TERRY WATSON,

Grievant,

v. **DOCKET NO. 04-ADMN-094**

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION,

Respondent.

DECISION

On December 29, 2003, Grievant Terry Watson filed a grievance against his employer, the Department of Administration/General Services Division (GSD or Respondent), claiming:

> All overtime has been offered to one employee in the past eight months. This employee has been given the opportunities for the overtime pay that should have been evenly distributed or offered to all employees in that classification. Also the overtime has been given to that employee - not even telling all employees there was overtime available.

As relief, Grievant seeks,

1. That they cease and desist the overtime being given to one employee.

2. That the overtime pay that has been allotted to that employee in the past year (and I hereby request that the hearing evaluator review those files that are confidential -- payroll, time sheets) be paid to me as I was not given the opportunity to earn that money.

3. That in the future any overtime that is required be offered to all employees that are within the working classification and that if morethan one employee is interested in working - to have a system set up that we could take turns working that overtime.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on June 1, 2004. Grievant appeared *pro se*. Respondent was represented by counsel, Heather Connolly, Assistant Attorney General. The matter became mature for decision at the close of the hearing.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Respondent employs Grievant as a Trade Specialist. When Grievant filed this claim, he was classified as a Carpenter, and had held that classification for about sixteen years.

2. About nine or ten months prior to the time Grievant filed this claim, Respondent hired a new employee, Mike Davis, as a Carpenter (now Trade Specialist). Grievant believed Mr. Davis had been offered more overtime work than all the other employees doing carpentry, painting and maintenance.

3. Grievant had worked no overtime in the ten months prior to the level three grievance hearing.

4. GSD has two separate crews of employees, the Operations and Maintenance (OPMT) crew and the Crafts crew. Grievant is on the Craft crew, but Mr. Davis worked with OPMT. Most Carpenters were on the Crafts crew, and all of the OPMT crew are Facility Equipment Maintenance Technicians (FEMTs), except Mr. Davis.

5. Before Mr. Davis was hired, he worked on a temporary basis as an FEMT doing shift work, but when he was made a permanent employee, he was classified as aCarpenter. Because he was trained as an FEMT, however, he occasionally did FEMT shift work. Since this ability was particularly useful, all Trade Specialists are being cross-trained now, as time permits.

6. The OPMT crew and the Crafts crew, since they worked under separate supervisors and were essentially two different shops, had two different rotation lists for overtime work. Once all the employees are cross-trained, the overtime pools will be combined.

7. On March 29, 2003, Mr. Davis and another employee, Billy Tincher, each worked six hours of overtime on a painting project assigned to the Crafts section.

8. In October and November, 2003 Mr. Davis and Mr. Tincher, Keith Stricklen and Thomas

Lambert all worked several hours of overtime on a carpentry project assigned to the OPMT shop.

9. On December 5, 2003, Charles Hager worked 2 hours of overtime on a Crafts shop assignment, and was the only employee to work overtime on that assignment.

10. On July 14, 2003, Mr. Tincher worked one hour of overtime on an OPMT project that Grievant claimed could have been performed by a Crafts worker.

11. In August and September, 2003, GSD had a major project preparing for the Southern Governor's Conference at the Capitol, and much overtime was available for employees in both shops. Out of 563 man-hours expended on the project, fourteen different employees worked 284 hours of overtime on this project. Grievant only worked six regular hours.

12. On January 5, 2004, Keith Stricklen worked 0.5 overtime hours on a carpentry/Crafts project. 13. GSD has been working on preparing the One Davis Square building in downtown Charleston for occupancy. There is work there for both OPMT and Crafts workers. Jim Burgess, Deputy Director of GSD, told employees that there was enough work to be done there that any employee could work all the overtime he or she wanted to work. Grievant has worked on the project, but declined the opportunities to work overtime. There was, at the time the grievance was filed, and there still is overtime work to be done there that Grievant can do if he so chooses.

DISCUSSION

In non-disciplinary matters the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Here, Grievant seeks to prove the way Respondent assigns overtime is unfair. His claim is essentially that one employee, Mike Davis, has been shown favoritism in being given overtime assignments more often than himself. Respondent denies Grievant's basic premise, and claims Grievant has been offered overtime. Respondent also denies Grievant is similarly situated with Mr. Davis and asserts it had a valid reason for giving Mr. Davis the assignments on which he worked overtime.

Favoritism is unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. W. Va. Code § 29- 6A-2(h). The test to determine whether Grievant has established a *prima facie* (See footnote 1) case of favoritism requires a grievant to establish by a preponderance of the evidence:

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

(b) that the other employee(s) has/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.

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998)*; Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990).

Grievant has not made this *prima facie* showing, because he has not established that he was similarly situated with Mr. Davis. Grievant and Mr. Davis worked in separate shops, with different supervisors and therefore different people assigned them overtime. Grievant was not eligible to work on Operations and Maintenance assignments even if unassigned overtime was available. Grievant argues that the work Mr. Davis performed was not work that could only be assigned to the Operations and Maintenance shop, because the work was carpentry, which Grievant is qualified to do. However, on those rare occasions that Mr. Davis worked on crafts projects, Grievant offered no evidence he was available to work instead. The information that Grievant has refused to work all overtime he has been offered is suggestive that in those cases, Grievant would not have accepted the overtime had he been offered it.

Further, the evidence shows Grievant's basic assertion is simply incorrect; Grievant has been offered all the overtime he wishes to work, and declined the offer. Contrary to Grievant's belief that only Mr. Davis has been offered overtime, the time records and work orders show many other employees besides Mr. Davis, in both shops, have been offered and have accepted overtime work. No favoritism has been shown to Mr. Davis simply because he accepted overtime assignments. Also, during the times Mr. Davis was workingovertime, he was not the only employee to do so. Lastly, part of Grievant's sought-for relief has been granted by Mr. Burgess. As soon as employees are sufficiently cross- trained that they can perform jobs from both shops, they will be placed in a common overtime pool. That Mr. Davis was simply the first employee to be cross-trained does not constitute favoritism.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works. His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Boylan v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. Favoritism, as defined by West Virginia Code § 29-6A-2(h), is unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

3. The test to determine whether Grievant has established a *prima facie* case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
> (b) that the other employee(s) has/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.

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998)*; Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990).

4. Grievant has not proven that favoritism was shown to another employee in granting overtime assignments, nor has he demonstrated any other violation of policy, rule or law.

For the foregoing reasons, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County, 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: June 22, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Latin for "at first look," or "on its face." A prima facie case is one that, at first blush, appears to be "open and shut." The Real Life Dictionary of the Law, Gerald and Kathleen Hill, General Publishing Group, http://dictionary.law.com/ (June 12, 2004).