WARREN SHIRKEY,

Grievant,

v.

DOCKET NO. 02-DOH-408

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Warren Shirkey, filed the following grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), on November 13, 2001, seeking lost wages as relief for overtime to which he alleges he was entitled during "bridge watch."

The grievance was denied at the lower levels of the grievance procedure, and Grievant appealed to level four on December 26, 2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on March 18, 2003, after which this case became mature for decision. Grievant appeared by himself, and DOH was represented at level three by Carrie Dysart, Esq., and at level four by Barbara L. Baxter, Esq.

SUMMARY OF EVIDENCE

Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Paul Kelley and Wade Patrick Withrow. DOH presented the testimony of Charles Smith and Edith Hall.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by DOH in North Charleston, District One, as a Transportation Worker II/Equipment Operator.

2. Grievant has been continuously employed by DOH since March 22, 1995.

3. Chuck Smith is employed by DOH as the Administrator over the North Charleston facility in District One.

4. Following the September 11, 2001 terrorist attack, the federal Department of Transportation ordered state departments of transportation to be prepared to patrol and monitor all bridges ("bridge watch").

5. Mr. Smith was directed by Paul Little, Maintenance Assistant in District One, to identify his most reliable employees to be prepared to perform bridge watch upon a moment's notice.

6. On Friday evening, October 5, 2001, Mr. Little called Mr. Smith and told him bridge watch would begin Sunday, October 7, 2001. 7. Mr. Smith had identified what he considered to be his most reliable employees, and called them out for bridge watch beginning Sunday, October 7. The bridge watch crews were made up primarily of foremen and crew chiefs, as well as Paul Kelley, a Transportation Worker III with approximately 20 years of experience.

8.

Grievant was not among the original bridge watch crew.

9. Bridge watch lasted from October 7 through October 23, 2001. The original bridge watch crew performed that duty until the last few days, when the danger factor was reduced, and the number of bridges to be watched was reduced. At that point, Mr. Smith asked Mr. Little if he could rotate the work through the rest of his employees.

10. Grievant worked bridge watch on October 20, 21, and 22, 2001.

11. Grievant filed this grievance on November 13, 2001.

DISCUSSION

DOH has asserted the Grievant did not file his grievance in a timely manner. As an untimely filing may defeat a grievance, this issue will be addressed first. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

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. At the request of the Grievant or the immediate supervisor, an informal conference shall beheld to discuss thegrievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievant filed his grievance on November 13, 2001, protesting the awarding of bridge patrol to other employees, specifically Paul Kelley, from October 7 through October 19, 2001 (Grievant worked October 20, 21, and 22, 2001). This is more than ten days following the last instance of the event giving rise to this grievance, and DOH has proven the grievance was untimely filed.

Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

In the instant grievance, Grievant claims he was discouraged from filing the grievance by representations made by his supervisor, and from the receptionist in his workplace. The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989), defined the type of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the

untimely filing "was the result either of a deliberate design by the employer or actions that an employershould unmistakably have understood would cause the employee to delay filing his charge." This standard was adopted in the Grievance Board's decision in Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). See Laila Khoury, et al. v. Kanawha County Bd. of Educ., Docket No. 99-20-031 (Mar. 31, 1999).

Grievant testified he approached his supervisor, Chuck Smith, during this time period in October when the overtime was being worked, and prior to his working overtime, and told him he wanted to file a grievance over the bridge watch overtime. Grievant testified Mr. Smith told him he had no grounds for filing a grievance, and that the allocation of overtime was his decision. Soon after this conversation, Grievant testified Mr. Smith gave him overtime work on October 20, 21, and 22. Grievant did not file the grievance at that time, but later decided to file. He testified that when he tried to file the grievance, Edith Hall, the receptionist, told him she did not have any grievance forms, and he would have to wait until she got some.

Mr. Smith denies telling Grievant he could not file a grievance, and denies Grievant came to him to complain about the overtime work. Ms. Hall denies telling Grievant she did not have any grievance forms.

The level three grievance evaluator found the grievance was untimely filed, but that the representations made by Mr. Smith and Ms. Hall were the type which would cause an employee to delay filing a grievance. However, Ms. Hall did not testify at level three, and Grievant's testimony about the lack of grievance forms went unrebutted at that level. Nevertheless, and despite Ms. Hall's denial at level four that she was without grievance forms, the undersigned, in the interests of fairness to an unrepresented grievance, will affirm the level three evaluator's decision on timeliness. As to the merits of the grievance, Grievant has failed to prove a violation of DOH's overtime policy in this matter. DOH's 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 follow.

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 employees will be offered overtime only if no permanent employee is available. A work unit is considered to be the County Headquarters or a Substation.

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.

See Level Three Decision

Mr. Smith testified that the September 11, 2001 tragedy, and the government's resulting attack on Afghanistan necessitated the bridge watch, and that in all his years withDOH, he had never seen anything like it before. Clearly, the directive to Mr. Smith to pick his most reliable employees to serve on bridge watch was a directive which came ultimately from the federal government, and falls within the parameter of a “particular project or other circumstance” as indicated in the Overtime Policy. Had this bridge watch work been an event which occurred in the normal course of DOH business, that method of choosing employees to work would be in violation of policy. In this unusual instance, however, it was not.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving the allegations in his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Grievant has failed to prove by a preponderance of the evidence that in this unusual set of circumstances, DOH violated its Overtime Policy.

Accordingly, this grievance is **DENIED**.

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 appealingparty 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: April 1, 2003