JARRELL CHANEY, et al.,

Grievants,

v.

DOCKET NO. 99-DOH-301

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, (See footnote 1) employees of the West Virginia Department of Transportation/Division of Highways ("Highways") filed this grievance on April 8, 1999, as follows:

> We are filing this grievance on management on working work-release people in February when we asked for the overtime. We'd had a grievance like this against college students working overtime. They promised us this situation would not reoccur if we settled the college students grievance. The reason for this delay of grievance was because we were just notified of the work release workers even working. We brought this situation to our supervisors attention and it was then taken to Greg Surber's attention. He was supposed to give us a reply on the matter in which he did not. It was later brought to our attention Greg Surber was the reason we were not getting the overtime and work release was working instead.

Grievants seek compensation for the days in which they allege they should have been offered overtime. The grievance was denied at level one by Farris Burton, Jr., on May 3,1999. A level two hearing was held on May 6, 1999, and the grievance was denied again on May 12, 1999, by J. Wilson Braley, District Administrator. A level three hearing was held on May 24, 1999, and a recommendation to deny the grievance was issued by Brenda Craig Ellis, Hearing Examiner, on July 9, 1999. Ms. Ellis' recommendation was accepted by Thomas F. Badgett, Assistant to the Secretary for Administration, on July 12, 1999. Thereafter, Grievants appealed to level four, and this matter was heard on August 25, 1999 and October 14, 1999. Grievants appeared pro se, with Jarrell Chaney as

their spokesperson, and Highways was represented by Krista L. Duncan, Esq. The parties declined to submit proposed findings of fact and conclusions of law, and this matter became mature for decision on October 14, 1999.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Daily Work Report DOT-12 Forms for February 15-19, 1999.

Ex. 2 -

Daily Work Report DOT-12 Forms for February 8-12, 1999.

Ex. 3 -

Daily Work Report DOT-12 Forms for April 6-9, 1999.

LIII Highway's Exhibits

Ex. 1 -

July 1, 1992 Agreement between W. Va. Dept. of Public Safety, Division of Corrections, and W. Va. Dept. of Transportation, Division of Highways.

LIV Grievants' Exhibits

Ex. 1 -

Overtime Request Forms for April 1999.

Ex. 2 -

Grievance Form of Donald L. Ray, dated August 13, 1997.

Ex. 3 -

Fanny Seiler column from The Charleston Gazette.

Ex. 4 -

Scheduled Overtime Offered/Worked, December 1998 through February 1999.

Ex. 5 -

Employee Performance Appraisal for Farris Burton, dated August 2, 1999.

Ex. 6 -

Fanny Seiler column from The Charleston Gazette, September 21, 1999.

Ex. 7 -

Seniority List.Ex. 8 -
Classification Specifications for Transportation Worker II, III, IV, and Transportation Crew Supervisor.

LIV Highway's Exhibits

Ex. 1a -

County Maintenance Organization Overtime Policy.

Ex. 2 -

May 19, 1995 memorandum from Jeff Black to District Engineers re: Overtime Policy.

Ex. 3 -

Huntington Work/Study Release Center DOH Cadre Crew Payroll Invoices, October 1998 through April 1999.

Ex. 4 -

October 31, 1997 memorandum from Joseph T. Deneault to “C” and “H” Level, All District Engineers and All Division Directors re: Overtime Control; July 9, 1997 memorandum from Fred VanKirk to same addressees re: Overtime Control; February 27, 1997 memorandum from Fred VanKirk to same addressees re: Overtime Review.

Ex. 5 -

1998 and 1999 Overtime Reports for District Two Bridge Department.

Ex. 6 -

Handwritten summary of 1998 and 1999 Overtime Reports prepared by Jeff Black.

Ex. 7 -

District 2 Bridge Organization Chart, March 24, 1999.

Ex. 8 -

January 21, 1999 agreement between W. Va. Dept. of Military Affairs and Public Safety, Division of Corrections, and W. Va. Dept. of Transportation, Division of Highways.

Testimony at LIII and LIV

Grievants presented the testimony of Roger Chapman, Mark Jordan, Manny Saber, Greg Surber, Roger Harris, Arthur Adkins, Wilson Braley, Farris Burton, Jarrell Chaney, Chuck Hughes, Gilbert Frye, and Sam Fu. Highways presented the testimony of Jeff Black and Wilson Braley.

BACKGROUND

Grievants allege Highways used work release inmates from the Department of Military Affairs, Division of Public Safety, to perform work they would normally perform to avoid paying them overtime. They allege they are entitled to be paid overtime for the hours that the work release individuals worked in their places on February 12 and 15, and April 2, 1999. Grievants filed this grievance on April 8, 1999, and stated in their grievance thatthe reason for the delay in filing was because they had only just found out that work release inmates had worked on the days in question.

The level one evaluator found that Highways' overtime policy had been violated, but he did not have the authority to award pay for the hours worked by the work release crew. The level two evaluator found that Highways' overtime policy had been violated, but also found that the grievance was untimely filed, and thus, denied the grievance. The level three Hearing Examiner found that the grievance was timely filed, but denied the grievance on the ground that “Grievants were not eligible to perform the work pursuant to Respondent's overtime policy” because they did not have current flagger certifications on the dates in question. Level Three Grievance Recommended Decision, July 9, 1999.

At level four, Highways conceded that the flagging certificates were not an issue, despite the level three decision relying on that fact. Highways maintains that the grievance was untimely filed as to the

February 12 and 15, 1999, dates, and that Highways did not violate its overtime policy by working work release inmates on the days in question.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievants are permanent, full-time employees of Highways, assigned to the District Two Bridge Department, Repair and Design Section.

2. Inmates of the Huntington Work/Study Release Center, a West Virginia Division of Corrections facility, worked for Highways on February 8, 1999 through February 12, 1999; February 15, 1999 through 19, 1999; March 29, 1999 through April 2, 1999; and April 6, 1999 through April 9, 1999, as part of a work release program. 3. February 12 and 15, 1999, were holidays and February 12 and 19, and April 2 and 9, 1999, were all Fridays.

4. Highways' Overtime Policy provides that scheduled overtime is to be offered within a work unit, and within the appropriate classification, to employees who are qualified to perform the necessary duties on a rotating basis, beginning with the most senior employee, and ending with the least senior. Temporary employees will be offered overtime only if no permanent employee is available.

5. Grievants' normal work days are four ten-hour days, Monday through Thursday. Work on Friday would result in overtime, provided Grievants had already worked a 40-hour week. Work on holidays would also result in overtime.

6. The District Two Bridge Department is divided into two “sides”, the Inspection side and the Repair and Design side. The upper supervisory levels of the two sides are as follows:

Sam Fu

Assistant District Engineer

Inspection Side Repair & Design Side

Mansour (Manny) Saber

Greg Surber

Engineer in Charge

Repair & Design Engineer

:

:

Chuck Hughes

Farris
Burton

Inspection Coordinator

Const. Superintendent

:

:

:

Roger Chapman Mark Jordan

Jarrell Chaney

Insp. Team Leader

Insp. Team Leader
Transp. Crew Supervisor

7. Each side is responsible for staffing its respective crews, including scheduling and arranging overtime. If, for instance, the Inspection side was working a project whichrequired overtime, it would either schedule Inspection personnel to work the overtime or call for work release inmates to work. The Inspection side would not go to the Repair side and ask if those employees could work overtime.

8. Sometime during the week preceding the weekend beginning Friday, February 12, Grievant Chaney spoke with Roger Chapman, Inspection Crew Leader, in the Barboursville Bridge Department Headquarters, also known as “the rat hole.” That weekend was a long weekend consisting of two holidays, Friday the 12th and Monday the 15th.

9. Roger Chapman and Mark Jordan only travel to the rat hole once every couple of months, and generally when the reach-all truck is going to be in the District.

10. Grievant Chaney knew the “reach-all” truck was going to be in the District that weekend, which meant there would be overtime work to be performed. The reach-all truck travels around the State, stopping in the different Districts for periods of time, when certain repairs and inspection can be done utilizing that piece of equipment.

11. The Repair side of District Two had not been receiving any overtime for a period of time, allegedly due to overtime control policies, which may or may not have stemmed from an article in The Charleston Gazette in which it was reported that the District Two Repair crew had accumulated the most hours of overtime in the State.

12. Grievant Chaney asked Mr. Chapman and Mr. Jordan if it was possible that the Repair side could be assigned any overtime that might be needed when the reach-all truck came in. Mr. Chapman told Grievant Chaney he did not have a problem with that, and would forward the request to his supervisor. 13. Upon returning to Huntington, the headquarters for the Inspection side of District Two, Mr. Chapman asked Chuck Hughes, Inspection Coordinator, if the Repair crew could work overtime for them when the reach-all truck came in that weekend.

14. Mr. Hughes replied it was not a problem for him if the Repair crew wanted to work the overtime. Mr. Hughes' first preference would be to use the Bridge Department employees for overtime.

15. Manny Saber, the Engineer in Charge for the Inspection side, was not available that day. Sam Fu, the Assistant District Engineer was also not available that day. 16. Mr. Saber's policy is to use Bridge Department personnel first for overtime when at all possible. He was not aware that the Repair crew was not getting any overtime during this time period. Mr. Saber would have had no problem with Grievants working the overtime requested had he been there.

17. Mr. Fu also believes Bridge Department personnel should be considered first for overtime before calling on work release inmates. Mr. Fu had instructed Mr. Saber and Greg Surber, Repair & Design Engineer (and Grievants' superior) to follow the Department's Overtime Policy, and believes the policy should have been followed in this instance.

18. Because Mr. Saber and Mr. Fu were not available, Mr. Chapman asked Mr. Surber if Grievants could work the overtime. This conversation took place in Huntington. Grievants were all

located in Barboursville and therefore were not present for this conversation. 19. Mr. Surber told Mr. Chapman in a room with others present, including Mark Jordan, that Grievants would be not getting any overtime anytime soon.

20. Mr. Surber has the authority to approve or deny requests for overtime. He denied this request, and it was not forwarded any further up the chain of command, which ultimately would have rested with Wilson Braley.

21. After Mr. Surber denied Grievants overtime, Mr. Raymond Byrd, Inspector II on the Inspection side, called Gilbert Frye, Supervisor of Work Release, and requested work release inmates to work on February 12 and 15, 1999.

22. A month or so later, sometime in March, 1999, Mr. Chapman and Mr. Jordan returned to the rat hole in Barboursville. Grievant Chaney asked them if the work release inmates had worked the past two holidays in February, and Mr. Chapman told him they had.

23. Grievant Chaney then went to Farris Burton, his immediate supervisor, and asked if the inmates had worked the holidays. Mr. Burton did not know. The next day, Grievant Chaney asked Mr. Surber if inmates had worked over the holidays, and Mr. Surber told him he would check into it.

24. Four or five days passed without response from Mr. Surber, when finally Mr. Chapman told Grievant Chaney it was Mr. Surber who had denied Grievants the requested overtime in the first place.

25. In the meantime, the work release inmates had worked again on April 2, 1999, and Grievants were not contacted to work the overtime.

26. Grievants filed this grievance on April 8, 1999.

PRELIMINARY ISSUE

As a preliminary matter, Highways alleges that the grievance filed on April 8, 1999, was not timely with respect to the February 12 and 15, 1999, dates. Timeliness is an affirmative defense. The burden of proof is on Highways to prove by a preponderance of the evidence that the grievance is not timely. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the Grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the Grievant or the designated representative, or both, may

file a written grievance with the immediate supervisor of the Grievant . . .

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). The grievance was filed on April 8,1999, well within the ten working days of April 2, 1999, one of the dates in question. February 12 and 15 are the only dates to be addressed as they relate to timeliness.

Grievants state they first became aware that work-release inmates performed work they normally would perform on the dates in question, three days prior to the filing of the grievance. Highways alleges Grievants knew earlier than they acknowledge. Highways points to Grievants' testimony that they requested to work overtime on the two holidays in February, and their immediate supervisor, Farris Burton's testimony that he requestedovertime for Grievants on those days. Highways further states that Grievants had knowledge that the reach-all truck remained parked at the facility where Grievants report to work on the Thursday before February 12 until the Tuesday following February 15.

Grievants acknowledge that they requested the overtime before February 12, but testified that they never received any answer, nor were they aware the inmates had worked those days until at least a month later, when Mr. Chapman returned to the rat hole in Barboursville. Even then, Grievants were not aware that an overtime request had actually been put in for them, and that Mr. Surber had denied the request. Only after they learned this fact, did Grievants file the grievance.

The West Virginia Supreme Court addressed this issue in Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). In Spahr, the grievants heard rumors that business teachers were receiving a pay supplement. The grievants wrote to the Superintendent of Schools inquiring about the discrepancies in salaries between themselves and the business teachers in an effort to confirm or deny these rumors. When the grievants received no response to their inquiry, they again wrote to the Superintendent. The grievants still did not receive a response. At a meeting with their WVEA representative, it was confirmed that the business teachers were, indeed, receiving a pay supplement. The grievants then filed their written grievance. The Supreme Court held that the grievants' letters to the Superintendent could not be characterized as demonstrating actual

knowledge of the facts constituting the grievance, and that grievants did not have actual knowledge until they met with their representative. Applying the holding in Spahr to this case, the undersigned finds that Grievants did not have knowledge of the event until Mr. Chapman informed Grievant Chaney three days prior to the filing of the grievance, that an overtime request had been submitted for them, and had been denied by Mr. Surber. Highways has failed to prove by a preponderance of the evidence that the grievance was untimely filed.

DISCUSSION

As this is not a disciplinary matter, Grievants bear the burden of proving their claims by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996). Grievants assert that Highways violated its Overtime Policy by using work release inmates to perform overtime work. The overtime policy reads as follows:

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

DIVISION OF HIGHWAYS

SCHEDULED OVERTIME POLICY - COUNTY MAINTENANCE ORGANIZATIONS

Introduction

This policy has been established to provide guidance on the scheduling and distribution of overtime in County Maintenance Organizations within the Division of Highways. This Policy is directed only to situations in which overtime is scheduled in advance of such work actually taking place. For the purpose of this Policy, overtime refers to any hours of work performed on a given day, which were scheduled in advance, and will cause an employee to accumulate hours in excess of the standard forty hour work week, regardless of the rate at which it is compensated. This Policy in no way precludes the Agency from requiring employees to work overtime as needed, or in situations which affect the public interest.

Policy

It is the Policy of the West Virginia Department of Transportation that scheduled overtime be offered to employees in Division of Highways County Maintenance Organizations in a systematic fashion that affords equal opportunity to properly classified employees to perform the necessary duties. Overtime offered/worked is to be recorded and posted for all organizational employees to view.

Procedure

Overtime is to be offered within a work unit, and within the appropriate classification, to employees who are qualified to perform the necessary duties on a rotating basis, beginning with the most senior employee, and ending with the least senior. Once established, this rotation list should not be changed. The offering of time with each new occurrence shall pick up on the list where the last one left off. New employees will be added to the end of the list. Temporary employeeswill be offered overtime only if no permanent employee is available. A work unit is considered to be the County Headquarters or a Sub-station.

As the list is worked, the supervisor shall record whether the employee worked the offered overtime or declined the offer to work. Once an employee has either worked or declined, they are not to be offered scheduled overtime until their name reappears in the rotation.

An Overtime Offered/Worked Chart (Addendum A) is to be posted in each work unit location for every calendar month. The chart is to be posted whether or not scheduled overtime was worked in the unit.

There may be instances where a particular project or some other circumstance dictates that the list not be consulted in the assignment of overtime hours. Because these situations can be numerous and varied, the organizational supervisor may use his/her discretion in making such assignments. In these cases, the employee who receives the overtime will be passed over when their turn next comes in the rotation.

R. Ex. 1a.

In addition to the above overtime policy, a memorandum dated May 19, 1995 from Jeff Black, Director of Human Resources, expounds on the policy as follows:

> The senior most employee is to be offered overtime consistent with the classification and level of work. For example, Transportation Worker III level work is to be offered to the employee with the most years in Division of Highways, and holds the classification of Transportation Worker III. The list is to be worked until all Transportation Worker III's have been offered this type work, and then the cycle is to start over. The same rationale applies to all other classifications, as well.

R. Ex. 2.

The policy is clear that overtime is to be offered within a work unit, and within the proper classification to qualified employees on a rotating basis beginning with the most senior employee.

Highways argued that the above overtime policy was written for County Maintenance Organizations and does not specify that it applies to the District Two Bridge Unit employees. However, Jeff Black testified the policy has been used as a model in the Districts and has always been followed there. Wilson Braley, District Two Administrator, testified that the overtime policy for

County Maintenance Organizations is the only overtimepolicy within the Division of Highways, and that it is used in the District office. Therefore, the argument that this policy does not apply to Grievants is not supported by the evidence, and the undersigned finds that the above-cited overtime policy is the policy which was, at all times relevant herein, applied to the Bridge Department and to Grievants.

There is no dispute that the work performed on February 12 and15, and April 2, 1999, was scheduled overtime within the meaning of the overtime policy. The work in question, flagging and litter control, was work which is performed by employees, was scheduled in advance, and would cause an employee to accumulate hours in excess of the standard forty-hour work week. (See footnote 2)

The question remains, though, whether Highways violated its own Overtime Policy when it assigned work to work release inmates which could have been offered to permanent employees.

Highways has, in the past, contracted with the Division of Corrections to provide inmates to work under a program authorized by the West Virginia Legislature in Chapter 62, Article 11A, and Chapter 17, Article 5 of the West Virginia Code, as amended. The first such agreement was entered into with Corrections for the 1992 fiscal year. LIII R. Ex. 1. The initial term of the contract was one year. However, Mr. Braley testified the contract was extended the following years, and Highways produced a signed agreement renewingthe contract dated January 20, 1999. R. Exs. 8. Mr. Braley testified that, at the time of the overtime hours in question, he was unaware of the January 20, 1999 contract extension, but was relying upon the earlier contract between Highways and Corrections in assigning work to work release inmates.

Mr. Braley testified it was not cost-effective to use skilled laborers for flagging work, and that controls had been set on overtime by the top administrators. Therefore, Mr. Braley said, even if the inmates had not worked the flagging overtime, Grievants would not have been assigned that work because their skills were too advanced for flagging. The testimony of Mr. Chapman, Mr. Jordan, Mr. Saber, Mr. Fu, and even Mr. Braley himself in his level two decision, does not support this contention, and it is evident that Grievants would have been offered the overtime if the work release inmates had not been contracted to perform the work.

Highways also argues that the Overtime Policy simply does not apply in this instance because the work release inmates are not employees of Highways, but are contracted to perform work as needed.

Highways points to the agreement with Corrections to provide work release inmates to Highways when needed, and there is no question that Highways may use work release inmates to perform Highways' work. However, the question remains whether Highways can use work release inmates to thwart the Overtime Policy. The hearing examiners at levels one, two, and three all found that the wording of the Overtime Policy meant that permanent, full-time employees should be offered overtime work instead of work release inmates, and that temporary employees will be offered overtime only if no permanent, full-time employees are available. While work release inmates are not "temporary" employees of Highways, I agree with the lower level hearing examiners that the inmates cannot be utilized in a manner that thwarts the Overtime Policy. An administrative body must abide by the remedies and procedures it properly establishes to conduct its own affairs. Swallop v. Civil Serv. Comm'n, 172 W. Va. 121, 304 S.E.2d 25 (1983), quoting Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Parsons v. W. Va. Dept. of Transp., Docket No. 97- DOH-289 (Oct. 30, 1997). Inmates cannot be used to perform work that would be scheduled overtime for permanent, full-time employees unless no permanent employees are available. See Henderson v. W. Va. Dept. of Transp., Docket No. 95-DOH-548 (Apr. 17, 1996). In Henderson, the Grievance Board found that Highways violated the Overtime Policy by assigning scheduled overtime to temporary employees. The Board emphasized that scheduled overtime must be offered first to permanent, full-time employees. That same rationale applies here, and the full-time employees in the work unit, whose names would have come up on the rotation list, should have been offered the opportunity to work this overtime before it was assigned to work release inmates.

Overtime is to be offered within a work unit, and within the appropriate classification, to employees who are qualified to perform the necessary duties on a rotating basis, beginning with the most senior employee, and ending with the least senior.

The time sheets indicate that work was performed as follows:

February 12, 1999 -

0298 (D-2 Bridge Dept.) - 5 inmates @ 7 hrs. each-

Activity Code - 813 - (flagging);

February 15, 1999 -

0298 (D-2 Bridge Dept.) - 5 inmates @ 9 hrs. each -

Activity Code - 813 - (flagging);

April 2, 1999 -

0280 (D-2 Maint. And D-2 Equip. Pool) - 5 inmates @ 8.5 hrs. each - Activity Code - 813 - (flagging).

Grievants are all assigned to the District Two Bridge Department, organization number 0298, and are, therefore, within the work unit for the work performed on February 12, 15, and April 2, 1999. While Grievants are on the Repair & Design side of the Department, the testimony establishes that they were eligible for the overtime on those days upon the request of the Inspection side that Grievants perform the work.

The inmates performed flagging, and while that issue was relied upon in denying the decision at level three, Highways has conceded that Grievants are qualified and would have been eligible to perform flagging overtime work. Flagging is normally a function of a Transportation Worker I and is work that should have been offered first to TWI permanent employees assigned to the District Two Bridge Department according to seniority on a rotation basis. If there were not TWIs within the Bridge Department or they declined to work, it should have been offered next to TWII employees, and thus continue in this manner, with the classifications that perform this function, until the need is met.

There were five (5) inmates who worked on each of the days at issue, for a total of fifteen (15) inmates. There are eight (8) remaining Grievants. Therefore, seven of the eight Grievants should have been offered overtime twice, and one Grievant would have been offered overtime once. It is not possible for the undersigned to determine which of the eight Grievants would have been next in rotation for overtime beginning on February 12, 1999. Therefore, Grievants and Highways will have to determine the rotation at thattime, and conclude which of the Grievants would have received two days and which Grievant would have received only one day of overtime.

CONCLUSIONS OF LAW

1. A timeliness defense is an affirmative defense which the Respondent must establish by a preponderance of the evidence. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997).

2. Highways has failed to prove by a preponderance of the evidence that the grievance was

untimely filed. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. Work release inmates cannot be utilized to circumvent Highways' overtime policy. An administrative body must abide by the remedies and procedures it properly establishes to conduct its own affairs. Swallop v. Civil Service Comm'n, 172 W. Va. 121, 304 S.E.2d 25 (1983), quoting Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997).

4. Highways violated its overtime policy on February 12, 15, and April 2, 1999, by utilizing work release inmates instead of permanent, full-time District Two Bridge Department employees.

Accordingly, this grievance is **GRANTED**, and Highways is hereby **ORDERED** to compensate Grievants for the amount of overtime to which they are entitled for February 12, 15 and April 2, 1999, respectively, along with all benefits, if any, and interest.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 20, 1999

Footnote: 1

Grievants are Jarrell Chaney, Warren Maynard, Donald Roy, Coy Robinson, Bobby Bays, Mike Wilds, Charles Wilson and Terry Parsons. Initially there were additional individuals signed on to the grievance, but over the course of the proceedings, they withdrew from the grievance.

Footnote: 2

As noted above, the level three Hearing Examiner found Grievants were not qualified for the overtime work, because

their flagging certifications were not current. However, Highways conceded at level four that the status of Grievants' flagging certificates was not a legitimate issue, because it was not enforced within Highways, and that Grievants were all qualified to perform the work performed by the work release inmates.