JANET BUTLER,

Grievant,

v. **Docket No. 99-DOH-084**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

On March 13, 1998, Janet Butler (Grievant), initiated a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Department of Transportation, Division of Highways (DOH), had improperly awarded Night Watchman duties to another employee. Grievant is seeking to recover back pay for the hours the other employee was improperly paid to work in an unposted position. After her grievance was denied at Levels I and II, Grievant appealed to Level III where an evidentiary hearing was conducted on August 10, 1998. On February 16, 1999, Thomas F. Badgett, Assistant DOH Commissioner, accepted the recommended decision of the Level III Hearing Examiner, Brenda Craig Ellis, granting Grievant's appeal, in part. On February 23, 1999, Grievant appealed to Level IV, challenging Respondent's decision to limit her back pay recovery to 10 days preceding the date she filed her grievance at Level I. Following a pre- hearing conference on March 24, 1999, a Level IV hearing was conducted in thisGrievance Board's office in Charleston, West Virginia, on April 2, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on May 3, 1999, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined. (See footnote 2)

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Department of Transportation, Division of Highways (DOH) as a Transportation Worker I (Craftsworker) in Calhoun County in DOH District Three.

2. Joan Satterfield is an Office Assistant III employed by DOH in Calhoun County in DOH District Three.

3. From October 1997 through March 1998, Ms. Satterfield was permitted to work at home and report road conditions. These reports on road conditions are used byDOH to determine if there is a need to call out Snow Removal and Ice Control (SRIC) equipment and employees to work during the night, as well as to report weather and road conditions in the county.

4. For each day Ms. Satterfield performed these SRIC-related duties, she was paid for two hours overtime under Account Code 345 (SRIC Support Operations), in addition to any hours she worked in the county office.

5. For many years prior to October 1997, the duties Ms. Satterfield performed were assigned to an individual who served as a “Night Watchman.”

6. In previous years, the traditional Night Watchman function was posted as a special assignment. Grievant successfully bid on and satisfactorily performed those duties in one or more prior years.

7. The Night Watchman duties performed by Ms. Satterfield were not posted and assigned in accordance with DOH's established policy on overtime.

8. Grievant was available to perform the work performed by Ms. Satterfield, but was not offered an opportunity to perform that work as required by the written DOH policy governing assignment of overtime.

9. Grievant first learned that Ms. Satterfield was being paid to perform SRIC duties from her home in early March 1998, within ten working days of March 13, 1998, when this grievance was initiated at Level I.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

DOH stipulated at Level IV that Grievant was a victim of favoritism in favor of Ms. Satterfield in the assignment of overtime during the 1997-98 SRIC season between October 1997 and March 1998. Such favoritism is prohibited by W. Va. Code § 29-6A-2(h). The only issue to be determined at this point is whether Grievant should be limited to recovery of overtime for 10 days immediately prior to the date she filed her grievance, or if she should be permitted to recover for the entire period of the violation. DOH limited recovery in the Level III decision, based upon the theory that Grievant was the victim of a "continuing violation."

The "continuing violation" theory is an exception to the rule that, in ordinary circumstances, a grievance must be filed within ten days of the event which gives rise to the grievance, and is most often applied in cases where an employee is alleging that he or she is currently misclassified. See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Burgraff v. Bd. of Directors, Docket No. 97-BOD-523/532 (Nov. 25, 1998); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997). At Level IV, DOH is no longer contending that this grievance is governed by the continuing violation exception. Instead, DOH relies upon the general rule that any monetary relief will be limited to ten working days prior to the initiation of grievance proceedings. See Frazier v. Dep't of Health & Human Resources, Docket No. 98-HHR-338(Jan. 22, 1999); Adkins v. W. Va. Div. of Highways, Docket No. 92-DOH-146 (Sept. 3, 1992).

Grievant argues that her recovery should not be limited to ten working days prior to filing her grievance because she did not discover that Ms. Satterfield was receiving favoritism in the assignment of overtime until shortly before she filed her grievance. W. Va. Code § 29-6A-4(a) allows an employee to file a grievance "within ten days of the date on which the event became known to the grievant." See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998).

The rule upon which DOH relies in this grievance was clearly stated in Hatfield v. W. Va. Alcohol Beverage Control Commission, Docket Nos. 91-ABCC-052/169 (Sept. 27, 1991), as follows: "Where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing." However, in Spahr, supra, the West Virginia Supreme Court of Appeals found that the grievants there did not learn of the "event" giving rise to the grievance until they met with their union representative. (See footnote 3) Accordingly, the grievance

was timely since it was filed within fifteen days of that discovery in accordance with the grievance procedure for education employees, W. Va. Code §§ 18-29-1, et seq. The undersigned finds that the facts in this matter are substantially similar to the situation addressed in Spahr. Grievant credibly testified that she did not find out another employee was performing the SRIC duties from her home, until a supervisor made an unintentional comment about Ms. Satterfield's actions during a casual conversation with Grievant and other employees. Indeed, although Grievant did not see anyone performing the Night Watchman duties during SRIC season in the manner she and other DOH employees had previously performed that assignment, there was no reason to suspect that these duties were being performed by a clerical employee working out of her home. Although Ms. Satterfield's overtime was being documented as SRIC-related, Grievant did not have access to those records until well after this grievance was initiated. See J Exs 1 & 2 at L IV. Thus, unlike the situation in Adkins, supra, Grievant established specific circumstances which prevented her from filing her claim earlier than she did.

Accordingly, under the “discovery” exception in W. Va. Code § 29-6A-4(a), Grievant's recovery is not limited to the ten days immediately preceding the filing of her grievance. Syl. Pt. 1, Spahr ,supra. See Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998); Lewis v. Kanawha County Bd. of Educ., Docket No. 97-20-554 (May 27, 1998). In accordance with W. Va. Code § 29-6A- 5(b), the undersigned finds that Grievant is entitled to back pay, plus interest, for all overtime improperly paid to Ms. Satterfield for work-at-home SRIC duties between October 1997 and March 1998, less any back pay which Grievant has already received in accordance with the Level III decision in this matter. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. “Where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing.” Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket Nos. 91-ABCC-052/169 (Sept. 27, 1991). Accord, Frazier v. Dep't of Health & Human Resources, Docket No. 98-HHR-338 (Jan. 22, 1999). See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

3. Under the "discovery provision" of W. Va. Code § 29-6A-4(a), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998). 4. Grievant established, by a preponderance of the credible evidence of record, that she did not learn that another employee was being paid overtime to perform SRIC duties from her home until that information was revealed by a supervisor in a casual conversation that took place within ten working days of the date this grievance was initiated at Level I.

Accordingly, this grievance is **GRANTED**. Respondent West Virginia Department of Transportation, Division of Highways, is hereby **ORDERED** to pay Grievant back pay, with interest, for all hours Joan Satterfield was paid for SRIC duties while working from her home between October 1997 and March 1998, less any back pay which has already been paid to Grievant in accordance with the Level III decision in this matter.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 13, 1999

Footnote: 1

Grievant was represented at the hearing by Kelly Rice. Respondent was represented by counsel, Krista L. Duncan, Esq.

Footnote: 2

At the Level IV hearing, Grievant attempted to expand her grievance to allege that DOH is not currently complying with its overtime policy, contrary to the Level III decision in this matter. DOH would not consent to amending the grievance at Level IV to include this issue. In accordance with W. Va. Code § 29-6A-3(j), the undersigned is without authority to rule on matters not properly raised and included in the grievance at the lower levels. W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Cummings v. W. Va. Dep't of Transp., Docket No. 95-DOH-104 (Jan. 12, 1995). Therefore, no findings of fact are made on this issue.

Footnote: 3

Spahr involved alleged disparate treatment of similarly situated teachers in regard to a pay supplement. Therein, the Court expressly stated, "A grievance can extend to prior years because the discovery rule exception, in effect, tolls the limitation as to those prior years." Thus, the grievants in Spahr were awarded back pay covering three prior school years. Id.