STEVEN L. MICHAEL,

Grievant,

v. **DOCKET NO. 97-DOH-148**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Steven L. Michael, initiated this grievance at level one on April 23, 1996. He alleges that overtime was awarded to four other employees in a discriminatory fashion during the winter of 1996, during which time the particular employees were allowed to work on the "salt bin project." As relief, Grievant seeks payment for the overtime the salt bin crew received. (See footnote 1)

The grievance was denied at level one by Grievant's supervisor on April 24, 1996, and at level two by Harry Carr, District Four Engineer, on May 30, 1996. After a level three hearing conducted on February 14, 1997, the grievance was again denied on March 4, 1997. Grievant's level four appeal was received by this Grievance Board on March 21, 1997, and a level four hearing was conducted in this Board's Morgantown, West Virginia, office on April 30, 1997. The matter became mature for decision on June 4, 1997, upon receipt of the parties' proposed findings of fact and conclusions of law.

The following findings of fact are made from the record as a whole, including the level three and four hearings, along with all exhibits.

Findings of Fact

1. Grievant is employed as a Transportation Worker II for the Marion County detachment of the Division of Highways ("DOH").

2. Sometime prior to late January of 1996, Melvin Mayes, Area Maintenance Assistant for District Four (See footnote 2) obtained funding and approval to build a new salt storage building (also called the “salt bin” or “salt shed”) in Marion County, to be completed by June 30, 1996. L. III Tr. at 22.

3. James Costello, Marion County Superintendent for DOH, selected a crew of four Marion County employees to build the new salt bin. These four individuals were Jim Gaines, Albert Hillberry, Russell Kennedy and Bill Lane. They were not selected based upon any particular classifications or qualifications.

4. District Four officials believe that building projects and other specialty projects are best completed by one crew to maintain continuity of the work and to have projects completed in a timely fashion. L. III Tr. at 27. The salt bin crew was allowed to work overtime as needed to complete the project. L. III Tr. at 16.

5. Since December 1, 1994, DOH has had a scheduled overtime policy, whereby overtime work which is scheduled in advance is to be offered to workers on a rotational basis by classification and seniority. The policy allows for special circumstances in which the policy need not be followed, within the discretion of the supervisor.

6. The Marion County office of DOH did not follow the scheduled overtime policy until July of 1996. 7. The salt bin project was an exception to the scheduled overtime policy.

Discussion

Grievant bears the burden of proving his claims by a preponderance of the evidence. W. Va. Code § 29-6A-6. Grievant alleges that, because DOH did not follow its overtime policy with regard to the salt bin project, he has suffered discrimination and is entitled to the discrepancy between the overtime pay he received during the relevant period and that which the salt bin crew received. In support of his claims, Grievant introduced into evidence numerous time reports for himself and the four members of the salt bin crew, dating from July of 1995 through June of 1996. Unfortunately, these time reports are not terribly helpful; although each has a column indicating “overtime hours,” there is no evidence of record indicating exactly what type of work each employee was engaged in when he received overtime work. As explained by Mr. Carr, all of the overtime, except for the salt bin crew, for January, February and March of 1996 was “emergency” overtime due to snow and ice

removal, which is not “scheduled” overtime within the meaning of the policy. L. III Tr. at 33. The additional time records for 1995 were not introduced until level four, and no witness explained or verified what type of overtime each of these employees worked during that time period. There was also no explanation of whether the overtime hours were emergency or scheduled or how it was determined overtime would be worked.

The DOH overtime policy states, in pertinent part, as follows:

> 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. . . .
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> * * *
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> 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. . . .
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> * * *
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> 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.

It is DOH's position that the salt bin project fell within the purview of the latter portion of the policy. Such building projects rarely occur and call for continuity in order to ensure timely completion. Additionally, as James Costello, Marion County Superintendent, testified, overtime was not necessarily scheduled in advance for the salt bin crew, because they were told to work as many hours as necessary to accomplish the job.

Respondent's argument is persuasive. The policy, as set forth above, is quite obviously very broad and allows substantial discretion on the part of supervisors to determine when particular projects should be excepted. Respondent did not violate the overtime policy in allowing the four

members of the salt bin crew to work overtime as needed.

There is no question that DOH did not follow the rotation procedure for scheduled overtime until July of 1996, as admitted by its witnesses at levels three and four. Scheduled overtime in April and May of 1996 was offered on a voluntary basis, whereby employees were allowed to “sign up” pursuant to a posted notice. L. IV, Gr. Ex. 3. Once the needed number of employees had signed up, all were allowed to work the overtime. There is no question that this system did not comply with DOH's policy. The instant case is not the first involving DOH's failure to follow its overtime policy. In Henderson v. W. Va. Dept. of Trans., Docket No. 95-DOH-548 (Apr. 17, 1996), as here, because DOH was not following overtime rotation lists, there was no way to ascertain whether the grievant was eligible and should have been offered overtime work at the particular time in question. Accordingly, Grievant has not proven that he should have been offered any particular overtime during 1995 or 1996. Although DOH did not follow its overtime policy, Grievant has not demonstrated that he has suffered any harm because of this failure. Grievant contends, that, even if the salt bin project fell within the “special project” exception, DOH failed to follow the procedures for “passing over” those employees for other overtime. Grievant attempted to prove this through the four employees' time records for the latter half of 1995, which do show that they worked overtime hours. However, neither the employees nor any other witness explained how the overtime was awarded or what type of work was being done. Moreover, there is no evidence regarding the overtime offered to or worked by other employees within Grievant's county detachment of DOH, so it cannot be ascertained by the undersigned whether the employees in question were passed over with regard to scheduled overtime offered.

Grievant has argued that the salt bin overtime was awarded in a discriminatory fashion. “Discrimination” is defined by W. Va. Code § 29-6A-2 as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” Grievant cannot establish a prima facie case of discrimination without showing that he is similarly situated to other employees who were treated differently. Underwood v. W. Va. Dept. of Trans., Docket No. 95-DOH-509 (May 21, 1996). As discussed above, there is little to no evidence regarding the classifications, qualifications, and typesof work performed by the four employees who were on the salt bin crew. Accordingly, the evidence does not establish that Grievant was similarly situated to those employees.

Conclusions of Law

1. Grievant bears the burden of proving his claims by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. Grievant failed to prove that DOH engaged in discrimination in awarding overtime to the salt bin crew in 1996.

3. Grievant proved by a preponderance of the evidence that DOH violated its overtime policy in the first half of 1996 by not following a rotation schedule.

4. It was within the discretion of DOH supervisors to determine that the scheduled overtime policy did not have to be followed with regard to the 1996 salt bin project.

5. Grievant failed to prove by a preponderance of the evidence that he has suffered any harm due to DOH's failure to follow its scheduled overtime policy.

Accordingly, this grievance is **DENIED.**

Any party 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.

Date: July 18, 1997 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant's original grievance form stated a second claim of retaliation by his employer. However, it was not addressed during the level four hearing or in Grievant's post-hearing submission, so it is deemed abandoned.

Footnote: 2

Although never explained at any level of the grievance procedure, it will be assumed that the Division of Highways is divided into districts and that the Marion County office is included in District Four.