JIM ADAMS,

Grievant,

v.

DOCKET NO. 02-DOH-409

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Jim Adams (See footnote 1), filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways"), on September 23, 2002:

> Favoritism: Overtime not being equally distributed among employees at Lincoln Co. DOH.
>
> Relief sought: Stop favoritism, also be compensated all overtime worked by Scott Dingess for year 2002, plus interest, and all costs this grievance may bring upon me.

The grievance was denied at all lower levels of the grievance process, and Grievant appealed to level four on December 23, 2002. This matter was held in abeyance at Grievant's request, until July 22, 2003, when Grievant agreed this matter could be submitted on the record developed below. This grievance became mature for decision on August 12, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 2) Grievant was represented by Roger Sowards, and Highways was represented by Barbara Baxter, Esq. Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence. (See footnote 3)

FINDINGS OF FACT

1. Grievant has been employed by Highways as a Transportation Worker II in District Two, Lincoln County, for approximately two years.

2. Scott Dingess is also employed by Highways as a Transportation Worker II in District Two, Lincoln County. He has more seniority than Grievant, although his specific length of service was not disclosed.

3. Sometime in calendar year 2002, Wilson Braley, District Engineer for District Two, was asked to assemble a crew to work in a flooded area of Mingo County, and that crew began work in June 2002.

4. Sometime in calendar year 2001, Mr. Braley was asked to assemble a crew to go to Wyoming County for work related to a flood.

5. Employees were selected for the flood crews based upon the proximity of their homes to the flooded areas, due to unavailability of hotel or motel rooms in the flooded area. 6. In the summer of 2002, Mr. Braley was asked to assemble a crew to pull ditch lines in Mingo County. This crew was made up of employees from each district, creating a separate state-wide crew of workers.

7. Grievant was not an employee of Highways at the time of the Mingo County flood work.

8. Scott Dingess was selected to work on all three jobs.

9. There have been instances when Grievant was working on the same crew with Mr. Dingess, and would have had an opportunity for overtime, except Mr. Dingess would not work overtime. When Mr. Dingess refused to work overtime, the crew was shut down because the foreman had to return Mr. Dingess to headquarters.

10. Grievant filed this grievance on September 23, 2002.

11. Highways raised the defense of timeliness at levels one, two, and three of the grievance process.

DISCUSSION

Highways asserts Grievant did not file his grievance timely. As an untimely filing will defeat a grievance, it is necessary to decide that issue first. Timeliness is an affirmative defense, and the burden is upon the party asserting the grievance was not timely filed to prove that defense by a

preponderance of the evidence. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 29-6A-3(a)(2) states as follows:

> Any assertion by the employer that the filing of the grievance at Level I was untimely shall be asserted by the employer on behalf of the employer at or before the Level II hearing.

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.

Highways raised the timeliness issue at Levels I, II, and III of the grievance process. Grievant was not employed by Highways at the time the Mingo County flood project was assembled in 2001. The Wyoming County flood project occurred sometime in early 2002. Clearly the grievance is untimely with regard to the Wyoming County flood project, and Grievant gave no reason for his delay in filing a grievance over that incident.

Grievant testified he learned about the Bolt Mountain, or ditch project, a “couple of weeks” after it started, and filed his grievance on September 23, 2002. It is unclear to the undersigned from the testimony at Level Three exactly when the Bolt Mountain project began, or whether the Bolt Mountain project is the same as the ditch project that began in the summer of 2002. Therefore, this portion of the grievance is considered timely filed.

Grievant claims he has been the victim of discrimination and/or favoritism because another employee, Scott Dingess, was asked to work on the ditch or Bolt Mountain project, which resulted in him receiving overtime.

W. Va. Code § 29-6A-2(d) defines “discrimination” 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.” Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or otheremployees.” In order to establish a prima facie case of discrimination or

favoritism, Grievant must establish 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

As with discrimination, if grievant establishes a prima facie case of favoritism, a Respondent may rebut this showing by articulating a legitimate reason for its action. However, the grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. 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); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant has failed to establish a prima facie case of discrimination or favoritism with regard to the assignments given Scott Dingess. Highways' Scheduled Overtime Policy provides that overtime be assigned to employees within a work unit of a County Maintenance Organization, on the basis of seniority, and then rotating downward through the seniority list. Mr. Braley testified that the Commissioner of Highways directed the District Engineers to assemble a state-wide team of employees to work on the ditch project. The District Engineers met and each District contributed equipment and personnel to the project, with Scott Dingess being sent from District Two. When

overtime was required on the state-wide project, the “work unit”, with regard to the overtime was the state-wide team, not each individual District. Thus, within the state-wide team, overtime would be allocated accordingly to seniority, on a rotating basis. Grievant simply was not eligible to receive any overtime from the state-wide ditch project, as he was not assigned to that work unit.

CONCLUSIONS OF LAW

1. Timeliness is an affirmative defense, and the burden is upon the party asserting the grievance was not timely filed to prove that defense by a preponderance of the evidence. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997).

2. Highways proved that Grievant's claims regarding the 2001 Mingo County flood work, and the 2002 Wyoming County flood work, were untimely filed.

3. W. Va. Code § 29-6A-2(d) defines “discrimination” 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.”

4. Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” 5. In order to establish a prima facie case of discrimination or favoritism, Grievant must establish 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.

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6. As with discrimination, if grievants establish a prima facie case of favoritism, a Respondent may rebut this showing by articulating a legitimate reason for its action. However, the grievants can still prevail if they can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. 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); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

7. Grievant failed to establish a prima facie case of discrimination or favoritism with regard to the assignment and overtime received by Scott Dingess on the state-wide ditch project.

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 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: August 21, 2003

Footnote: 1

Watt Vance was originally a party to this grievance, but withdrew his claim by letter dated August 4, 2003.

Footnote: 2

Neither party submitted written briefs.

Footnote: 3

No exhibits were introduced into the record.