SHELBY J. MORRIS,

Grievant,

v. DOCKET NO. 05-DOH-119

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL

Respondents.

DECISION

Grievant Shelby J. Morris filed a grievance on November 26, 2003, against her employer, Respondent Department of Transportation/Division of Highways (DOH), alleging “classification and gender discrimination,” and a “hostile work environment.” As relief, she is seeking “one million dollars or office manager classification or to be compensated for time not worked during emergency situation.” Due to the classification issue, the Division of Personnel (DOP) was joined as a party at level four. However, at the level four hearing, Ms. Morris was permitted to amend her grievance to exclude the classification claim, and DOP, represented by Assistant Director Lowell D. Basford, did not participate any further. Ms. Morris at that time also dropped her request for compensation in the amount of one million dollars.

A level four hearing was held in the Grievance Board's Beckley office on May 25, 2005. Grievant was represented by David Hedrick, and DOH was represented by counsel, Barbara Baxter. The matter became mature for decision on July 8, 2005, the deadline for the parties to submit their proposed findings of fact and conclusions of law.

Issues and Arguments

With the amendment to the grievance, the allegations left to be proven by Grievant are gender discrimination and hostile work environment. However, the actual matter in contention is Ms. Morris' belief that she is not given enough opportunities for overtime work.

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: (See footnote 1)

Findings of Fact

1. Ms. Morris is employed by DOH in Summers County as a clerk for the Maintenance section, and is classified as an Office Assistant 3. She has worked in the same office for 28 years. She is the only clerical employee, and the only woman, in the office.

2. Ms. Morris received merit pay increases in 2000, 2002 and 2004. Her salary is above the maximum salary for the pay grade for an Office Assistant 3.

3. In addition to her regular salary, Grievant is able to earn overtime pay. In 2000, she worked 373.5 overtime hours, 201 hours in 2001, 237 hours in 2002, 52 hours in 2003 and in 2004 she worked 93 overtime hours. The average number of overtime hours for other Maintenance clerks in the district in 2004 was eleven.

4. Summers County Highway Administrator Billy Joe Lilly is Ms. Morris' immediate supervisor. He has prior approval from District Engineer James Lagos to assign overtime to employees in his county, when needed. 5. A.W. Maddy is the District 9 Safety Specialist, and his office is located in Summers County. He is assigned to the Human Resources division and is not supervised by the Summers County Highways Administrator.

6. On November 19, 2004, there was a county-wide emergency situation due to extensive flooding. Because of the emergency, Mr. Maddy did not have any safety programs to do that day, so he volunteered to help out in the county office. Eddie Wiley, the Assistant County Supervisor, told Mr. Maddy that the best way he could help would be to answer the phones.

7. The county office has a “front office,” where Ms. Morris works, and a “back office,” which is also called the “foremen's room” or “crew room,” where the crews report to when they are not in the field. When the telephone is not answered in the front office, it rings in the back office. Mr. Maddy's office is also located next to Ms. Morris' office.

8. Although answering the telephones is part of Grievant's normal duties, on November 19, she was not answering the phones, and they were constantly ringing in the back room. Mr. Maddy began answering them and taking messages, and spent the entire day doing that.

9. Mr. Maddy told Mr. Wiley that he could stay as long as he was needed, and Mr. Wiley told him to stay on. Sometime before his normal quitting time at 4:00, Mr. Lilly told Mr. Maddy that he had

another crew coming in at 7:00, and he should stay at his post until they got there. Mr. Maddy earned overtime for the extra hours he worked that evening.

10. Ms. Morris was told to go home at her regular time that day and not to stay and work overtime.

Discussion

In non-disciplinary matters such as this, Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. (See footnote 2) With the amendment to the grievance, the allegations to be proven by Grievant are gender discrimination and hostile work environment. Rather than evaluating discrimination claims based on their predicate, such as gender or race, grievance claims before the Grievance Board are evaluated based on the definition of discrimination contained in West Virginia Code § 29- 6A-2(d), in which "'Discrimination' means 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." A grievant establishes that discrimination occurred by proving: (See footnote 3)

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

A hostile work environment is proven when a grievant shows by a preponderance of the evidence that she is subject to inappropriate conduct that is sufficiently severe or pervasive to alter the conditions of her employment. (See footnote 4) In determining whether a hostile environment exists, the totality of the circumstances must be considered from theperspective of a reasonable person's reaction to a similar environment or under like circumstances. (See footnote 5)

This grievance arises out of Mr. Lilly's refusal to let Ms. Morris work overtime on November 19, 2004, and instead let Mr. Maddy do so, even though Mr. Maddy was doing work that was normally

part of Ms. Morris' job. Ms. Morris did not provide any statute, rule or policy that would have required her to be offered overtime on that day, but even so, the evidence strongly suggests she was at least partly to blame. Mr. Maddy volunteered to do a job Ms. Morris should have been doing in the first place, and Respondent certainly did not need her to work overtime in order to continue not doing her job. Also, this was an emergency situation, and Mr. Lilly had the authority and the need to handle it in the most expedient way possible.

As for the discrimination claim, Grievant has not met her burden of proof. Although she claims she is not permitted overtime like other maintenance section clerks, she admitted that of all the clerks in the district, she has in the past had, by far, the most overtime worked. Even granting her the assumption, which was not proven by the evidence, that she was similarly situated to these other clerks, she has not been treated adversely in regards to overtime or in any other way.

Grievant has also failed to prove a hostile work environment exists. She identified no inappropriate conduct by her supervisors. Although she did testify that she felt ostracized by and isolated from her coworkers, again this seems to be mainly her own fault. She is not helpful to them when they need something clerical done, and has even prohibited them from coming into the front office ever since new carpet was installed. Shearranged to have forms the workers need to fill out moved from the front office to the foremen's office, so the workers will have no reason to come into her work area. Although she complained that she was overworked, she also complained that some of her duties had been taken over by other employees, such as the new storekeeper. Grievant has entirely failed to prove any improper pattern of conduct, by anyone she works with, exists.

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 she works. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Transportation*, Docket No. 94-DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the

evidence supports both sides equally, then Grievant has not met this burden. *Id.*

2. "'Discrimination' means 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(d).

3. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

4. Grievant has not met her burden of proving discrimination with respect to overtime assignments.

5. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 513 S.E.2d 463, 467 (1998); *Woody v. Div. of Rehab. Svcs*. Docket No. 02-RS-382 (June 8, 2005).

6. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment or under like circumstances. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

7. Grievant has not met her burden of proving she works in a hostile work environment.

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 or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty 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.

July 26, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Both parties raised a number of subjects at level three and four that occurred after this grievance was filed. These issues have not been considered. Similarly, past practices that Ms. Morris admitted have ceased have not been considered as bases for which the relief sought should be granted.

Footnote: 2

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 3

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Lusher v. Dep't of Transp./Div. of Highways, Docket No. 05-DOH-157 (June 15, 2005).

Footnote: 4

Woody v. Div. of Rehab. Svcs. Docket No. 02-RS-382 (June 8, 2005).

Footnote: 5

See Lanehart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).