JOHN COLLINS,

Grievant,

v. **DOCKET NO. 02-DOH-338**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent .

D E C I S I O N

Grievant, John Collins, filed this grievance against his employer, Respondent, Department of Transportation/Division of Highways ("DOH"), on September 4, 2002. The statement of grievance reads:

> Favoritism and or discrimination on or about August 20th and 21st, 2002. Warren Miller acting supervisor called out for overtime a[n] Operator III and a Truck Driver to flag. It was Craftworker II work, and I John Collins should have been called out.

As relief Grievant sought, "to be compensated for the 6 ½ hours that I should have been called out for and any cost this grievance may bring." (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by DOH in Lincoln County as a Craftworker II for 18 months. One of Grievant's regular duties is directing traffic by "flagging."

2. Warren Miller is employed by DOH in Lincoln County as the Assistant County Administrator.

3. DOH has in place a policy which outlines how scheduled overtime is to be assigned. The policy does not state how emergency overtime is to be assigned, and it is assigned at the discretion of the supervisor.

4. On or about August 20 or 21, 2002, Mr. Miller, who was the Acting Supervisor during the

vacation of the County Administrator, received a telephone call at his home during non-working hours from Charleston Control, notifying him that a telephone call had been received from 911 requesting traffic control immediately due to an automobile accident. The accident occurred approximately one mile from the DOH West Hamlin garage at approximately 5:00 p.m. Mr. Miller was not told what time the accident occurred, or any other details of the situation.

5. As is the normal practice in Lincoln County in such a situation, Mr. Miller began telephoning those DOH employees at their homes who lived closest to the DOH West Hamlin garage, and who were qualified to flag. Mr. Miller attempted to contact Jim Adams, Jeff Midkiff, and Nick McCoy, but was not able to reach them, as the accident had disrupted telephone service in the area. Mr. Miller could not reach Mark Terry, as his telephone service was not connected. He then tried to reach Darrell Quintrell, and left a message for him; and then tried to call Robert Dingess, but no one answered the telephone. Mr. Quintrell then returned the telephone call. All of the employees Mr. Miller attempted to contact are Equipment Operators.

6. Mr. Quintrell is employed by DOH in Lincoln County as an Equipment Operator III. Mr. Quintrell is certified to flag, although he does not normally perform this duty. He is certified to flag so that he can do so when necessary, such as in an emergency situation. He resides 9 2/10 miles from the West Hamlin garage. Mr. Quintrell was able to respond to the accident and did so.

7. Mr. Miller told Mr. Quintrell to go pick up Jimmy Adams or Jeff Midkiff, and to get to the accident as quickly as possible to provide traffic control. Mr. Quintrell went to the DOH West Hamlin garage and got a truck, and then, at approximately 7:30 p.m., picked up Mr. Adams to assist him. They returned to the garage and got a second truck.

8. Mr. Adams is employed by DOH in Lincoln County as a TW-II, Equipment Operator. Mr. Adams is certified to flag, but does not do so on a regular basis. He resides closer to the DOH West Hamlin garage than Mr. Quintrell.

9. Grievant lives 18 miles from the West Hamlin garage.

Discussion

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued this was not an emergency, and the overtime rotation list had to be followed, as is set forth in

DOH's overtime policy; although he did not know whether he was next on the rotation list to be called out. As part of this argument, Grievant suggested that the situation at the accident scene when Mr. Quintrell and Mr. Adams arrived was that the injured parties and their vehicles had already been removed from the scene, and the utility company was installing a new pole, and the utility company normally has its own personnel perform flagging duties. The only testimony on this was from Mr. Adams, who could not see the accident scene from his location, because it was around a curve; and he was merely repeating what he had inferred from his brief discussions with others on the scene. Grievant also argued that Craftworkers should have been called out to perform flagging duties, not Equipment Operators. DOH argued this was not scheduled overtime, and the overtime rotation list did not have to be consulted.

DOH's scheduled overtime policy states, in pertinent part:

> 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**
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> 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**
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> 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. . . . A work unit is considered to be the County Headquarters or a Sub-Station.

. . .

> 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.

This Grievance Board has previously stated that,

> It is quite clear the above-cited policy only applies to "scheduled" overtime. Emergency overtime is awarded as needed.

Adkins and Adkins v. W. Va. Dep't of Transp., Docket No. 01-DOH-015 (Aug. 24, 2001).

It is crystal clear that this was not scheduled overtime. DOH had no advance knowledge that this accident would occur and would require it to send employees to assist with traffic control. Accordingly, the scheduled overtime policy was not applicable. Whether this situation was what one would call a true emergency is of no relevance, although it is clear that it was. Mr. Miller quite logically and responsibly set out to call those employees who could respond to the situation in the least amount of time, and were capable of performing the job.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);

> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,

> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

While Grievant stated that Mr. Quintrell gets called out for overtime once or twice a week, while Grievant has never been called out, he did not elaborate on what sort of work Mr. Quintrell is performing in these overtime situations, or whether this is scheduled or non-scheduled overtime. Mr. Quintrell can operate equipment. Grievant apparently cannot, and stated he would have no problem with Mr. Quintrell being called out to operate equipment. Further, no documentation was presented to support Grievant's claims that Mr. Quintrell is called out to work overtime this frequently, nor did Grievant indicate how he was aware of this.

Grievant has not demonstrated any discrimination or favoritism in the assignment of overtime. In this particular instance, as noted above, Mr. Miller simply called those employees who could respond most quickly to an emergency.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. DOH's overtime policy “only applies to 'scheduled' overtime. Emergency overtime is awarded

as needed. Adkins and Adkins v. W. Va. Dep't of Transp., Docket No. 01-DOH-015 (Aug. 24, 2001).

3. The situation complained of was not scheduled overtime, and the policy was not applicable.

4. Mr. Miller acted reasonably and responsibly in contacting those employees who could respond to the situation the most quickly, and who were capable of performing the job.

5. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

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6. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

7. Grievant did not demonstrate any favoritism or discrimination in the assignment of overtime.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: February 11, 2003

Footnote: 1

The grievance was denied at Level I on September 10, 2002. Grievant appealed to Level II, where the grievance was denied on September 16, 2002. Grievant appealed to Level III, where a hearing was held on October 1, 2002, and a decision denying the grievance was issued on October 8, 2002. Grievant appealed to Level IV on October 11, 2002. A Level IV hearing was held on January 3, 2003, at which time the parties submitted one exhibit and presented oral argument. Grievant was represented by Roger Sowards, and Respondent was represented by Barbara Baxter, Esquire. This matter became mature for decision at the conclusion of the Level IV hearing, on January 3, 2003, as the parties did not wish to submit written argument.