BENJAMIN BLAKE,

Grievant,

v. **DOCKET NO. 97-DOH-338**

WV DEPARTMENT OF

TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Benjamin Blake, Grievant, challenges the Division of Highways' ("DOH") decision to offer overtime work to a temporary employee on March 2, 1997. As relief, he seeks compensation for eight hours of overtime work. Grievant's immediate supervisor denied the grievance on March 6, 1997, and it was also denied at level two on March 26, 1997. A level three hearing was held on June 3, 1997, followed by a decision denying the grievance dated July 11, 1997. Grievant appealed to level four on July 18, 1997. A level four hearing was scheduled for October 7, 1997, which was continued for good cause shown. Thereafter, the parties agreed to submit this matter for a decision based upon the record developed below, accompanied by findings of fact and conclusions of law submitted by November 19, 1997. The following findings of fact are made from a preponderance of all of the evidence of record.

Findings of Fact

1. Grievant is employed by DOH in Lewis County as an Equipment Operator III.

2. On Saturday, March 1, 1997, flooding caused a Lewis County road to become blocked, necessitating the need for an emergency DOH crew to clear the road.

3. It is the responsibility of William Cayton, Lewis County Superintendent, to call outemployees for emergency overtime work.

4. The employees who worked on March 1, 1997, did not finish the job of clearing the roadway. Mr. Clayton discovered this at some time late that Saturday evening. (See footnote 1) Accordingly, it was necessary for Mr. Cayton to also call employees to work on the following day, Sunday, March 2, 1997.

5. Mr. Cayton made the decisions regarding the overtime work on March 1 and 2, 1997, from his home, and he did not consult a list of employees when he chose who to call for the work.

6. One of the employees Mr. Clayton called out to work on March 2, 1997, was Todd Carpenter, a temporary employee classified as an Equipment Operator II. Mr. Carpenter had not worked on Saturday.

7. The work performed by Mr. Carpenter on March 2, 1997, consisted of flagging, operating a chain saw, and other miscellaneous duties normally assigned to laborers or craftsworkers.

Discussion

Grievant bears the burden of proving his claims by a preponderance of the evidence. See W. Va. Code § 29-6A-6. The dispute in this case involves application and interpretation of DOH's "Scheduled Overtime Policy," which has been in effect since December of 1994. 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. 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 ofthe standard forty hour work week.

* * *

> 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 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.

* * *

> 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 quite clear that the policy only applies to “scheduled” overtime. Grievant contends that, in this case, the work which was needed for Sunday, March 2, 1997, was “scheduled in advance,” because the employees were called on Saturday evening. Accordingly, Grievant argues that the policy for scheduled overtime applies and, therefore, it was improper for Mr. Cayton to call Mr. Carpenter for the work.

The record and testimony at level three indicate that, in fact, officials with DOH were somewhat confused as to whether the continuation of the work which occurred on Sunday was considered “emergency” or “scheduled” work. Mr. Cayton believed the work was emergency, merely being a continuation of the situation which began on Saturday. However, Marvin Murphy, District Engineer, and the level two evaluator in this case, remained confused as to whether or not this was scheduled work. Mr. Murphy testified at level three that, while the work may not have been considered scheduled, he felt that Mr. Cayton still had time on Saturday evening to call otherpermanent employees, instead of a temporary employee such as Mr. Carpenter. He found in DOH's favor at level two, however, because he did not believe Grievant had proven that he would have been called, even if Mr. Carpenter had not.

DOH's confusion is understandable. The written overtime policy does not address the particular situation presented here, when an emergency occurs during a weekend, requiring two days of overtime work. Nevertheless, the undersigned cannot find that DOH clearly violated its overtime policy. While DOH has been admonished in the past for ignoring the scheduled overtime policy, this is not such an instance. In cases such as Henderson v. W. Va. Dept. of Transp., Docket No. 95-DOH-548 (Apr. 23, 1996) and Michael v. W. Va. Dept. of Transp., Docket No. 97-DOH-148 (July 18, 1997), DOH simply ignored its duty to follow a rotation list of employees when scheduling overtime work in advance. However, in this case, DOH's actions were quite reasonable. The overtime policy specifically requires that an “Overtime Offered/Worked Chart” will be posted in each work unit

location, listing each employee's name by seniority and classification, with marks made as to when work was offered and whether it was accepted or refused. Clearly, in the instant situation, it would not have been reasonable to have required Mr. Cayton to leave his home late on a Saturday evening to consult the overtime list in the office, when an emergency situation unquestionably existed on Saturday, and the work merely continued into Sunday.

Accordingly, the undersigned finds that an emergency situation existed on Saturday, March 1, 1997, which continued into Sunday, March 2, 1997. This is not comparable to weekend work which the agency knows of during the prior work week, when it is clearly required to use the rotation list for offering the work to its employees. Accordingly, DOH's “Scheduled Overtime Policy” did not apply, and DOH committed no violation by calling a temporary employee to work. Althoughthere is a serious question as to whether or not Grievant would have otherwise been called to participate in the work in question, that issue need not be addressed, in light of the finding that the overtime policy did not have to be followed, and no violation occurred.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate in this case.

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. The overtime policy of the Division of Highways requires that scheduled overtime be offered to full-time employees before being offered to temporary employees. Henderson v. W. Va. Dept. of Transp., Docket No. 95-DOH-548 (Apr. 23, 1996).

3. Grievant did not prove by a preponderance of the evidence that the work which was the subject of this grievance was “scheduled” overtime within the meaning of the Division of Highways 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 numberso that the record can be prepared and transmitted to the appropriate court.

Date: February 9, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The record does not indicate at exactly what time this discovery was made, or what time Mr. Cayton made calls to employees asking them to work on Sunday.