CHARLES E. WALKER,

Grievant,

v. DOCKET NO. 01-DOH-450

W.VA. DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS

DECISION

On March 5, 2001, Charles E. Walker (Grievant) filed this grievance at Level I with his immediate supervisor, stating: “I feel I have been discriminate[d] against due to being sent home on Fridays and not being allowed to work my eight hour scheduled shift while another employee was allowed to work a full shift on Friday resulting in over 40 hrs. for the week.” As relief, Grievant requests that he be compensated for wages lost due to this act of discrimination.

This grievance was denied at all lower levels and was appealed to Level IV on or about July 27, 2001. A Level IV hearing was held on September 4, 2001 in the Grievance Board's Beckley office, where Grievant represented himself, and Respondent was represented by its counsel, Jennifer Francis, Esq. Although Grievant did testify to rebut a statement in the Level III decision, neither party called any witnesses nor presented any additional evidence, preferring to rely on the record as developed at Levels I through III. Grievant agreed to allow Respondent ten days to file its proposed Findings of Fact andConclusions of Law, and this matter became mature for a decision on receipt thereof on September 13, 2001.

Based upon a preponderance of all the evidence contained in the record, the following findings of fact are made:

FINDINGS OF FACT

1. Grievant is a Transportation Engineering Technician employed by Respondent in District Nine. His supervisor at the time of the events upon which this grievance is based was Greg Hylton.

2. In November, 2000, Division of Highways (DOH) Deputy Commissioner Carl Thompson directed District Nine Administrator Joe Hayes, Jr. to curtail all unnecessary overtime and excess time unless it was necessary to protect the traveling public, such as for snow removal.

3. On Friday, February 16, 2001, Grievant reported to work at his normal time, but was told by

Mr. Hylton that he would only be permitted to work 2 ½ hours that day because otherwise he would exceed 40 hours for the week. He was sent home after being at the office for ½ hour because he was driving a company vehicle and the 1-hour trip each way counted as work time.

4. Charles Wilson, also a Transportation Engineering Technician in District Nine, is supervised by Eric Redden.

5. Mr. Wilson attended a work-related class the following Monday, a holiday, and then proceeded to work the remainder of the week. His supervisor failed to instruct him not to work his usual shift for the rest of the week, thus earning excess time. As aresult, he was credited with 48 hours of work time for the week, an excess of eight hours over a normal work week.

6. The work Mr. Wilson performed for the excess eight hours was not necessary to protect the traveling public.

7. Mr. Hayes was not aware that Mr. Wilson had been allowed to work the excess hours and would not have authorized it had he been aware. Mr. Wilson's supervisor made a mistake in allowing Mr. Wilson to exceed 40 hours for the week.

DISCUSSION

Grievant has articulated a claim that he was discriminated against because a similarly situated employee was allowed to work in excess of 40 hours while he was not. "Discrimination" means 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. W. Va. Code § 29-6A-2(d). Employees seeking to establish discrimination may establish a prima facie case of discrimination under W. Va. Code §29- 6A-2(d) by demonstrating:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct.19, 1989). Grievant has made such a showing, by proving that Mr. Wilson, employed by Respondent in the same district with the same job title, albeit under a different immediate supervisor, was permitted to work in excess of 40 hours after Grievant was prohibited from doing so. However, when a prima facie discrimination claim is established, Respondent is permitted to rebut the claim with a legitimate excuse. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). The Grievance Board has recognized that a mistake is a legitimate excuse. Crosston v. W. Va. Dep't of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). Respondent has shown that when Mr. Wilson was permitted to work in excess of 40 hours, this was a management mistake that should not have occurred. Grievant may show that the offered excuse is pretextual. Deal, *supra*. Grievant did not offer any evidence that would establish that Mr. Wilson's treatment was anything other than a mistake.

This discussion is supported by the following conclusions of law:

CONCLUSIONS OF LAW

1. "Discrimination" means 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. W. Va. Code § 29-6A-2(d).

2. Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct.19, 1989).

3. Grievant did establish a prima facie discrimination claim by demonstrating that he was treated differently than a similarly situated employee for reasons unconnected to their actual job responsibilities.

4. Once a grievant establishes a prima facie case of discrimination, the burden shifts to the

employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). *See* Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

5. Respondent demonstrated that the reason for the difference in treatment was a mistake by management that violated the DOH Commissioner's directive to curtail unnecessary overtime or excess time. Grievant presented no evidence to support a finding that this excuse was pretextual.

6. Mistakes by employers do not usually entitle a grievant to relief. White v. Dep't of Highways/Div. of Trans., 00-DOH-313D (Jan. 17, 2001); Crosston v. W. Va. Dep't of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997); Specifically this Grievance Boardhas held that it is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. White, *supra*.

7. Grievant is not entitled to the relief he requests even though he was treated differently from another employee, because the other employee benefitted from a mistake.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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M. Paul Marteney

Administrative Law Judge

Dated: September 19, 2001