BILL PRATER, et al.,

Grievants,

v.

DOCKET NO. 00-DOH-303

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, Bill Prater and Norman Stepp filed this grievance against their employer, the West Virginia Department of Transportation/Division of Highways ("Highways") on March 10, 1999:

> I believe that the overtime policy is not being followed in Mingo County because overtime is not being distributed fairly and equally and no record is kept of overtime worked/offered for employees to view.
>
> Relief sought: The overtime policy should be followed. I should be compensated for overtime not properly offered to me, and to be made whole in any other way.

The grievance was denied at level one on March 15, 1999, by Grievant's immediate supervisor, Joe Hatfield. A level two conference was held on March 29, 1999, and the grievance was granted in part and denied in part by J. Wilson Braley, District Administrator. A level three hearing was conducted on January 6, 2000. Grievance Evaluator Brenda Craig Ellis recommended denial of the grievance, and her recommendation was acceptedby Thomas Badgett, Assistant Commissioner, on September 11, 2000. Grievants appealed to level four on September 19, 2000, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 18, 2000. This matter became

mature for decision on January 25, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievants were represented by Mr. Steve Rutledge, AFSCME representative, and Highways was represented by Jennifer E. Francis, Esq.

SUMMARY OF EVIDENCE

Level Three Grievants' Exhibits

Ex. 1 -

Grievants' notes attached to the original grievance form when filed.

Ex. 2 -

1998 Overtime Hours Summary for Organization 0230.

Ex. 3 -

Level II response to the grievance.

Ex. 4 -

W. Va. Dept. of Transportation/Div. of Highways' Scheduled Overtime Policy.

Ex. 5 -

Overtime hours for parts of 1998 and 1999 for Dwayne Dingess, Billy Prater, and Norman Stepp.

Level Three Highways' Exhibits

Ex. 1 -

DOH 12's for Organization 0230 for September 2, 1998, through February 28, 1999.

Level Four Grievants' Exhibits

Ex. 1 -

1998 Overtime Hours for 0230 - Mingo County Headquarters.

Ex. 2 -

July 6, 1999 response to level two grievance.

Level Four Highways' Exhibits

Ex. A -

General Highway Map, Mingo County, West Virginia, 1998.

Ex. B -

Handwritten Notes of Cecil Collins calculating Highway Mileage Report.

Testimony

Grievants presented the testimony of J. Wilson Braley, Danny Frye, Joe Hatfield, Bill Prater, and Norman Stepp. Highways presented the testimony of Cecil Collins, Barry Mullins, and J. Wilson Braley.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant Prater is a Transportation Worker III, Equipment Operator, employed by Highways for 11 years.

2. Grievant Stepp is a Transportation Crew Chief, Maintenance, employed by Highways for 11 years.

3. Mingo County is composed of several substations, each of which is largely responsible for work within given work boundaries in the county. Gilbert and Miller Creek are two such substations. The specific work boundaries for Gilbert and Miller Creek are depicted on Level IV Highways' Exhibit A, a transportation map of Mingo County.

4. Grievants are assigned to the Gilbert substation.

5. The Gilbert and Miller Creek substations are separate work units for purposes of scheduled overtime, and employees from different substations are not required to share or divide overtime.

6. Mingo County Routes 8, 8/1, and 10, are located within the work area of the Gilbert

substation.

7. The Department of Transportation's Scheduled Overtime Policy states that:

> 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, andending with the least senior. Once established, this rotation list should not be changed. The offering of time 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 Substation.

8. It is standard DOH practice to bring in employees from other substation/work areas to work on state routes, when using only employees from the work area where the route is located would hamper maintenance of other state routes within the work area.

9. Miller Creek employees and temporary employees were brought in to work on Routes 8, 8/1 and 10, in the Gilbert area, because these work projects required too many work hours for Gilbert employees to perform on their own while still providing routine maintenance on other routes in the Gilbert area.

10. Travel time from Miller Creek headquarters to the work sites in the Gilbert area is approximately 1 hour each way, for a total of 2 hours daily travel to and from the work site for Miller Creek employees. Employees of the Gilbert substation were not required to travel such distance to report to work.

11. Miller Creek employees received 2 hours overtime pay for days that they worked an 8-hour shift and then traveled 2 hours to and from work.

12. Grievant Stepp is in charge of posting the overtime log at the Gilbert area substation.

13. Gilbert substation stopped posting overtime logs because all Gilbert employees generally worked when overtime was available, making the postings unnecessary. 14. Opportunities given to Miller Creek employees and to temporary employees to work scheduled overtime were also given to Gilbert employees.

15. Under some circumstances unrelated to the work on Routes 8, 8/1 and 10 in the Gilbert area, Miller Creek employees might be given an opportunity to work overtime that Gilbert employees are not given. For instance, when there is an emergency situation (such as a downed tree-limb), the first available personnel are to report to the scene in an attempt to keep response time down,

regardless of the substation in which the first available employees work. Therefore, if an emergency situation occurs and Miller Creek employees are the first available to report, even if the scene of the emergency is within the Gilbert work boundaries, the Miller Creek employees should be called to report.

16. Emergency situations are considered “unscheduled overtime” rather than “scheduled overtime,” as described in Finding of Fact No. 7.

17. In Mingo County, there is an inordinate amount of what is referred to as “Autumn Vandalism” or “Halloween Pranks”, which constitute emergency situations in which the first available personnel report to work. For example, Duane Dingess, a resident of the heavily vandalized area of Dingess, has received overtime to clean up after the vandalism because of the proximity of his home to the scene of the vandalism.

18. Ernest Rockel, a Miller Creek employee, received overtime in some instances where other employees did not, because he is one of only a few employees who has specialized skills to operate special equipment. As a result, he is required to work on projects all over the county, thereby giving him increased opportunity to accrue overtime. 19. Joe Hatfield, Gilbert foreman and crew leader, received more overtime than Grievants because, as a result of his position, he is called first for off-hours emergencies. Often Mr. Hatfield is able to handle the emergency himself without calling out other employees to work. Therefore, in such cases, he alone is compensated for his overtime.

20. J. Wilson Braley's level two decision affirming Grievants' complaint reflects his initial belief, based on information provided to him by Danny Frye, a former Highways' employee who has since been terminated, that Grievants were treated unfairly in terms of overtime offered to them.

21. Following the level two hearing, Mr. Braley reviewed time sheets of Gilbert and Miller Creek employees, at which time he discovered that Highways' overtime policy had not in fact been violated to the detriment of Gilbert employees. As a result, Mr. Braley's position with regard to this grievance has changed.

DISCUSSION

In a non-disciplinary grievance such as this, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Tucci v. W. Va. Div. of Highways, Docket No. 94- DOH-592 (Feb. 28, 1995). W. Va.

Code § 29-6A-6. Grievants allege Highways has violated its Scheduled Overtime Policy because employees of Miller Creek substation received greater amounts of overtime during September, October and November of 1998, than employees at Gilbert substation. Further, Grievants point to Mr. Braley's level two response to their grievance in which he affirmed the overtime policy had not been correctlyapplied, but denied Grievants any compensation for lost overtime, as proof that they have sustained their burden in this grievance.

Highways' 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. DOT Administrative Procedures, Vol. II, Chapter 9. It is not a policy of Highways that employees in different substations must share/divide overtime, even scheduled overtime, equally. Substations are separate entities for the purposes of scheduling overtime. Even in circumstances such as this where employees of different substations are working on one project in one substation's work area, there is no requirement that employees of different substations share overtime. As a result, the requirement that overtime be offered to employees on a rotating basis, as detailed in Highways' Scheduled Overtime Policy is inapplicable to this grievance. Unscheduled overtime is not required to be offered on a rotating basis, but rather, in emergency situations, it is offered to the first available personnel.

With regard to Mr. Braley's level two decision, he credibly explained the reason why he affirmed the decision in part at level two, in that he relied on information provided to him by Danny Frye, an ex-employee at Highways, without investigating the matter himself. Based on the informaton received from Mr. Frye, Mr. Braley had concluded that the Scheduled Overtime Policy had not been correctly applied vis-a-vis the Grievants. Once he undertook an investigation, he realized he had been given wrong information. At levelfour, he testified that he now believes the Scheduled Overtime Policy has been correctly applied, and Grievants have not been denied any overtime they were entitled to receive.

CONCLUSIONS OF LAW

Grievants have failed to prove by a preponderance of the evidence that Highways violated, misapplied or misinterpreted any statute, policy, rule, regulation or written agreement in its assignment of overtime to Miller Creek employees or to temporary employees.

Accordingly, this 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 § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 13, 2001