "1. Whether the appeal to the Personnel Board from the third step denial of the grievance was filed in a timely manner.
- 2. Whether the Board has jurisdiction to hear this appeal.
- 3. Whether or not the rule which exempted grievants from entitlement to hourly pay for overtime and which became effective February 1, 1976, is arbitrary and capricious and unwarranted by law.
- 4. In the event that the Board should find the rule in question not to be arbitrary or capricious and not to be unwarranted by law, whether or not the Department of Transportation has the right to utilize such supervisory personnel as grievants who now have exempt status in job responsibilities which are compensable at premium pay rates."

At a subsequent prehearing conference the issues were clarified by the appellants as follows:

"Appellant stated that the issues attacked the rule (§Pers. 5.06(2)(g), W.A.C.) itself as being arbitrary and capricious and the practice of using salaried personnel to perform duties and responsibilities of personnel who are paid hourly wages and not compensating the salaried personnel at the same overtime rate received by hourly personnel as also being arbitrary and capricious.

FINDINGS OF FACT

1. The appellants at all relevant times have been employed by the respondent DOT as State Patrol Sergeants.
2. From approximately 1968 to February 1, 1976, overtime pay at the rate of $1\frac{1}{2}$ times the base pay was available to sergeants.
3. As a result a change in departmental policy reflected in Transportation Administrative Manual (TAM) 404-2, effective February 1, 1976, sergeants became exempt from the payment of any overtime at either time and one-half or straight time, although there were provisions for certain allowances of what amounts to compensatory time off, and for payment of up to 8 hours overtime at a straight time basis for work on a regularly scheduled day off or under certain emergency situations.
4. This change has resulted in a decrease in the total amount of salary paid appellants who now work some hours in excess of 40 per week for which they receive no specific monetary compensation beyond base pay.
5. Because of the nature of the sergeants' duties and responsibilities it is difficult but not impossible to take this "compensatory" time off.
6. There are other exempt employes in the DOT who work on an emergency basis and all exempt employes are subject to the same policy on overtime as are the sergeants.
7. As a result of the DOT change in overtime pay policy, in an appreciable number of instances sergeants working overtime are being paid less than subordinate troopers working overtime.
8. As another result of the DOT change in overtime pay policy, the morale of an appreciable number of sergeants had dropped and their performance has been adversely affected.

9. As another result of the DOT change in overtime pay policy, there has been some lessening of interest in advancement to the sergeant classification.

10. This appeal was filed within 15 work days of the denial of the grievance at the third step as is required by the non-contractual grievance procedure.

11. The grievances at the departmental level did not raise the issue identified as #4 above, or as modified in the subsequent prehearing conference.

CONCLUSIONS OF LAW

1. The Personnel Board has jurisdiction over issue #3 (as clarified) of this appeal pursuant to §16.05(7), Wisconsin statutes.

2. The rule which exempted the appellants from entitlement to certain hourly pay for overtime and which became effective February 1, 1976, is not arbitrary and capricious and unwarranted by law.

3. Section Pers. 5.06(2)(g), Wis. Adm. Code, is not arbitrary and capricious.

OPINION

With respect to the question of the timeliness of this appeal, the respondent DOT withdrew its objection on this score in a prehearing brief. Also in that brief the respondent DOT conceded jurisdiction as to the initial issue #3 but argued no jurisdiction as to issue #4. The subject matter relative to issue #4 was never raised during the first 3 steps of the grievance and is not fairly subsumed by issue #3 or the grievance presented by the first 3 steps. Therefore, the Board lacks subject matter jurisdiction over this issue.

With respect to the substantive issue, #3 (as clarified at the second prehearing conference), it is clear that reasonable people could differ as to the wisdom of the respondents' policies, as they affect the appellants. However, the appellants on this appeal have the burden of proof, and the Board is unable

to conclude that there was arbitrary and capricious action by the respondents. The legislature left the determination of exempt employes to the discretion of the director. See §16.086(6), Wisconsin statutes:

"Provisions relating to compensation for hours of work in addition to the standard basis of employment under §16.30(5)(a) shall be provided for in the rules of the director. Employes shall be compensated in cash or time off for additional hours of work at the rate of one and one-half times the regular rate, except for employes in positions specifically exempted by the rules of the director."

In determining which employes are exempt, the respondents obviously must draw lines. While one can debate the merits of the lines drawn here, the issue in this case, again, is whether there was arbitrary and capricious action, not whether the Board agrees or disagrees with the management decisions involved.

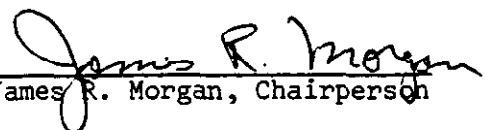
There was considerable discussion of the effectuation of the Fair Labor Standards Act and the supreme court decision on its unconstitutionality. Since the respondents at all times had a basis for their actions under state law and independently of the FLSA, the supreme court's decision does not make the state's posture arbitrary and capricious.

ORDER

The respondents' position on this grievance is sustained and this appeal is dismissed.

Dated: May 18, 1978

STATE PERSONNEL BOARD


James R. Morgan, Chairperson