THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHARLES D. HARTLEY,
Grievant,

v. **Docket No. 2009-1329-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Charles D. Hartley filed this grievance on March 18, 2009, against his employer, Division of Highways, alleging unfair distribution of overtime among maintenance assistants in District Six for the year of 2008 and continuing to the present time. For relief he seeks financial compensation for overtime hours that he was not given the opportunity to work. This grievance was denied at level one on April 20, 2009, by Respondent's designee. Level two mediation was conducted on July 16, 2009. Appeal was made to level three and a hearing was conducted before the undersigned Administrative Law Judge on November 9, 2009, at the Grievance Board's Westover location. Grievant appeared pro se. Respondent appeared by its counsel, Barbara Baxter. This grievance became mature for consideration at the conclusion of the level three hearing because the parties chose not to file proposed findings of fact and conclusions of law.

Synopsis

Grievant alleged he was the victim of favoritism with regard to the assignment of projects which resulted in overtime for another employee, Charles Henry. The evidence demonstrated that the difference in overtime hours resulted in Mr. Henry's work to closeout Federal Emergency Management Agency and storm event projects. Respondent asserted that the closeout work was a temporary assignment that is best coordinated by one

employee to ensure the proper data compilation and review in a timely manner. Respondent's decision to use one employee to conduct Federal Emergency Management Agency and storm event project closeouts was made on a rational basis. Grievant failed to prove that he was the victim of favoritism. This grievance is denied.

The following findings of fact are based upon the record of this grievance developed at level one and level three:

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in District Six as a Transportation Engineering Technologist, Maintenance Assistant.

2. Charles Henry is employed by DOH as a Transportation Engineering Technologist, Maintenance Assistant in District Six.

3. In 2008, Charles Henry was chosen to coordinate closeouts for claims through the Federal Emergency Management Agency ("FEMA") and the Federal Highway Administration ("FHWA") Emergency Relief ("ER") for repair work performed in District Six. Hancock, Brooke, Ohio, and Marshall Counties are contained in District Six and they suffered landslides and other flood events during 2004 and 2005.

4. Closeout work is a temporary assignment that is best coordinated by one employee to ensure proper data compilation and review within federal time limits. Mr. Henry has prior experience with FEMA and ER closeouts, knowledge of the process and developed spreadsheets to track and review closeouts.[1]

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[1]While a clear definition of closeout was not apparent to the undersigned, it appears to be a check and balance system whereby the various federal agencies providing emergency relief monies can verify project claims' amounts in relation to the type of work performed.

5. Charles Henry had 1033 hours of overtime in 2008.

6. Grievant had 362 hours of overtime in 2008.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The facts of this grievance are fairly straightforward. Grievant contends that he is being treated less favorably than Mr. Henry in that Mr. Henry had substantially more overtime hours than Grievant had in 2008. Grievant argues that his supervisors could have distributed the overtime more fairly by naming Grievant to coordinate closeouts of FEMA and ER repair work, splitting the closeout duties or assigning Grievant some of Mr. Henry's daily maintenance assistant duties in his assigned District Six counties.

DOH contends that favoritism is not at issue in this matter and that the difference in the 2008 overtime hours between Grievant and Mr. Henry is due to Mr. Henry's work to closeout FEMA and ER storm repair event projects. DOH further argues that the closeout work is best coordinated by one employee to ensure proper data compilation and review in a timely manner. Mr. Henry was the best choice to coordinate the project because of his prior experience with FEMA and ER closeouts, his knowledge of the process, and his initiative in developing spreadsheets to track the projects. DOH argues that, in the past, distributing daily duties between maintenance assistants resulted in territorial defensiveness.

"Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007);[2] *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has failed to establish favoritism under the facts presented in this grievance. Grievant and Mr. Henry are both classified as Transportation Engineering Technologist's and, within that classification, perform the same general duties as maintenance assistants in District Six; however, it is only to that extent that they are similarly situated. According to his supervisors, Mr. Henry is more experienced and knowledgeable in the area of FEMA and ER closeouts than Grievant. Mr. Henry had previous experience in coordinating activities with FEMA and FHWA and in working with the intricacies of reporting work performed and justifying charges to the agencies. DOH also determined that due to complexities of the closeouts and the need to coordinate with both FEMA and County Maintenance Organizations, only one employee should be designated to handle the closeouts.

Grievant had the opportunity to request needed overtime on a weekly basis subject to his supervisor's approval; however, Grievant did not offer any evidence that he requested additional overtime beyond the 362 overtime hours worked in 2008. In any event, this Grievance Board has previously determined that flood cleanup work is a situation in which supervisors are allowed the discretion to determine who would be best

[2]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

for the job at hand. *See Adkins v. Dep't of Transp.*, Docket No. 01-DOH-625 (March 21, 2002).

In this situation, DOH made a decision which was designed to more efficiently utilize its resources by using an employee who could better work with and coordinate activities with FEMA, which is its prerogative and responsibility. This Grievance Board has ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). Grievant did not meet his burden of proving the management decision was improper, or that it was the result of favoritism.

The following conclusions of law support the Decision reached.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h).

3. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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4. Grievant failed to prove that DOH engaged in favoritism under the facts of this grievance.

5. Grievant did not sustain his burden of proving the management decision resulting in higher overtime hours to another employee was improper as that decision was supported by the record of this grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: February 18, 2010

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Ronald L. Reece
Administrative Law Judge