

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RANDALL RANDOLPH,
Grievant,**

v.

Docket No. 2019-0287-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Randall Randolph, Grievant, filed this grievance against his employer the West Virginia Department of Transportation, Division of Highways, ("DOH"), Respondent. Grievant protests Respondent's process and/or application of selecting employee for unscheduled/emergency overtime. The original statement of grievance was filed on August 7, 2018, which provides, "Respondent is not following overtime policy." The relief sought states, "To be made whole in every way including back pay with interest."

A conference was held at level one on September 5, 2018, and the grievance was denied at that level on September 26, 2018. Grievant appealed to level two on October 2, 2018, and a mediation session was held on December 21, 2018. Grievant appealed to level three on December 31, 2018. A level three hearing was held before the undersigned Administrative Law Judge on May 13, 2019, at the Grievance Board's Charleston office. Grievant appeared in person with representative Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jason Workman, Esq., DOH Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this

matter became mature for decision on June 24, 2019, on receipt of the last of these proposals.

Synopsis

There are recognized administrative operating procedures established for Respondent in granting overtime hours to its employees. Grievant firmly believes he is being overlooked for overtime opportunities. Respondent maintains that applicable overtime policy is properly being followed and overtime is distributed based on the needs of the organization. Respondent maintains the employees that Grievant focuses on having more overtime are not similarly situated employees.

There is scheduled and unscheduled overtime. Respondent's overtime assignments in Mason County vary and change with a variety of organizational needs, e.g., special projects, weather conditions and seasonal activities. Grievant reasonably harbors some concerns over the execution of Respondent's discretion in distributing overtime. Nevertheless, not all of the individuals Grievant highlights are similarly situated employees, nor is it established the difference in treatment was unrelated to job assignment. Although it was established and recognized that not all of Respondent's employees receive the same or equivalently similar amounts of overtime, Grievant has failed to establish that he is entitled to the difference in total overtime paid to other employees as lost wages. A difference in overtime totals alone does not establish entitlement. The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture. This case is not the exception to this principle. Accordingly, this grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a Transportation Worker 3 - Equipment operator with seven years seniority at the Mason County Organization (ORG 0127) of the West Virginia Division of Highways, Respondent.¹

2. Respondent is a State agency. This agency has hundreds of employees. The number of employees working exclusively in ORG 0127 is not specified.

3. Ernie Watterson is Highway Administrator for Mason County. A Highway Administrator is responsible for district-wide activity, and his duties include the maintenance activities in ORG 0127. Administrator Watterson testified at the instant level three hearing.

4. Respondent's Overtime Policy provides for two types of overtime categories, scheduled overtime and emergency overtime. WEST VIRGINIA DIVISION OF HIGHWAYS ADMINISTRATIVE OPERATING PROCEDURES SECTION V CHAPTER 14, Highway Operations, Scheduled Overtime Worked/Emergency contains Respondent's overtime policies for both scheduled overtime and emergency overtime. See G Ex 1 and R Ex 1, hereinafter Ex 1.

5. Scheduled overtime is to be offered to employees who are qualified to perform the necessary duties on a rotating basis based upon a seniority list that is followed on a rotating list. Specifically, the list is picked up where it was last left off when

¹ Respondent DOH is organized into ten districts each covering specific areas of the State. Each district is divided into organizations.

new scheduled overtime is offered; once an employee worked or declined the offer to work scheduled overtime, he or she will not be offered again until his or her name reappears in the rotation. Ex 1, also see L-3 testimony of Ernie Waterson.

6. Emergency overtime is that required to deal with unforeseen emergencies that have arisen. Emergency overtime is awarded as needed by the prescribed situation. Emergency overtime is at the discretion of the supervisor and frequently depends on the location of the need.

7. Scheduled overtime opportunities is to be posted “for all organizational employees to view.” DOH Administrative Policy, Ex 1, pg. 2. Further, unscheduled overtime² is “to be recorded and posted separately for all organizational employees to view.” Id at pg. 5.³

8. Crew Chiefs are responsible for the direct supervision of the transportation workers. The amount of discretion available to particular crew chiefs seems to vary with the circumstances of the activities and the personality of the employee(s).

9. There are five TW 3-crew chiefs in Mason County. The five crew chiefs of Mason County are J.R. Bays, Darrell Brown, Charles Dunn, Denny Nibert, and Jimmy Pruitt.

10. Darrel Brown, a Transportation Worker 3-Crew chief, testified at the level three hearing. The witness provided information and some insight regarding the activity

² “Emergency overtime” and “unscheduled overtime” are not necessarily synonymous terms but seem to be used indiscriminately by participants in the circumstances discussed.

³ Respondent has a duty to follow its own policy and to maintain the overtime list accurately. It is not clear whether Respondent is or isn’t posting the overtime list. Grievant did not aggressively pursue this aspect of Respondent’s obligation. Nevertheless, it is imperative that Respondent maintain and keep accurate overtime schedules. Grievant obtained and presented into the record Respondent’s payroll time report of overtime for ORG 0127.

of a crew chief, emergency callout, and practical application of discretion. Darrell Brown is a TW3 crew chief with thirteen years at Respondent's Mason County organization.

11. Crew Leader Brown does not volunteer for a lot of call-out overtime. The witness provided information and insight regarding his experiences and perception of how individuals are called out for emergency overtime.

12. The true amount of discretion used by a crew leader to call TW3 workers out for emergency overtime is not clear.

13. In relevant part the WEST VIRGINIA DIVISION OF HIGHWAYS ADMINISTRATIVE OPERATING PROCEDURES SECTION V CHAPTER 14, (Highway Operations, Scheduled Overtime Worked/Emergency) provides:

II.POLICY (page 2 of 6)

SCHEDULED OVERTIME POLICY: It is the Policy of the West Virginia Department of Transportation that scheduled overtime is offered to employees in Division of Highways Maintenance Organizations and the Bridge Maintenance Organization in a systematic fashion that affords equal opportunity to properly classified employees to perform the necessary duties. Overtime offered/worked is to be recorded and posted for all organizational employees to view.

PROCEDURE: 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. Once established, this rotation list should not be changed. The offering of overtime with each new occurrence shall pick up on the list where the last one left off. New employees will be added to the end of the list. Temporary employees will be offered overtime only if no permanent employee is available. As the list is worked, the supervisor shall record whether the employee worked the offered overtime or declined the offer to work. Once an employee has either worked or declined, they are not to be offered scheduled overtime again until their name reappears in the rotation.

III. **POLICY** (page 5 of 6)

OVERTIME WORKED/EMERGENCY POLICY: It is the Policy of the West Virginia Department of Transportation that all emergency overtime worked is to be recorded and posted separately for all organizational employees to view. The carryover hours of all overtime worked, scheduled and emergency overtime, will be recorded on the Overtime Worked/Emergency Chart (Addendum B), up to the first day of the given month.

PROCEDURE: As emergency/SRIC overtime hours are worked, the supervisor shall record that the employee worked the overtime on the Overtime Worked/Emergency Chart. Because these situations can be numerous and varied, the organization's supervisor may use his/her discretion in making such assignments based on the employee's expertise, the circumstance of the emergency situation and the location of the emergency. An Overtime Worked/Emergency Chart is to be posted in each work unit location for every calendar month. The chart is to be posted whether or not overtime was worked in the unit. Periodic reviews by appropriate members of management (supervisor, county administrator, maintenance assistant, etc.) should be performed to insure equalization of hours and policy adherence.

See Ex 1.

14. Charles Dunn is a TW3 crew chief with Respondent's Mason County organization. Crew Chief Dunn did not testify at the level three hearing.

15. There is scheduled and unscheduled overtime offered by Respondent to its employees. Different classifications of employees are offered different overtime opportunities. An employee's time is categorized as overtime if the employee actually works over forty hours in a workweek.

16. The overtime assignments in Mason County vary and change according to the needs of the organization. It is specifically recognized that the requirements of the organization includes, but is not necessarily limited to, special projects, weather conditions and seasonal activities.

17. It is perceived that Respondent employs approximately fifty employees in its Mason County operations (exact number not identified). Not all employees are of the same classification or share similar working conditions.

18. There is a great variation to how much time is earned during an emergency overtime call out due to the many different types of events that the agency responds to and the severity of the emergency. Not all call out overtime is necessarily an emergency.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant argues that the policy relating to overtime is not being followed in his organization. Grievant is a Transportation Worker 3 Equipment Operator and is assigned to Mason County in D-1. Grievant firmly believes he is being overlooked for

overtime opportunities.⁴ Grievant provided a copy of what is identified as “Overtime reports Mason County and Grievant’s summary of worked/emergency overtime sheet.” G Ex 2 and 3 Grievant argues that the rotation aspect of the scheduled overtime policy and emergency call outs are not being followed in accordance with mandatory policy.

There is established and applicable policy which provides how Respondent is to distribute overtime to its employees. See WEST VIRGINIA DIVISION OF HIGHWAYS ADMINISTRATIVE OPERATING PROCEDURES SECTION V CHAPTER 14, Highway Operations, Scheduled Overtime Worked/Emergency., Ex 1 also see Finding of Fact (fof) 12, *supra*. It is recognized policy of Respondent that scheduled overtime is offered to employees in Division of Highways in a systematic fashion that affords equal opportunity to classified employees to perform necessary duties. Further applicable policies specify that all overtime worked (scheduled or emergency) is to be recorded and posted separately for all organizational employees to view.⁵

Grievant argues that applicable policy relating to overtime is not being followed, however, Grievant’s argument as present at level three tends to highlight call out overtime. Grievant estimated he lives approximately 2.8 miles from the shop and very often employees that live much further away are called out for the emergencies. Grievant stated that some employees come from across the county for call outs when he is available but was not called. Grievant believes overtime opportunities are not fairly

⁴ The rationale for Grievant’s belief varies but it is factually accurate to state he believes one or more individuals in position(s) to affect the amount of overtime he performs is not distributing overtime equitably. Rationale for Grievant’s belief includes, but is not limited to, his reporting alleged illegal activities to management.

⁵ The carryover hours of all overtime worked, scheduled and emergency overtime, will be recorded on the Overtime Worked/Emergency Chart, up to the first day of the given month.

distributed and highlights that an identified crew chief is limiting his opportunities for emergency call out overtime.

It has been recognized that emergency overtime is at the discretion of the supervisor and frequently depends on the location and type of need. *Bucklew v. W.Va. Dep't of Transp.*, Docket No. 02-DOH-237 (Aug 22, 2003) *Collins v. Dep't of Transp.*, Docket No. 02-DOH-338 (Feb. 11, 2003); *Adkins v. W. Va. Dep't of Transp.*, Docket No.01-DOH-015 (August 24, 2001). The discretion of a supervisor could affect the amount of emergency call outs a particular TW3 worker receives. Unfettered personal opinion of a supervisor-worker (like/dislike of an individual) is not an acceptable variable for equitable distribution of overtime. Grievant presented a witness at the level three hearing that offered testimony regarding potential abuse of discretion. Crew Chief Brown indicates that Crew Chief Dunn would not call Grievant, unless he had to. The reason for this alleged bias is not clear. Crew Chief Brown was a cooperative witness but short on details of specific incidents. No evidence was presented ranking the proficiency of the TW3 of Respondent's Mason County Organization.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees. W. VA. CODE § 6C-2-2 (d) (2008). "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). To establish 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);
- (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008); *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004).

Grievant presents testimony, which gives the undersigned pause but falls short of being convincing that an unlawful action is transpiring. The personal feelings of an employee's supervision is **not** the variable which should have a significant impact on an employee's fair share of overtime. Grievant is of the belief that that crew supervisor, Charles Dunn would avoid calling him for emergency overtime pay. See L-3 testimony of Brown and Grievant. The degree of this alleged bias is not established to any quantitative degree.

Grievant may or may not have rational reason to be concerned he is not receiving his fair share of overtime pay.⁶ The difficult thing is establishing the notion as fact and determining if based upon reliable information or established events there has been identifiable economic damages (loss wages). Grievant's belief alone coupled with hearsay is not proof. Grievant's desire for more overtime doesn't prove he was unduly denied wages. The distribution of emergency overtime is governed by Respondent's operating procedure, which gives the supervisor discretion in the assignment of overtime

⁶ At level one, Grievant provided he believes he is being overlooked for overtime opportunities because he has been reporting alleged illegal activities to management. See level one September 26, 2018 decision. Grievant highlighted other rationale at level three and seemingly avoided or abandoned an agencywide retaliation/conspiracy theory.

based on employee expertise, the emergency circumstance, and the location of the emergency. Emergency overtime is not a simple rotation. Situations can be numerous and varied, an organizational supervisor may use his/her discretion in making such assignments. The tool-set needed to accomplish a task and the location of the event are variables a prudent crew leader must consider. There are five TW 3-Crew Chiefs in Mason County. Charles Dunn is not the only crew leader calling employees for emergency overtime. Highway Administrator Ernie Watterson testified the only indication Respondent has of this alleged bias is Brown's perception that Dunn doesn't like Grievant.⁷ Crew Leader Dunn did not testify at level three. Crew Leader Brown's testimony indicates that crew leader Dunn has opinions regarding various TW3, and refrains from contacting some more than others. Grievant was not the only TW3 named not to be at the top of Crew Chief Dunn's call outs.

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-

⁷ Pursuant to Respondent's Administrative Operating Procedures, periodic reviews by appropriate members of management should be performed to insure equalization of hours and policy adherence. See Ex 1, pg. 5.

081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Grievant attempts to prove his contention by highlighting the difference in the amount of overtime he has verses that of other employees of Respondent. Grievant does not breakdown the overtime of various Respondent’s employee with any clarity. Grievant highlights the total hours, and this is informative to a degree. But it does not, in and of itself, establish essential elements of this grievance.⁸ The comparison of all of Respondent’s employees overtime totals and seeing a difference between “some” employees does not prove Grievant’s contention. Respondent creditably avers the discrepancy in totals can be affected by many factors.⁹ Grievant’s blanket comparison of overtime totals does not in and of itself establish a violation of applicable overtime policy. Grievant does not acknowledge the difference in job classification(s) and diverse demand for various overtime opportunities. “[E]mployees who do not have the same classifications are not performing ‘like assignments and duties’ for uniformity purposes and cannot show they are similarly situated for discrimination and favoritism purposes.[”] *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam*), *overruled in part and on other grounds by Bd.of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); Grievant is a Transportation Worker 3 Equipment Operator the

⁸ Respondent highlights that an employee’s time is categorized as overtime for any time worked over forty hours in a work week. The discrepancy in total overtime worked can be affected by many factors, not solely from call outs.

⁹ Respondent’s overtime policy provides that “scheduled overtime” be offered to employees in a systematic fashion and it is assigned on a rotating basis according to seniority. Further, this Grievance Board has repeatedly observed that this policy only applies to scheduled overtime, and emergency overtime is awarded as needed. *Collins v. Dep’t of Transp.*, Docket No. 02-DOH-338 (Feb. 11, 2003); *Adkins v. W. Va. Dep’t of Transp.*, Docket No.01-DOH-015 (August 24, 2001).

opportunity for him to receive overtime pay verses say that of a secretary is not equivalent. Grievant did not establish that he was a similarly-situated employee as the identified employees Neatta Mullins, or Charles Dunn. Not every classification of employees employed by Respondent performs their assigned duties within the same conditions or frequency of events.

It is more persuasive, if Grievant can establish a significant difference in the amount of overtime for TW3 coworkers in Mason County. Comparison of similarly situated employees is relevant data and can be persuasive information. Other than Dale McDonald, one of several employees in the transportation worker series classification, Grievant fails to establish significant differences in overtime among his similarly situated co-workers. Grievant's anecdotal testimony fails to provide the necessary details that establishes that he was wrongly omitted for specific emergency call outs in lieu of other employees; Grievant does not persuasively explain why it would be wrong to call out the employees that were called out instead of him on the occasions in question. The proficiency of the various TW3's of Respondent's ORG 0127 among and between one another is not established. Further, Grievant does not provide any evidence of how many hours that a particular employee worked in an event he was more suited to perform.¹⁰ Grievant is speculating.

Although it was established and recognized that not all of Respondent's employees receive the same or an equivalently similar amounts of overtime, Grievant has failed to establish that he is entitled to the difference in total overtime paid to another employee

¹⁰ With regard to the total hours listed, the overtime hours are not separated into emergency and scheduled overtime, the evidence introduced simply does not establish that overtime has been assigned unfairly.

as lost wages. Grievant failed to percussively establish identifiable event of lost entitled wages. The undersigned is reminded of a general rule with regard to proof of damages in that such proof cannot be sustained by mere speculation or conjecture. Syl. Pt. 1, *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S. E. 2d 720 (1968). Grievant understandably, isn't pleased with what he perceives as an inequitable distribution of overtime. It is practical for Respondent to more efficiently explain its overtime practices. There is scheduled and unscheduled overtime offered to Respondent's employees. Grievant received more than some employees and less than others. Nevertheless, because emergency overtime situations can be numerous and varied, it is specifically recognized that a supervisor may use his/her discretion in marking such assignments based on the employee's expertise, the circumstance of the emergency situation and the location of the emergency. See Ex 1, DOH Administrative Operating Procedure. Grievant has failed to prove that Respondent's actions are contrary to law, rule or policy. Grievant did not establish that Respondent's crew leaders were arbitrary and capriciously exercising their discretion. Grievant's failed to percussively establish he has been unlawfully denied duly entitled overtime.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As the issue of 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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

3. Once a grievant establishes a *prima facie* case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. *Hickman*, *supra*. See *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 178 W.Va. 53, 365 S.E.2d 251 (1986); *Hendricks v. W. Va. Dep't of Tax & Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996); *Runyon v. W. Va. Dep't of Transp.*, Docket Nos. 94-DOH-376 & 377 (Feb.23, 1995).

4. Grievant has not met his burden of proof and established a case of discrimination and/or favoritism.

5. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered

arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of [the employer]. *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. Respondent’s Overtime Policy provides for two types of overtime categories, scheduled overtime and emergency overtime. See West Virginia Division of Highways Administrative Operating Procedures; Section V Chapter 14, Highway Operations, Scheduled Overtime Worked/Emergency. With regard to emergency overtime, the situations can be numerous and varied, the organization's supervisor may use his/her discretion in making such assignments based on the employee's expertise,

the circumstance of the emergency situation and the location of the emergency. Grievant failed to prove that Respondent's actions were arbitrary and capricious in following applicable and relevant agency overtime policy.

8. Grievant failed to prove that Respondent abused its discretion, or acted in an arbitrary and capricious manner in the distribution of overtime.

9. The monetary relief sought by Grievant is speculative. Grievant did not establish by a preponderance of the evidence that he is entitled to lose wages stemming from unlawful call out practices.

10. Grievant did not establish by a preponderance of the evidence that he is entitled to additional wages stemming from inequitable distribution of overtime wages.

11. When the relief sought by a grievant is speculative or otherwise legally insufficient, the claim must be denied. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-60 1 (Feb . 28 , 1990); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

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 (2018).

Date: August 6, 2019

Landon R. Brown
Administrative Law Judge