LARRY PARSONS,

Grievant,

v. DOCKET NO. 97-DOH-361

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Larry Parsons, alleged discrimination in assignment of overtime. Specifically, Grievant objected to allowing a new employee overtime, without first offering the overtime to more senior employees such as Grievant. The grievance was denied at all lower levels, and was submitted on the record developed below for decision at Level IV. The matter became mature for decision on August 18, 1997, the deadline for submission of Proposed Findings of Fact and Conclusions of Law.

The facts of this matter appear undisputed, and are found as follows:

FINDINGS OF FACT

1 1. Grievant is employed as a crew leader in Respondent's Lincoln County Maintenance Organization (LCMO).

2 2. William Wade was employed by Respondent's LCMO, and was temporarily reassigned to work in the "Disforce" Organization (See footnote 1) soon after being hired. Six months after being hired, Mr. Wade was permanently assigned to the Disforce Organization.

3 3. Larry Pauley is the supervisor for the LCMO. 4 4. Jim Alford is the supervisor for the Disforce Organization.

5 5. While temporarily assigned to the Disforce Organization, Mr. Wade reported to and was given assignments by Mr. Alford. Mr. Wade was offered and worked overtime for the Disforce Organization, which was not offered to Grievant. (See footnote 2)

6 6. Respondent has a "Scheduled Overtime Policy" for county maintenance organizations (Policy). Gr. Ex. 1.

7 7. Respondent does not post an overtime list in its LCMO, although posting is required by its Policy. (See footnote 3)

DISCUSSION

In a non-disciplinary grievance of this nature, Grievant bears the burden of proving his case by a preponderance of the evidence. W. Va. Code §29-6A-6. Grievant here alleges Respondent failed to follow its own Policy, by discriminating in assigning overtime between Grievant and another identified employee.

Respondent's Policy provides, in pertinent part:

> 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 anemployee to accumulate hours in excess of the standard forty hour work week...
>
> POLICY
>
> It is the Policy of [Respondent] 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... 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. A work unit is considered to be the County Headquarters or a Sub-Station.
>
> 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... 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.

Clearly, by its own terms, this Policy applies only to county maintenance organizations. It requires equitable and systematic offering of overtime to employees "within a work unit" and to employees "within the appropriate classification." Review of the evidence presented dictates that Grievant has failed to prove hiscase, as he has failed to prove that this Policy applied to the situation with which he takes issue.

Grievant failed to prove that the Disforce Organization is, or could be construed to be, one of the county maintenance organiza- tions to which the policy applies. The sparse evidence tends to show that the Disforce Organization is not, and should not be construed to equate to, a county maintenance organization. The witnesses all referred to the Disforce Organization as if it were a separate organizational entity. Apparently, different employment registers were used by LCMO and Disforce, as testimony indicated that Mr. Wade was not reachable on the register used for Disforce hiring, but was reached using the LCMO register. (See footnote 4) The respective names suggest either that they are on an equivalent level of the organizational structure (as both are "organizations"), or that Disforce is a regional entity (as it does not bear the "County" modifier). These things taken together are insufficient to prove that Disforce is an organization covered by the Policy.

Even if the Policy **had** applied to the overtime offered to Mr. Wade by Disforce, these same facts dictate that Disforce be viewed as a different work unit. There is no evidence that Disforce is either a County Headquarters or a Sub-Station, which are "work units" under the Policy. Disforce work was under the purview of anentirely different supervisor. See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992) (where this same Grievant's supervisor was found responsible for fairly and evenhandedly allocating overtime to Grievant, as well as other LCMO employees in the crew leader classification). Thus, overtime offered to Disforce workers was not offered "within a work

unit" which included the LCMO. Grievant also failed to prove that the overtime at issue was "scheduled" overtime.

Finally, it is clear that Mr. Wade and Grievant are in different classifications. Mr. Wade is an Equipment Operator II, while Grievant is a crew leader. Thus, it does not appear that work which Mr. Wade is "qualified to perform" is the same as work which Grievant is "qualified to perform." (See footnote 5) (Cf. Adkins v. W. Va. Div. of Highways, Docket No. 92-DOH-146 (Sept. 3, 1992) at 5, where testimony established that LCMO did not award overtime to employees based solely upon their job classification or current duties, and therefore the grievant was similarly situated to employees in other classifications.) Grievant failed to provide evidence as to what kind of work was, in fact, performed during the overtime. Respondent's one piece of evidence on this point was Mr. Pauley's testimony that "they don't have a crewleader in Disforce. In my interpretation, Mr. Wade didn't take any overtime work away from [Grievant]." (Tr. p. 31.) This sparse evidence tends to show that Grievant was neither "within the appropriate classification" nor "qualified to perform the necessary duties." Turning to Grievant's discrimination claim, W. Va. Code §29- 61-2(d) defines "discrimination" 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." To establish a prima facie case of discrimination, Grievant must show:

> (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 the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Here, Grievant failed to make a prima facie case under the above standard. He failed to show that he was similarly situated to Mr. Wade, as he and Mr. Wade are in different classifications and perform work for different organizations. See Board v. W. Va. Dept. of Transp., Docket No. 91-DOH-

211 (Feb. 28, 1992). Moreover, he failed to show that differences in his and Mr. Wade's treatment were unrelated to their respective, actual job responsibilities.

Even if Grievant were deemed to have made a prima facie case of discrimination, similar reasons support a finding thatRespondent provided a legitimate, non-discriminatory reason for the employment action. It is clear that Grievant was not subject to Mr. Alford's supervision, while Mr. Wade was subject to Mr. Alford's supervision. I do not hold that Mr. Wade's temporary assignment to Disforce, and Mr. Alford's offering of overtime to Mr. Wade as a temporarily-assigned employee, were permissible or impermissible practices. However, I do hold that Grievant has failed to prove that any legal requirement was violated by the arrangement, such that he was harmed. (See footnote 6)

CONCLUSIONS OF LAW

1 1. In non-disciplinary grievances of this nature, Grievant bears the burden of proving his case by a preponderance of the evidence. W. Va. Code §29-6A-6.

2 2. W. Va. Code §29-61-2(d) defines "discrimination" 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." To establish a prima facie case of discrimination, Grievant must show:

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> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3 3. Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4 4. Respondent's Scheduled Overtime Policy applies to county maintenance organizations. It mandates that scheduled overtime be offered on a rotating seniority basis within the work unit, to employees within the appropriate classification, who are qualified to perform the necessary duties.

5 5. Grievant failed to prove Respondent violated, misapplied or misinterpreted any statute, policy, rule, regulation or written agreement in its assignment of overtime to Mr. Wade, while Mr. Wade was temporarily assigned to the Disforce Organization.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the circuit court of the county in which the grievance occurred. 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 thecivil action number so that the record can be prepared and transmitted to the appropriate court.

Date: September 29, 1997

JENNIFER J.MEEKS **Administrative Law Judge**

Footnote: 1

What this organization is, and what it does, was not addressed in the record. While it appears that Disforce is another organizational part of the Division of Highways, it is unknown whether it is a county-level, district-level or statewide-level organization.

Footnote: 2

The record suggests that Grievant was offered the opportunity to perform work for the Disforce organization. (Tr. p. 16.) However, as this offer was made subsequent to the filing of the grievance, and as it is unclear exactly what the offer entailed, the offer is deemed irrelevant.

Footnote: 3

While it is clear that this constitutes a violation of the Policy, it is also clear that Grievant is not complaining of Respondent's failure to post the overtime rotation list, and therefore this violation will not be further addressed.

Footnote: 4

While this may seem a questionable practice, Grievant specifically stated that he was not challenging the legality of hiring, temporarily assigning and then transferring Mr. Wade to Disforce. His objection was only to Mr. Wade receiving overtime while an employee of the LCMO, without that overtime being offered to more senior employees on the rotation list. Thus, the legal sufficiency of Respondent's practice need not be ruled upon in this grievance.

Footnote: 5

Grievant did not supply evidence that he ever held the Equipment Operator II classification, or that he was "qualified" to operate the equipment which Mr. Wade presumably operated.

Footnote: 6

Employees of Disforce might have standing to contest the practice, however.