JOHN SAMMONS,

Grievant,

v. Docket No. 05-DOH-293

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, John Sammons, filed this grievance against his employer, the Division of Highways ("DOH") on March 26, 2004, alleging:

> **On August 17, 2000, I was granted the position of supervisor of Wayne Co. At that time I was granted all back pay & seniority with interest[.] This was to include the overtime that I woud [sic] have earned had I been awarded the position. Mr. Jeff Black and Jerry Bird have both told me that I was due this time, however the payment has not been received.** (See footnote 1)

The relief sought was "[t]o be justly compensated."

This grievance was denied at all lower levels, and it was appealed to the Grievance Board on August 9, 2005. The parties agreed to submit the case on the record. This case became mature for decision on October 7, 2005, the date the prior grievance record was received by the undersigned Administrative Law Judge. Respondent submitted proposed findings of fact and conclusions of law, but Grievant did not submit these proposals. (See footnote 2)

Issues and Arguments

Grievant argued he should have received overtime in his prior grievance, because the individual in this position frequently works many hours of overtime, and that overtime is part of the routine compensation for the position.

Respondent asserted: 1) the grievance was not timely filed; and 2) the relief requested was speculative, as Highway Administrator III's set their own hours and are not required to work a set amount of overtime.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH for more than thirty years and is currently working as a Highway Administrator III in Wayne County. (See footnote 3)

2. In January 2000, Grievant filed a grievance over his non-selection for his current position. His Statement of Grievance read: "I was not selected for the position of Highway Administrator III. I was the most qualified applicant and should have been awarded the position. The civil service guidelines were not followed and the selection was flawed by outside interest." The relief sought by Grievant at that time was "to be installed as Highway Administrator III in Wayne County and to be made whole in salary difference since Wilmer Napier was made supervisor." (Emphasis added).

3. The original grievance was submitted on the record developed below. 4. The original grievance was granted on August 17, 2000, and this Decision stated, "Accordingly, this grievance is GRANTED. Respondent is directed to instate Grievant into the position at issue with full back pay and seniority, with interest, from the date the position was originally filled with Mr. [Coy] Robinson." (Emphasis added). Sammons v. W. Va. Dep't of Transp., Docket No. 00-DOH-150 (Aug. 17, 2000).

5. DOH appealed this Decision to the Kanawha County Circuit Court, and then withdrew this appeal on June 19, 2001.

6. Grievant was placed in the position in June 2001, but because the Highway Administrator III position was in the same Pay Grade as his then-position, he received no back pay award.

7. Grievant discussed the question of overtime back pay with several administrators and believed he would be paid this remuneration. (See footnote 4)

8. On March 30, 2005, Grievant filed this grievance seeking payment for the same

number of overtime hours received by individuals in the position from the date of the initial selection until it was awarded to Grievant.

9. None of the lower level Decisions in this grievance mentioned the issue of timeliness.

10. During the time in question, the prior Highway Administrator III's worked 692.5 hours of overtime, and Grievant worked 23 hours of overtime. The Highway Administrator III from January 1, 2000 to March 31, 2000, worked 125 hours forapproximately 41 hours a month. The Highway Administrator III from April 2000, to mid- May 31, 2000, worked 77 hours for approximately 51 hours a month. The Highway Administrator III from May 10, 2000, to June 16, 2001, worked 490.5 hours for approximately 37 hours a month.

11. Jeff Black, the Director of Human Resources at DOH, testified the number of hours worked by Highway Administrators varies greatly, and the individual in that position can decide how many hours of overtime he wants to work.

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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Timeliness

DOH contends the grievance is untimely, as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). W. Va. Code § 29-6A-4(a) requires a grievance to be filed "within ten days following the occurrence of the event upon which the grievanceis based. . . ." W. Va. Code § 29-6A-3(a)(2) states, "Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." In this grievance, the issue of timeliness was not

raised until the submission of the Level IV proposals. Accordingly, the issue of timeliness will not be addressed further, as DOH did not raise this issue within the time frames required by statute.

II. Overtime

The question of whether Grievant should receive overtime compensation pursuant to the Level IV Decision will be addressed next. Although no evidence about overtime was contained in the lower level record of the original grievance, the purpose of the Level IV relief ordered by the undersigned Administrative Law Judge, "Respondent is directed to instate Grievant into the position at issue with full back pay and seniority, with interest, from the date the position was originally filled . . ." was to place Grievant in the position he would have had, if he had been granted the position. While not specified in the relief statement, it is clear that overtime is an essential portion of the Highway Administrator III position, and some relief should be granted.

The West Virginia Supreme Court of Appeals in Spencer v. Steinbrecher, 152 W. Va. 490, 164 S. E. 2d 720 (1968) stated at Syllabus Point 1, "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." See W. Va. Code § 18-29-5(b). The Spencer court also noted that an amount needs to be ascertained with reasonable certainty, or else it should be set aside. See Rodgers v. Bailey, 68 W. Va. 186, 69 S. E. 698 (1910). Here, the undersigned Administrative Law Judge cannot know with certainty the exact amount of overtimeGrievant would have worked, but the hours worked by Mr. Messer, who held the position for more than 13 months, can be used as a fairly accurate guide. Mr. Messer averaged approximately 37 hours a month in overtime. This time period would include all seasons and conditions. Accordingly, Grievant is to receive the same amount of overtime, 37 hours a month, from the time Mr. Robinson was placed in the position to the day Grievant was placed in the position. The 23 hours of overtime Grievant worked during this time frame should be deducted from this amount. No interest is awarded.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. An assertion of untimeliness must be raised by the Level III hearing. W. Va. Code § 29-6A-3(a)(2). Because this issue was not raised until the filing of the Level IV proposals, it must fail. 3. Grievant has met his burden of proof and demonstrated that to be made whole as was requested and granted in the prior Decision would include the payment of overtime.

4. "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." Syl. Pt. 1, Spencer v. Steinbrecher, 152 W. Va. 490, 164 S. E. 2d 720 (1968).

5. The evidence presented by Grievant established that working overtime is part of the position for a Highway Administrator III.

6. Grievant established that an average of 37 hours a month is not a speculative amount.

Accordingly, this grievance is GRANTED. DOH is directed to pay Grievant overtime, as directed by this Decision.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 14, 2005

Footnote: 1

The Statement of Grievance Grievant sent when he appealed to the Grievance Board stated, "On August 17, 2000, I was granted the position of county supervisor of Wayne County. At that time I was granted all back pay & seniority with interest. That should [have] included the overtime I would have earned had I been awarded the position. The relief sought was "[t]o be paid my overtime."

Footnote: 2

Grievant represented himself, and Respondent was represented by DOH Attorney Barbara Baxter.

Footnote: 3

Throughout the record in this grievance, the parties would state Grievant was a Highway Administrator III, and later it would be stated Grievant was a Highway Administrator II. Since the parties did not report this as a bone of contention, it will not be addressed further.

Footnote: 4

It does appear that at some point, then-Commissioner Fred Van Kirk decided not to pay Grievant any overtime, but it is unclear whether Grievant was ever told about this decision. DOH did not place into evidence any document that reflected its decision not to award this compensation to Grievant.