THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KEITH WOODRUFF III,

Grievant,

v. **Docket No. 06-DOH-309**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Keith Woodruff ("Grievant") initiated this grievance on March 21, 2006, alleging a violation of the scheduled overtime policy. He seeks back pay for the overtime wages he lost by not being placed in a particular position that began on March 16, 2006. The grievance was denied at level one on March 22, 2006, and at level two on April 3, 2006. A level three hearing was conducted on July 10, 2006, and the grievance was denied at that level on September 7, 2006. Grievant appealed to level four on September 14, 2006. A hearing was held in the Grievance Board's office in Westover, West Virginia, on January 10, 2007. Grievant was represented by Shabnaum Amjad of AFSCME, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration at the conclusion of the level four hearing.

Synopsis

Grievant contends that, when flood repair work was performed by the district's Disforce organization, he should have been selected for a particular job. DOH pickedanother employee from a different substation over Grievant, and the work resulted in overtime hours. However, DOH's Scheduled Overtime Policy applies only to county maintenance organizations and their substations, and the type of work involved here is not covered by the policy. In such situations, supervisors have discretion to determine which employees should perform the work, and those employees are to be passed over when they are next in the overtime rotation. Grievant failed to prove a violation of the overtime policy.

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

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in District Six, Wetzel County, assigned to the Pine Grove Substation as a Transportation Worker 2, Equipment Operator. He has worked for DOH for approximately nine years.

2. Wetzel County's usual procedure for assigning scheduled overtime is to employees at the substation for the particular work area, on a rotational basis.

3. Because of flooding that occurred in 2004, there were hundreds of road "slips" which needed repaired in Wetzel County. This repair work still has not concluded, more than two years after the floods occurred.

4. In March of 2006, slip repair work was being done in Wetzel County by private contractors. The district's Disforce organization assisted the contractors with this work and provided extra workers when needed. (See footnote 1) When Disforce needs local workers, TomWilhelm, its administrator, contacts Randy Rush, the Highway Administrator for Wetzel County, and informs him what types of workers are needed, and Mr. Rush determines who will receive the assignment.

5. For the particular work being performed, Disforce needed a certified welder who could also operate a rubber-tire backhoe and a trackhoe. Also, the work to be performed was located in New Martinsville and Pineville.

6. Grievant is a certified welder, but he is not certified to operate the rubber-tire backhoe and trackhoe. However, he does have experience operating both of those pieces

of equipment for DOH, even without certification. (See footnote 2)

7. Mr. Rush decided not to recommend Grievant for this particular job, because he had recently been dissatisfied with Grievant's productivity. Specifically, he believed that Grievant was spending too much time in the office when he should have been out in the field working.

8. Grievant had performed the same type of work for Disforce shortly before the assignment in question.

9. James Souls is a Transportation Worker 3, Equipment Operator in District, Wetzel County, and is assigned to the Hundred substation. 10. Mr. Souls is a certified welder, rubber tire backhoe operator and trackhoe operator. Like Grievant, he had performed the same type of slip repair work for Disforce as that which was assigned in March of 2006.

11. Mr. Rush selected Mr. Souls to perform the March, 2006, assignment, because of his certifications, crew supervisor experience, and productivity.

12. The particular job in question extended over several weeks and resulted in Mr. Souls receiving numerous hours of overtime pay. Although the work was conducted during regular working hours, due to the need to complete the project as quickly as possible, employees were asked to work overtime on a frequent and regular basis.

Discussion

Grievant contends that he should have been selected for this particular project, and believes that his non-selection was a violation of DOH's overtime policy. That policy states that its purpose is “to provide guidance on the scheduling and distribution of overtime in County Maintenance Organizations . . . .” Further, it states:

> Overtime is to be offered within a work unit, and within the appropriate classification, to employees who are qualified to perform the necessary duties on a rotating basis, beginning with the most senior employee, and ending with the least senior. . . . The offering of time with each new occurrence shall pick up on the list where the last one left off. . . . A work unit is considered to be the County Headquarters or a Substation.

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> There may be instances where a particular project or some other circumstance dictates that the list not be consulted in the assignment of overtime hours. Because these situations can be numerous and varied, the organizational supervisor may use

> his/her discretion in making such assignments. In these cases, the employee who receives the overtime will be passed over when their turn next comes in the rotation.

Grievant believes that, since the work to be done was in the area of his substation, it was a violation of the policy for DOH to place Mr. Souls on the project, when he worked at a different substation in the county. However, DOH argues that, due to the nature of this particular project, it was not required to follow the scheduled overtime policy. When employees are assigned to a project of this type, they are working for Disforce, not the county, and Disforce is not a “county maintenance organization” as discussed in the overtime policy. DOH contends that the final paragraph in the overtime policy, as set forth above, applies to these situations, allowing supervisor discretion. In addition, Disforce officials have agreed that Mr. Souls would be passed over for the next project involving overtime work.

Indeed, this Grievance Board has previously determined that flood cleanup work, while constituting scheduled overtime, is a situation in which the seniority rotation list need not be consulted, and supervisors are allowed the discretion to determine who would be best for the job. *See Adkins v. Dep't of Transp.*, Docket No. 01-DOH-625 (March 21, 2002). Moreover, it is clear from the language of the overtime policy itself that special Disforce projects, which are accomplished through a combination of contract workers and “borrowed” county employees, were not meant to be encompassed within the policy. Disforce has been in existence at the DOH district level for many years, yet the overtime policy specifically applies to “county maintenance organizations” only. If DOH had meant to include district-wide projects and organizations in the overtime mandates, it certainly could have done so.

Accordingly, the undersigned finds that DOH's placement of Mr. Souls in this position to perform Disforce flood repair work did not violate the scheduled overtime policy. However, it does appear that the intent of the policy is to provide some fairness and equity when overtime work is awarded. In light of the final portion of the policy, which states that, when specific projects do not require that the seniority rotation list be used, an employee receiving overtime hours must be passed over at his next turn, it seems insufficient for Mr. Souls to only be excluded when the next Disforce overtime work comes along. Therefore, the undersigned finds that, in order to make the awarding of overtime work equitable within the local organization, Mr. Souls should have been passed over when his substation next needed someone to perform overtime. Since this apparently was not done previously, Mr. Souls should miss his next turn in the rotation for local overtime work. Wetzel County officials are cautioned

to follow this procedure in the future.

The following conclusions of law support this decision.

Conclusions of Law

1. In non-disciplinary matters Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. The Division of Highways' “Scheduled Overtime Policy” specifies that scheduled overtime is to be offered to employees within a work unit in a seniority-based rotation. A work unit is considered to be the county headquarters or a substation.

3. Some situations dictate that the overtime list not be consulted, and supervisors may use their discretion in these situations in making the assignments. *See Division of Highways' Scheduled Overtime Policy; Adkins v. Dep't of Transp.*, Docket No. 01-DOH-625 (March 21, 2002). 4. Disforce work for flood repairs is not encompassed within the scheduled overtime policy, so Respondent did not violate that policy by selecting another employee over Grievant to perform the work in question.

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: January 31, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A Disforce is a unit of employees who are not assigned to a particular county in the district, but operate heavy equipment on special jobs throughout the district, rather than routine highway maintenance

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Footnote: 2

Evidence at level four indicated that DOH has had a practice of allowing employees to operate equipment on which they were not certified through the use of a "DOH 20." This is a mechanism which is intended to give the employee a supervised training period, then allow them to operate the equipment for a period of up to two years before actually taking a certification test. Although not really relevant to the outcome of this particular grievance, there was evidence that this mechanism had been abused in the past, and some employees had been allowed to operate equipment for several years without obtaining certification.