

RALPH HENDERSON,

Grievant,

v.

DOCKET NO. 95-DOH-548

WEST VIRGINIA DEPARTMENT

OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

DECISION

In December 1995, Grievant, Ralph Henderson, an Operator 2 with the West Virginia Division of Highways (hereinafter DOH), filed this level four appeal from a level three decision rejecting his claim that he was improperly denied an opportunity to work overtime on February 13, 1995. Grievant seeks payment for eight hours of overtime work. The statement of grievance filed on February 21, 1995, states as follows:

Temporary employees working on holiday when work
wasn't offered to full-time employees.

Although not clearly articulated, Grievant appears to assert a claim that the overtime policy of the DOH has been violated. The grievance was denied at levels one, two and three. A level four hearing was held on January 29, 1996. The grievance became mature upon receipt of the parties' proposed findings of fact and conclusions of law on February 29, 1996.

DISCUSSION

DOH has a scheduled overtime policy for County Maintenance Organizations. This policy is as follows:

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

DIVISION OF HIGHWAYS

SCHEDULED OVERTIME POLICY - COUNTY MAINTENANCE ORGANIZATIONS

Introduction

This Policy has been established to provide guidance on the scheduling and distribution of overtime in County Maintenance Organizations within the Division of Highways. This Policy is directed only to situations in which overtime is scheduled in advance of such work actually taking place. For the purpose of this Policy, overtime refers to any hours of work performed on a given day, which were scheduled in advance, and will cause an employee to accumulate hours in excess of the standard forty hour work week, regardless of the rate at which it is compensated. This Policy in no way precludes the Agency from requiring employees to work overtime as needed, or in situations which affect the public interest.

Policy

It is the Policy of the West Virginia Department of Transportation that scheduled overtime be offered to employees in Division of Highways County Maintenance Organizations 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 time 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. A work unit is considered to be the County

Headquarters or a Sub-station [\(See footnote 1\)](#).

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 until their name reappears in the rotation.

An Overtime Offered/Worked Chart(Addendum A) is to be posted in each work unit location for every calendar month. The chart is to be posted whether or not scheduled overtime was worked in the unit.

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.

This policy explicitly requires that all permanent employees be offered the opportunity to work scheduled overtime before temporary or part-time employees are given the chance.

Grievant testified at the level four hearing that he was asked by the then superintendant, Aaron Gibson, if he would mind going to Pentress for the winter time and that as soon as SRIC (Snow Removal Ice Control) season was over he would go back to Sabraton. Grievant testified he was told that he could be assigned to work anywhere within the county whether it be on a regular shift or overtime. (L. III Transcript, p. 11). This assignment was approximately from December, 1994, through sometime in September, 1995. On February 13, 1995, Grievant was still working out of the Pentress sub-station. [\(See footnote 2\)](#)

The Monthly Overtime Chart for February, 1995, (Exhibit # 2, L. III hearing) shows that two temporary employees worked on February 13, 1995, from the Sabraton Garage. These employees were Fred Gapen and Bob Wolfe. The fact that temporary employees worked this particular holiday is not in dispute. What is in dispute is whether DOH violated its own policy on February 13, 1995, and whether Grievant should have been offered the scheduled overtime work on February 13, 1995.

Grievant was listed on the monthly overtime chart for the Sabraton Garage rotation (Exhibit #2, L. III hearing, Monthly Overtime Chart, February, 1995). Grievant was also on the scheduled overtime sheet for Pentress (Exhibit #3, L. III hearing). Respondent argues in its Proposed Findings of Fact

and Conclusions of Law that Grievant seeks to be placed on more than one overtime list, thereby allowing him to receive overtime from both Sabraton and Pentress simultaneously. Respondent also argues that the Grievant's "reassignment", or its instruction that he report to the Pentress area for daily duty assignments, exempted them from the obligation to offer him overtime work when it became available at his permanent duty station, the Sabraton Garage.

Inconsistencies in the application of the scheduled overtime policy were brought out at both the level three and level four hearings. Grievant testified that he had previously been assigned to work overtime from other locations including scheduled overtime work while temporarily assigned to the Pentress Garage. (L. III Transcript, p. 5) In addition, Mr. Swanger, an Operator 3, testified at the level three hearing that he is normally assigned to the Sabraton work area although he is offered scheduled overtime at other work units. (L. III Transcript, p. 21).

Grievant testified that the Sabraton Garage was not using the scheduled overtime sheet according to the Policy. (L. III Transcript, p. 19,). Grievant does not know whether or not his name would have come up on the rotation; however, DOH did not address this issue. DOH only argued that Grievant wants to be on more than one overtime list. Mr. Robert Wayne Armstrong, a personnel specialist and creator of the DOH overtime policy, testified that the intent of DOH's overtime policy was to establish a mechanism for overtime, to evenly distribute overtime work, and that this particular policy became effective on December 1, 1994. Mr. Armstrong also testified at the level four hearing that a work unit may be either a sub-station or the county garage, and that the policy does not allow someone to be on more than one overtime list at one time. Grievant testified that he was told he works in Monongalia County, "that he can work any work unit they need me"[sic]. (L. III Transcript, p. 14). It is clear from the evidence that Grievant's name was listed on two garage overtime lists, but it was never addressed as to who was in charge of maintaining these lists.

Kathy Westbrook, assistant supervisor for Monongalia County, testified at the level three hearing that DOH normally goes by whoever is available at the work unit where the overtime is needed. (L III Transcript, p. 29). Ms. Westbrook further testified that if she needs additional work and she doesn't have enough people to do it all, then she calls the sub-stations and find out if anyone else is interested. (L III Transcript, p.29)

The DOH overtime policy additionally states that the organizational supervisor may use his/her discretion in making such assignments in instances where a particular project or some other

circumstance dictates that the list not be consulted in the assignment of overtime hours. These instances are not spelled out but they appear to be emergency-type situations and do not include "overtime" as defined in the first paragraph of the policy:

[a]ny hours of work performed on a given day, which were scheduled in advance, and will cause an employee to accumulate hours in excess of the standard forty hour work week, regardless of the rate at which it is compensated.

February 13, 1995, a Monday, was President's Day, a holiday. Mr. Armstrong testified that the employees were notified on Friday about the available overtime, that this particular overtime would "probably" fall under scheduled overtime, and that it was a regularly scheduled crew. Respondent argues that DOH has discretion in making decisions in regard to overtime. The undersigned, however, finds that the policy is clear in that scheduled overtime must be offered to full-time employees first and that the assignment of any unscheduled overtime, including emergency situations, remains at the discretion of DOH. The DOH ignores the fact that this particular overtime was scheduled overtime.

In the instant case, DOH failed to offer scheduled overtime to Grievant, apparently reasoning that according to DOH's overtime policy, the supervisor has discretion in assigning overtime, that the overtime was not in the Grievant's work unit and that the Grievant was incorrectly listed on two overtime lists from two different work units. Although DOH has offered several reasons for its failure to provide this particular overtime opportunity to Grievant, the overtime clearly was "scheduled overtime" and the full-time employees in the "work unit" whose names would have come up on the rotation list should have been offered the opportunity to work this overtime before it was offered to temporary employees.

It is without question that DOH is in violation of its own policy by not offering scheduled overtime to full-time employees listed on the overtime schedule. Although the question remains as to whether Grievant's name would have come up on the rotation list, the evidence presented indicated that DOH was not following the rotation lists. DOH has a duty to follow its own policy and to maintain the overtime lists accurately. Therefore, DOH must properly maintain and keep accurate overtime schedules, including making sure that no employee is listed on two schedules.

The foregoing discussion and analysis is supplemented by the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by the Division of Highways, classified as an Operator 2 and permanently assigned to the Sabraton Garage sub-Headquarters in Monongalia County.
2. Grievant was on loan to the Pentress sub-headquarters for the SRIC season beginning in December, 1994.
3. There is no official written memorandum transferring Grievant from the Sabraton work unit to the Pentress work unit between December 1994 and September 1995.
4. Grievant worked from the Sabraton Garage during May and June of 1995.
5. Grievant and an Operator 3 assigned to the Sabraton Garage, were not offered nor assigned to work overtime on February 13, 1995, a scheduled holiday.
6. Bob Wolfe and Fred Gapen, temporary employees at the Sabraton Garage, worked February 13, 1995, a holiday.
7. DOH has a scheduled overtime policy for County Maintenance Organizations. The policy is for situations in which overtime is scheduled in advance of such work actually taking place. The policy, however, does not preclude the agency from requiring employees to work overtime as needed or in situations which affect the public interest.
8. DOH overtime policy allows for instances where a particular project or some other circumstances dictate that the overtime list not be consulted in the assignment of overtime hours.
9. In the past, Grievant was offered overtime work from the Sabraton Garage while reporting to work on a daily basis at Pentress. (L. III Transcript, p. 4, 16-17)
10. Grievant was listed on the Monthly Overtime Chart for the Sabraton Garage, February, 1995 rotation (Exhibit #2, L. III hearing). Grievant's name is also on the scheduled overtime sheet for the Pentress Garage, February, 1995 (Exhibit #3, L. III hearing).
11. If a work crew was needed for overtime work and there were not enough people to do all the work, the sub-stations were then called to find out if anyone else was interested in this overtime work.
12. DOH was not properly following the overtime rotation lists; therefore, it is not clear if Grievant would have been offered this particular scheduled overtime work.

CONCLUSIONS OF LAW

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code §§29-6A-1 et seq.

2. The overtime policy of the Division of Highways requires that scheduled overtime be offered to full-time employees before being offered to temporary employees.

3. Grievant proved his by a preponderance of the evidence that Respondent violated its overtime policy on February 13, 1995 by assigning scheduled overtime to temporary employees instead of offering the scheduled overtime to full-time employees.

4. Grievant has not proved by a preponderance of the evidence that he was eligible for scheduled overtime on February 13, 1995.

Accordingly, this grievance is **DENIED**; however, Respondent is **ORDERED** to strictly follow its scheduled overtime policy, to follow properly its rotation lists for scheduled overtime, and to accurately maintain records as to the assignment of scheduled overtime.

Any party may appeal this decision to the "Circuit Court of the county in which the grievance occurred," 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.

DATE: April 17, 1996

MARY BETH ANGOTTI-HARE
Administrative Law Judge

[Footnote: 1](#) *The undersigned finds that the words sub-station and garage are used interchangeably by the parties both referring to a "work unit".*

[Footnote: 2](#) *At the present time, Grievant works out of the Sabraton sub-station.*