THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KEN PATRICK,

Grievant,

v. **Docket No. 06-DOH-271**

Denise M. Spatafore,

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Ken Patrick ("Grievant") initiated this proceeding on March 30, 2004, alleging he should have been allowed the opportunity to work in the "radio room." He seeks back pay for the overtime work he would have received if he had been eligible for this assignment. The grievance was denied at level one on April 13, 2004, and at level two on February 24, 2005. (See footnote 1) After a level three hearing conducted on May 10, 2005, the grievance was denied at that level on August 7, 2006. Grievant appealed to level four on August 9, 2006. After a level four hearing was scheduled, the parties agreed to submit this matter for a decision based upon the lower level record. This grievance was reassigned to the undersignedadministrative law judge on November 13, 2006, and became mature for consideration upon receipt of the parties' fact/law proposals on November 22, 2006. (See footnote 2)

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Prior to his retirement on October 31, 2005, Grievant was employed by Respondent as a Transportation Engineering Technologist in District Three. His working job title was “Area Maintenance Assistant.”

2. Grievant's was a high-level, managerial position, which required him to sometimes be available to work on weekends, and he ordinarily accumulated a significant amount of overtime hours. During Snow Removal and Ice Control (“SRIC”) season, Maintenance Assistants are often called to various locations in the district to deal with emergency situations and supervise lower-level employees.

3. During SRIC, the district operates a “radio room” on a 24-hour, 7-day-a-week basis. (See footnote 3)

4. Before the beginning of SRIC season in 2003, District Three officials asked for volunteers to staff the radio room, and these employees would be placed on a list to be used on a rotation basis. 5. In compiling the list of radio room workers, officials sought mostly office and clerical employees, who do not ordinarily receive much overtime work. In addition, they wanted to include construction employees on the list, who normally do not have much work to do during the winter season. This way, it would be easier to assign employees to the radio room at night who would not necessarily be required to work the following day.

6. Maintenance Assistants were not included on the list of employees to work the radio room, because their normal duties during SRIC season could potentially conflict with radio room duties.

7. Grievant was informed in November of 2003 that he would not be eligible for radio room work, but he did not file this grievance until March 30, 2004.

8. The 2003-2004 SRIC season was from December 5, 2003, through March 26, 2004.

Discussion

In non-disciplinary matters, a grievant must prove all the allegations constituting 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). A grievance must be filed with the immediate supervisor of the grievant "[w]ithin 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. . . ." *W. Va. Code* § 29-6A-4(a). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

Grievant alleges that Respondent's refusal to place him on the radio room list was a continuing practice, as contemplated by *W. Va. Code* § 29-6A-4(a). However, the undersigned must disagree with that assessment. Witnesses at level three testified that, in November of 2003 during the initial discussions of the radio room call-out list, Grievant specifically inquired whether he would be placed on the list. He was told unequivocally at that time that he would not be. Grievant made no further requests to be placed on the list, and no further refusals were made. Accordingly, this was a specific, discrete event, which constitutes the basis for the grievance. Grievant's filing some five months later certainly constitutes an untimely grievance.

Although this grievance is untimely, a brief discussion of the merits would likely be edifying to the parties. Grievant contends that it was discriminatory for him to be excluded from the radio room call-out list. 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." Indiscussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

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.

White, *supra*; *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

Despite Grievant's insistence to the contrary, he has not established discrimination. Although, in his capacity as a Maintenance Assistant, Grievant is not always called out for emergencies during SRIC season, the fact remains that such situations did occur in the past and were a legitimate basis for excluding him from radio room work. This was a legitimate concern, which was directly related to Grievant's (and any other Maintenance Assistant's) job duties. Moreover, Grievant received the same treatment as all other Maintenance Assistants. Accordingly, no discrimination occurred.

The following conclusions of law support this Decision.

Conclusions of Law

1. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin 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. . . ." *W. Va. Code* § 29-6A-4(a).

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

3. This grievance was not filed within ten days of the event upon which it was based, so it is untimely.

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.

Date: December 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

There was a delay of proceedings after level one, due to the processing of Grievant's various allegations of default, which were denied by this Grievance Board. See Patrick v. Dep't of Transp., Docket No. 04-DOH-349D (Nov. 12, 2004) and Patrick v. Dep't of Transp., Docket No. 04-DOH-378D (Feb. 7, 2005).

Footnote: 2

Grievant represented himself, and Respondent was represented by Carrie Dysart, Esquire, at level three, and by Barbara Baxter, Esquire, at level four.

Footnote: 3

Although not specifically explained in the record, it appears that the purpose of the radio room is to field calls regarding dangerous road conditions and maintain contact with employees who must be called out to perform snow removal and ice control.