DAVID R. BUCKLEW,

Grievant,

v. **Docket No. 02-DOH-237**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

David R. Bucklew ("Grievant") initiated this proceeding on December 26, 2001, alleging discrimination and favoritism in the awarding of overtime work on December 24, 2001. Grievant seeks compensation for 4½ hours (See footnote 1) of overtime. The grievance was denied by Grievant's immediate supervisor on January 7, 2002, and denied at level two on January 15, 2002. A level three hearing was held on April 5, 2002, and the grievance denied in a written decision dated July 31, 2002. Grievant appealed to level four on August 6, 2002. After numerous continuances granted at the request of the parties, a hearing was held in the Grievance Board's office in Westover, West Virginia, on June 30, 2003. Grievant was represented by Diane Parker of the Laborers' District Council, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration on July 30, 2003, the deadline for submission of the parties' fact/law proposals.

The following conclusions of law are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in Preston County as a Transportation Worker III--Equipment Operator.

2. 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 left to the discretion of the

supervisor.

3. Snow Removal and Ice Control ("SRIC") is not considered scheduled overtime work. SRIC includes all work which is deemed necessary to make roadways safe for travel during winter weather.

4. During the winter months, DOH employees in Preston County work their normal schedules, but they are expected to stay beyond their usual eight-hour shift if there is bad weather. They are paid overtime for any hours above their usual shift, once they reach over 40 hours in any given work week.

5. Grievant normally reports for work at 6:00 a.m. to work his usual eight-hour shift.

6. Grievant is usually assigned to operate a grader. However, the grader is not used during SRIC unless the snow is extremely deep, so he operates a smaller truck if he is needed to do SRIC.

7. December 24, 2001, was a state holiday, and DOH employees were not required to report to work that day.

8. Very early in the morning on December 24, 2001, it began to snow lightly in Preston County. Larry Turner, Grievant's immediate supervisor, was driving that morning and slid on some ice, prompting him to call some workers to treat the roads. Whileattempting to use his cell phone, the battery died, so he stopped at the home of George Boylan, which was close by. Mr. Boylan is employed in Preston County as a Transportation Worker II--Equipment Operator. While at Mr. Boylan's house, Mr. Turner asked him to work a few hours to treat the icy roads.

9. Grievant lives closer to the Preston County DOH garage than any other employee.

10. Doug Taft, also an Equipment Operator II, was called by Mr. Turner to help treat the roads in the early morning hours of December 24.

11. Mr. Boylan used the truck Grievant normally drives for SRIC, because only a small truck was needed to treat icy spots.

12. Mr. Taft and Mr. Boylan each received five hours of overtime pay for working Christmas Eve 2001.

13. That same day, it began snowing in the higher elevations of Preston County around 10:00 a.m. Therefore, Mr. Turner called Grievant and two other employees to work a few hours treating roads. Grievant reported to work at 10:30 a.m., and Mr. Taft and Mr. Boylan went home.

14. Grievant received five hours of overtime pay for working on Christmas Eve 2001.

15. Grievant believes it was unfair for Mr. Boylan and Mr. Taft to be allowed to work during the

morning hours on Christmas Eve, his usual time to work, while he was required to work in the middle of the day.

16. Mr. Boylan received an unusually large number of overtime hours during the fall of 2001, because he was doing mechanical work on equipment in preparation for SRICseason. Grievant was not asked to help with this work, because he had informed his supervisors he had no mechanical skills.

17. During February of 2001, Mr. Boylan's wife was critically ill, and he requested not to be called for overtime unless absolutely necessary. His supervisors honored this request.

18. Compared to other employees of the Preston County garage, Grievant's total overtime hours for 2001 were in “the middle of the pack,” with approximately 29 employees receiving more overtime hours and approximately 36 employees receiving less than Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant contends that he should receive 4½ additional hours of overtime pay, because he was not called first thing in the morning on December 24, 2001. He alleges that the calling of other employees before him is evidence of an overall unfair practice of assigning overtime in Preston County.

DOH's overtime policy provides that “scheduled overtime be offered to employees . . . in a systematic fashion” and it is assigned in a rotating basis according to seniority. This Grievance Board has repeatedly observed that this policy only applies to scheduled overtime, and emergency overtime is awarded as needed. Collins v. Dep't of Transp., Docket No. 02-DOH-338 (Feb. 11, 2003); Adkins v. W. Va. Dep't of Transp., Docket No.01-DOH-015 (August 24, 2001). Clearly, as DOH has insisted, SRIC work is not scheduled overtime, because weather is unpredictable and often strikes with little notice. Therefore, DOH was not required to follow the scheduled overtime rotation in assigning SRIC work.

It has been held that unscheduled overtime is not required to be offered on a rotating basis, but rather, in emergency situations, it is offered to the first available personnel. Prater v. Dep't of Transp.,

Docket No. 00-DOH-303 (Feb. 13, 2001). Logically, so long as some sense of fairness governs the assignment of unscheduled overtime hours, no impropriety may be found. As stated in Collins, supra, a supervisor “acted reasonably and responsibly in contacting those employees who could respond to the situation the most quickly, and were capable of performing the job.” In the instant case, Grievant alleged that Preston County's overall system has been unfair for several years, evidenced by Mr. Boylan's being allowed to “remove” himself from being called for overtime while his wife was sick, then being allowed to work many more hours than others during October of that same year.

Grievant alleges Preston County's overall assignment of overtime has resulted in discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d) 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of

Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has failed to establish a *prima facie* case of either discrimination or favoritism, because he has not been treated differently in any pertinent way from Mr. Boylan or Mr. Taft. The fact remains that Grievant and the other employees received the same amount of overtime for working on Christmas Eve. If Grievant had not been called at all that day, he might have a better argument. Just because Grievant felt that coming to work at 10:30 as opposed to 6:00 was a less favorable situation has no relevance. Grievant, Mr. Boylan and Mr. Taft received the same benefit of working the same amount of overtime hours on that particular day. As to Grievant's allegations of an overall unfair assignment of emergency overtime in Preston County, these claims are also unsubstantiated. One key element of Grievant's case is that we are dealing only with emergency overtime; there has been no claim nor any evidence that the scheduled overtime rotation has not been properly used at Grievant's work location. Because the “overtime lists” used as evidence in this case do not separate emergency from scheduled overtime and merely reflect each employee's overall overtime hours for the year, they do not support Grievant's claim of being treated unfairly. While Mr. Boylan did receive a large amount of overtime in October of 2001, it was scheduled overtime, and it was work which Grievant admitted he was not qualified to perform. Accordingly, he was not similarly situated to Mr. Boylan with respect to those overtime hours.

Grievant's overtime hours were almost exactly in the middle of the overall number of hours earned by all Preston County employees. Especially since the overtime hours are not separated into emergency and scheduled with regard to the total hours list, the evidence introduced simply does not establish that overtime has been assigned unfairly. As stated above, unscheduled overtime need not be awarded on a rotating basis. It also should be noted that even scheduled overtime will never be awarded equally, as it would depend on the job to be accomplished, and when the employee is asked to work. Adkins, supra.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No.

89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. DOH's overtime policy only applies to scheduled overtime, and emergency overtime is awarded as needed, within the discretion of the supervisor. Collins v. Dep't of Transp., Docket No. 02-DOH-338 (Feb. 11, 2003); Adkins v. W. Va. Dep't of Transp., Docket No. 01-DOH-015 (August 24, 2001).

3. The work performed on December 24, 2001, was unscheduled overtime, and the policy was not applicable.

4. In order to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (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 he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. 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); Hendricks v. W. Va. Dep't of Tax& Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

6. Grievant has failed to establish any favoritism or discrimination in the assignment of unscheduled overtime in Preston County.

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, and 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.

Date: August 22, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although DOH continues to maintain that the employees in question were actually paid for 5 hours of overtime. Grievant persisted in requesting he be paid for 4½ hours.