DAVID NICHOLAS,

Grievant,

v. DOCKET NO. 94-HHR-596

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

SHARPE HOSPITAL,

Respondent.

D E C I S I O N

Grievant, David Nicholas, filed this grievance on January 20, 1994, as follows:

> Weston Hospital unjustly worked me 32 hours straight and rather than pay me overtime mandated that I accept schedule adjustment rather than pay me overtime.
>
> Relief Sought: To be made whole in every way to include but not limited to 16 hours overtime.

The Level III Hearing Examiner granted the grievance in part and awarded Grievant 6.5 hours of overtime. Following an appeal to Level IV on October 4, 1994, a hearing was held on June 26, 1995, wherein the parties stipulated that the relief sought was overtime compensation for 9.5 hours. The parties were invited to submit proposed findings of fact and conclusions of law by July 31, 1995, at which time this case became mature for decision.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant is employed by Respondent West Virginia Department of Health and Human Resources, Sharpe Hospital, as a maintenance worker.

2. Grievant worked a normal eight-hour shift on January 3, 1994.

3. Grievant was at work on January 4, 1994, when a heavy snowstorm hit the area. Grievant's supervisor, Frances "Pat" Krause asked Grievant and other maintenance workers to voluntarily work additional shifts to remove snow. Grievant worked from 6:30 a.m. on January 4, 1994, to 3:30 p.m. on January 5, 1994.

4. By the end of Grievant's shift at 3:30 p.m. on January 5, 1994, Grievant had already worked 41 hours for the week.

5. On January 5, 1994, Mr. Kraus told Grievant to adjust his schedule and take off work for the rest of the week. Mr. Kraus also told other maintenance workers in Grievant's job capacity who had worked extra hours during the snowstorm to adjust their schedules.

6. Despite Mr. Kraus' directive, Grievant appeared for work on January 6, 1994. The supervisor in charge that day, Harold Collins, told Grievant to go home. Grievant refused, stating he would not be paid overtime if he did not work beyond his regular 40-hour work week.

7. After five-and-a-half (5-1/2) hours on January 6, 1994, Grievant clocked out of the maintenance department. Grievant received two-and-a-half (2-1/2) hours schedule adjustment onJanuary 6, 1994, and eight hours schedule adjustment on January 7, 1994.

Discussion

In order to prevail, Grievant must prove the allegations of his complaint by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant alleges he was wrongly refused the opportunity to work the remainder of the week of January 3, 1994, even though he had already accumulated 40 hours of work by January 5, 1994. Grievant seeks to be paid for the time he alleges he should have been allowed to work. (See footnote 1) Federal and state laws require employers to pay overtime compensation to employees who have worked more than 40 hours in one week. 29 C.F.R. 778; W. Va. Code §§ 21-5(C)-1 et seq., 29-6-10.

Respondent maintains that Grievant has failed to prove a violation, misapplication or misinterpretation of any rule or regulation relating to overtime compensation. Indeed, Respondent relies on federal, state and department law, regulations and policies which allow employers to adjust workers' schedules instead of paying them overtime in certain instances. R Exs. 3, 5-7, 9.

Michael McCabe, Director of Respondent's Office of Personnel Services, testified that the department's policy is to use schedule adjustments whenever possible and that facility directors havediscretion in awarding overtime. The overtime policy was in place prior to January 1994.

Assistant Administrator of Sharpe Hospital, Chip Garrison, confirmed Mr. McCabe's description of the department's overtime policy. Mr. Garrison explained that the policy is to pay overtime only if there is no similarly skilled worker to replace the worker who worked extra shifts. There were other maintenance workers to replace Grievant during the remainder of the week in question. Mr. Garrison testified that Sharpe Hospital uses schedule adjustments whenever possible because there is no line item within the budget for overtime.

Having carefully reviewed all matters of record, it is clear that Grievant has failed to meet his burden of proving a violation, misapplication or misinterpretation of any rule or regulation relating to overtime hours. Indeed, Grievant has cited no rule, regulation or statute to support his theory that he is entitled to work overtime, and, indeed, no such entitlement exists.

Conclusions of Law

Grievant has not alleged any violation of any of the rules, regulations or policies which govern payment of overtime for Department employees, nor produced any statute, rule or regulation which supports his contention that he is entitled to be able to work overtime rather than take a schedule adjustment.

Accordingly, this grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 17, 1995

Footnote: 1 *As noted above, Grievant received compensation for 6-1/2 hours overtime at the Level III hearing, which accounts for the 1 hour worked over 40 hours on January 5, 1994, and the 5-1/2 hours worked under protest on January 6, 1994. Grievant maintains he is still entitled to 9.5 hours of overtime.*