**RANDY REDMOND,**

**Grievant,**

**v.** **DOCKET NO. 04-DOH-402**

**DEPARTMENT OF TRANSPORTATION/**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

Randy Redmond filed this grievance against his employer, the Department of Transportation, Division of Highways (DOH) on June 3, 2004, claiming that Herman Johnson had been temporarily upgraded to a Foreman position in excess of 720 hours. He alleged favoritism in his supervisor's assignment of temporary upgrades to Mr. Johnson. Grievant originally stated the relief sought as: “The Temporary Foreman position and the up-grade in pay when the 720 hr was surpassed.” At level three, this relief was amended to include, “Fair treatment according to policy for all employees in Logan County under the supervision of Curley Belcher, concerning time worked, foremen's positions, upgrade positions, anything that's available, to share it and be equal about it as a supervisor and have it monitored.”

Although this grievance was granted at level three, Mr. Redmond appealed to level four, and a hearing was held in the Grievance Board's Beckley office on January 5, 2005. Grievant appeared in person, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for decision on February 4, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

### Issues and Arguments

At level three, Mr. Redmond contended that his supervisor, Curley Belcher, favors Mr. Johnson when making temporary upgrade and overtime assignments, and that Mr. Johnson's total hours worked at an upgraded classification exceeded that allowed by DOH policy. The level three

Grievance Evaluator agreed, and granted the grievance. Grievant now seeks his original relief sought, i.e., payment for hours over 720 in which Mr. Johnson was upgraded, on the theory that he would have been upgraded for those hours, had the policy been followed. Although there was some confusion in the discussion about the amendment at level three, it appears likely that Grievant did not intend to replace his original relief sought, only to add to it. The level three Grievance Evaluator, however, did not address the original relief. Since the amended relief was granted, the only matter left for consideration is whether Grievant is entitled to back pay for upgrade hours he would have worked had Mr. Johnson stopped working when he reached 720 hours and Grievant been upgraded at that time.

Respondent contends Mr. Johnson did not work in excess of 720 upgrade hours in the calendar years of 2003 and 2004. Respondent also argues the level three Grievance Evaluator erred in finding Grievant was similarly situated with Mr. Johnson and other Equipment Operators, or that he proved favoritism. These issues, as stated, will not be revisited.

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

**Findings of Fact**

1. Randy Redmond is employed by DOH in District Two, Logan County, as a Transportation Worker 2/Crafts worker.

2. Herman Johnson is employed by DOH in Logan County as a Transportation Worker 2/Equipment Operator. Both Mr. Redmond and Mr. Johnson are supervised byCurley Belcher, who is the Logan County Supervisor. Wilson Braley is the District Two District Engineer.

3. DOH has a policy on temporary upgrades, which states that the District Engineer or Division Director may make temporary assignments of employees to duties outside their classifications. The policy also provides that “[a]ssignments to a higher classification may not exceed 720 hours in a calendar year.”

4. Under the upgrade policy, a Transportation Worker 2 may be upgraded to Transportation Worker 3 or to Transportation Crew Chief positions.

5. Marjory Dean is an Accounting Technician 4 in District 2, and is in charge of accounting for upgrade pay. She keeps records of each employee's time spent working in upgraded classifications.

6. According to Ms. Dean's records for 2004 up to November 15, Mr. Johnson was upgraded a total of 620 hours. For all of 2003, Mr. Johnson was upgraded 291 hours.

7. The difference between Ms. Dean's records and the finding of fact at level three that “Mr. Johnson exceeded the maximum number of permissible temporary upgrade hours for the calendar year 2003" is that, at level three, there was no evidence presented reflecting that some of the hours Mr. Johnson worked in 2003 at a higher classification were due to a promotion, not a temporary upgrade. Mr. Johnson was promoted to Transportation Crew Chief on March 16, 2002, then demoted as a result of a grievance on April 16, 2003.

## Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence. (See footnote 1) Grievant's claim at level four is that Mr. Johnson was upgraded to a higher classification for more hours than was allowed by DOH policy. Despite the conflicting evidence at level three, he has not met his burden of proving his belief is true.

At level three, Grievant provided as evidence payroll documents that showed Mr. Johnson had worked in a classification in a higher pay grade than Transportation Worker 2. The parties and the Grievance Evaluator assumed he did so as a result of temporary upgrades, although the documents did not evidence how he got there. At level four, Ms. Dean clarified Mr. Johnson's status: he had been promoted for part of the time, rather than being temporarily upgraded. This difference means that all the hours Mr. Johnson worked in a higher classification were not as a result of a temporary upgrade, and although the number of those hours was greater than 720, the temporary upgrade policy was not violated.

It is easy to see how Mr. Redmond would believe DOH violated its own temporary upgrade policy for Mr. Johnson, but due to the technicality of Mr. Johnson's promotion, DOH actually did nothing contrary to policy. Therefore, there are no temporary upgrade hours in excess of 720 for which Mr. Johnson was paid that Grievant could have worked, and this portion of the relief sought must be denied. The following conclusions of law support this decision:

## Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *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 his burden. *Id.*

2. Grievant has not met his burden of proving Mr. Johnson was in a temporary upgrade position for longer than 720 hours in any calendar year. For the foregoing reasons, this grievance is hereby **DENIED**. Respondent is **ORDERED** to comply with the mandates contained in the level three decision, but Grievant is not entitled to any back pay.

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.

**March 22, 2005**

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**M. Paul Marteney**

**Administrative Law Judge**

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Footnote: 1

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