KELLY RICE,

Grievant,

v. **Docket No. 96-DOH-247**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Kelly Rice, filed this grievance on September 9, 1995, alleging in his statement of grievance "changing shifts ahead of schedule eg [sic] from 4 10's to 5 8's starting 9/18/95 instead of 10/30/95[;] Favoritism. He seeks as relief "to be compensated for the additional travel time and expenses caused by this change." This grievance was denied at all lower levels. At the scheduled Level IV hearing, Grievant agreed to submit the case on the record developed below. This case became mature on April 14, 1997, the deadline for the parties' proposed findings of fact and conclusions of law. The parties did not submit these proposals.

From a review of all the evidence of record the Undersigned Administrative Law Judge makes the followings Findings of Fact.

Findings of Fact

1. Grievant is employed in District III as a Storekeeper II in Wirt County.

2. Sometime during the Spring of 1995, the County Supervisors asked Robert Epler, the District III Engineer, if they could work a flex-time schedule of four, ten hour days during the Summer instead of five, eight hour days. Level III Trans. at 12. 3. Mr. Epler agreed and, on or about the first of June 1995, the counties started this flex-time. The original plan was to return to five, eight hour days the last Sunday in October 1995. Level III, Grievant's Exh. 1.

4. The Division of Highways'("DOH") Administrative Operating Procedures, Volume IV, Chapter 9, page 3, deals with "Scheduling and Reporting to Work." This Policy states the normal work week for DOH is forty hours, which usually consists of five, eight hour days from 7:30 a.m. to 4:00 p.m. All employees have the primary responsibility to report to work at the prescribed time and location as

directed by management, and the District Engineer is the "approving authority for the scheduling of work on holidays, overtime, and any permanent workweek that differs from the normal workweek of five (5) eight (8) hour days."

5. In the middle of August, Mr. Epler noted "it was starting to get dark early in the morning and [he] started getting concerned about the fog and the dark and the safety of the workers out there in the dark." Level III Trans. at 13. The employees started at 6:00 a.m. in the morning. Later, he met with the CountySupervisors and found many of them had already returned to five, eight hour days. Wirt County had not.

6. Because he wanted to give the employees some advance notice, he directed all County Supervisors to return to the five, eight hour day schedule on September 18, 1995.

7. Because of this change, Grievant had to drive to work five times a week instead of four times a week.

8. A Wirt County, District III Custodian, Mr. Larry Sutphin, was authorized by Mr. Epler to remain on a four, ten hour day schedule until the end of daylight saving time. This schedule was allowed because coming in early before the rest of the employees assisted Mr. Sutphin in completing his job duties. Level III Trans. at 5 & 6.

9. No shopkeeper was allowed to work a four day schedule after September 18, 1995. A shopkeeper obtains parts for the other employees. Testimony did not establish that any other employee was allowed to remain on a four day schedule permanently. (See footnote 1)

Discussion

Although somewhat unclear, this grievance appears to have two parts. First, Grievant seems to argue that Mr. Epler could not change the date to return to the five day work week once a date had been discussed at a maintenance staff meeting. This theory isdirectly opposed to the Policies of DOH. The District Engineer is the "approving authority for the scheduling of work on holidays, overtime, and any permanent workweek that differs from the normal workweek of five (5) eight (8) hour days." DOH Admin. Operating Procedures, Volume IV, Chapter 9, page 3 of 37, Scheduling and Reporting to Work. (Emphasis added). Mr. Epler's decision to return to the eight hour, five days per week schedule was based on safety reasons, but according to the above stated policy he can change the schedule whenever he sees fit. Thus, this portion of Grievant's argument must fail.

Second, Grievant has alleged that Mr. Epler's allowing other employees to continue to work the four, ten hour days demonstrates favoritism, and states he was treated differently than other similarly situated employees. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

It is clear Grievant does not have the evidence to support his case. To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or otheremployee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of favoritism. Grievant demonstrated the only employee who continued to work the four, ten hour days was Mr. Sutphin, and Mr. Sutphin testified he was allowed to remain on this schedule because it enabled him to complete his custodial chores more easily without the other workers around. Grievant failed to demonstrate other storekeepers were allowed to continue to work the four day workweek. Indeed, he failed to prove any other worker was allowed to remain on the four day schedule. Additionally, it makes good common sense that a shopkeeper would need to be present during the regular working hours of the majority of the employees. (See footnote 2) The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving his case by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. Grievant failed to establish a prima facie case of favoritism when DOH required Grievant to return to the five day work schedule earlier than the planned date, but allowed a custodian to continue in the four day work week because it assisted him in completing his duties.

3. A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va Code § 29- 6A-2(i). See, Ball v. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997).

4. Grievant did not demonstrate Mr. Epler's management decision to return to the regular five day workweek violated any rule, regulation, or statute, or constituted a substantial detriment to, or interference with, his effective job performance or health and safety. Indeed, the evidence demonstrated the decision to return to the regular schedule was based on safety considerations and was well within the powers granted Mr. Epler bythe Division of Highways' Administrative Operating Procedures, Volume IV, Chapter 9, page 3, "Scheduling and Reporting to Work."

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 1997

Footnote: 1

Grievant attempted to show, through the testimony of Mr. Sutphin, that other employees were allowed to remain on a four day workweek after September 18, 1995. Although Mr. Sutphin believed that other employees may have remained on this schedule, he was unable to swear to the fact, especially as he did not work on Fridays.

Footnote: 2

At Level IV, Grievant argued the Level III Decision was not being followed and demanded at Level IV hearing that the Undersigned enforce the lower level ruling. He believed that statements in the discussion section of the Level III Decision entitled him to work over time. These statements were: "[t]he Grievant's primary responsibility is that of storekeeper, not a custodian for Wirt County. This would involve the need for him to be present when the rest of the Wirt County employees are working." This argument is without merit, the above-sentences indicate Grievant needed to work the five, eight hour days when the rest of the employees are working, not the four, ten hour day he was seeking in the grievance.