BILLY PRATER,

Grievant,

v.

DOCKET NO. 96-DOH-350

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Billy Prater, filed this grievance on September 18, 1995, as follows:

> Alone on job site for 50 minutes, and no transportation remainder of day.

The relief sought is “[T]hat this practice cease and to be made whole in every way.” Following adverse decisions at the lower levels, Grievant appealed to level four on August 13, 1996. A hearing was scheduled for October 21, 1996, but on October 10, 1996, Grievant requested this matter be decided on the record developed at the lower levels. Thereafter, this matter became mature for decision on October 29, 1996, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

Based upon a review of the lower level record, the undersigned hereby adopts and sets forth below the level three grievance evaluator's findings of fact.

Findings of Fact

1. The Grievant works for the Division of Highways, District Two at Organization 0230, Mingo County, Gilbert substation. He is classified as a Highway Transportation Worker II, Equipment Operator.

2. On September 15, 1995, the Grievant was assigned to a grading job in the Justice area. The Grievant, who was operating the grader, and two other employees were at the job site most of the day with only a grader for transportation. The dump truck which provided transportation to the job site was being used to haul stone to the job site. This was a round trip of approximately forty-five (45) minutes. The job site was approximately a ten (10) minute walk from the nearest commercial business.

3. Safety and the availability of restroom facilities are the major concerns of the Grievant when employees are on the job under these and similar circumstances.

4. Although the Grievant has not been in these circumstances since September 15, 1995, there have occasionally been other similar situations involving other employees.

5. Two pickups, including a crew cab and two dump trucks are used for transportation to the Gilbert substation. The unavailability of transportation for the crews occurs primarily when equipment is in need of repair and unsafe to operate. Repairs are not always performed in a timely manner. Inadequate transportation is further complicated when several Community Work Experience Program ("CWEP") workers are added to the normal crews, ten to twelve working days each month.

6. There is a radio in the pickup which is used by Joe Hatfield, Area Maintenance Manager, and would not normally be on a job site for any length of time. The only other radio at Gilbert is assigned to the grader and this radio is inoperable. Due to themountainous area around Gilbert, radio contact with the main Headquarters at Miller's Creek or another vehicle is unreliable.

Discussion

There is no dispute that in performing road maintenance where the job site changes daily, the County Superintendent and other management must always be concerned with the proximity to first aid, medical help and the availability of restroom facilities. The construction industry is governed in part by the Occupational Safety and Health Administration ("OSHA") which has promulgated regulations regarding medical services and first aid, and sanitation. Specifically, 29 C.F.R. § 1926.50 provides that "[p]rovisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury." 29 C.F.R. § 1926.51 provides that "[t]oilets shall be provided for employees. . .", and "[u]nder temporary field conditions, provisions shall be made to assure not less than one toilet facility is available." However, that provision also makes an exception that the

requirements for providing sanitation facilities “shall not apply to mobile crews having transportation readily available to nearby toilet facilities.” The Division of Highways does not have any internal policy concerning the availability of transportation for work crews at job sites.

It is apparent from the testimony of the witnesses that, on occasion, there is inadequate transportation equipment available when one or more pickup trucks are in need of repairs. This is further complicated when CWEP workers are added to the normal crews with no additional transportation equipment to accommodate them. The Gilbert substation has a problem with the condition of its equipment and the time it takes to complete repairs. The ability to promptly repair inoperable equipment is important, not only for properperformance of maintenance activities, but also to ensuring the health, safety and well being of the maintenance crews.

The testimony presented established that although there was no pickup truck available on September 15, 1995, the grader could have been used for transportation in case of emergency. The job site was relatively close to a populated area. Also, there were two other co-workers with Grievant at the job site who could have provided assistance if necessary. There is no question the circumstances involving Grievant on September 15, 1995, were not ideal, and Respondent is hereby strongly encouraged to follow the recommendation made by the level three grievance evaluator that the District Engineer review the equipment assignment at the Gilbert substation to determine if existing equipment could be replaced with newer and/or more reliable equipment. However, with respect to his request that “this practice cease and to be made whole in every way”, Grievant has failed to assert any legal right to any remedy available by law. Even if Respondent had violated the above-cited OSHA regulations, the penalty undoubtedly would be a civil money penalty imposed on Respondent by OHSA, not some monetary or equitable remedy available to Grievant through the grievance process. Relief which is speculative in nature or if granted would result in a mere advisory opinion is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988).

Conclusions of Law

1. In a non-disciplinary matter, Grievant must prove his case by a preponderance of the evidence. W. Va. Code § 29-6A-1, et seq. 2. 29 C.F.R. § 1926.51 provides that “[t]oilets shall

be provided for employees. . .", and "[u]nder temporary field conditions, provisions shall be made to assure not less than one toilet facility is available." Section 1926.51(c)(4) provides, "[t]he requirements of this paragraph (c) for sanitation facilities shall not apply to mobile crews having transportation readily available to nearby toilet facilities."

3. 29 C.F.R. § 1926.50(b) states that "[p]rovisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury."

4. Grievant has failed to establish that the above provisions were violated by Respondent on September 15, 1995.

5. Relief which is speculative in nature or if granted would result in a mere advisory opinion is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988).

6. Grievant has failed to establish any legal right to any remedy available at law.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 14, 1997