JEFF HUGHES and SCOTT DINGESS,

Grievants,

v v.

Docket No. 01-DOH-571

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, Jeff Hughes and Scott Dingess, are employed by the West Virginia Division of Highways ("DOH") as Equipment Operator II's. They filed this grievance on August 6, 2001. Their Statement of Grievance indicates they believe they were entitled to overtime they did not receive during flood relief work, while other workers did receive this additional overtime. For relief, Grievants sought, "[t]he same amount of overtime hours worked on July 29, 2001 by Mark Terry, Robert Dingess, [and] Darrell Quintrell [and] to be made whole of lost wages."

At Level I, Grievant's supervisor, Larry Pauley, stated he did not have the authority to resolve the grievance. At Level II, District Engineer Wilson Braley denied the grievance, and he noted the DOH employees who assisted with the flood clean up were under the supervision of the National Guard. The Level III Decision denying the grievance was issued by Hearing Examiner, Brenda Ellis, and then adopted by Assistant Commissioner Jerry Bird, on October 31, 2001. (See footnote 1) Grievant appealed to Level IV on November 8, 2001, and a Level IV hearing was held on April 12, 2002. This case became mature for decisionat that time as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievants argue that if additional overtime was to be given, they should have been the ones to

receive it because they were the first to be called as required by the overtime rotational system. Respondent avers the situation was in the hands of the National Guard, and it had no control over whom they asked to return.

Findings of Fact

1. Grievants are employed in District 2 at the Harts Creek substation as Equipment Operator II's.

2. After the June 2001 flooding, the National Guard asked DOH to send three Equipment Operator II's and equipment to assist in the clean up.

3. Wilson Braley, the District Engineer in District 2, decided this type of work would be scheduled overtime which required the overtime rotation list be followed.

4. Mr. Braley also decided the Equipment Operator II's closest to the clean up area, which would be the Harts Creek substation, should be offered the overtime first.

5. Grievants were the only two Equipment Operator II's from the Harts Creek substation who accepted the overtime work.

6. The Equipment Operator II's from the next closest substation, West Hamlin substation, were called next. Darrell Quintrell accepted the overtime work. 7. These Equipment Operator II's started work on July 19, 2001.

8. Later in the week, the National Guard asked for another Equipment Operator II, and Robert Dingess from the West Hamlin substation, agreed to work the overtime. He started his work on July 23, 2001.

9. Mr. Quintrell called Mr. Pauley on Wednesday, July 25, 2001, and advised him the overtime work would be concluded on Saturday.

10. On Saturday morning, Sgt. Ball of the National Guard told Grievants and Mr. Quintrell that they would not be needed after Saturday.

11. All District DOH workers left around noon on Saturday, and Mr. Robert Dingess brought his DOH truck back from the work site.

12. Mr. Quintrell is knowledgeable about DOH's overtime policy.

13. Unbeknownst to Grievants, Mr. Quintrell talked to another National Guard person, and he was asked to return to the work site on Sunday, July 19, 2001. Mr. Quintrell did not inform Mr. Pauley

or Grievants of this change.

14. Mr. Quintrell told Robert Dingess when he dropped him off Saturday that he would pick him up at the same time as before on Sunday.

15. Mr. Quintrell and Robert Dingess worked 9½ hours of overtime on July 28, 2001, assisting in flood clean up.

16. Because he believed the work was over, Mr. Pauley sent Mark Terry on Sunday to retrieve a piece of equipment with the tandem truck. (See footnote 3) 17. Shortly after this flood relief work, Mr. Quintrell joined the National Guard. 18. After this grievance was filed and after the Level II conference on August 22, 2001, Mr. Braley received a letter dated September 4, 2001, from Captain Robert Schoolcraft with the National Guard. Captain Schoolcraft stated he had personally asked Mr. Quintrell to return on Sunday, July 29, 2001, because of his expertise. Mr. Quintrell agreed this was "the sort of mission [Mr. Quintrell] could make a positive impact upon." Resp. Ex. No. 1, at Level III. This letter does not mention any need for Robert Dingess. 19. There was no crew leader with these workers at any time, and one had not been sent because the National Guard had not asked for one.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23- 174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

This grievance deals with scheduled overtime, but this specific set of facts is not covered in the "Scheduled Overtime Policy." Rather, this grievance presents a unique issue, with the main focus being one of fairness. DOH correctly asserts it had nothing to do with Mr. Quintrell and Robert Dingess returning to the work site on Sunday. These facts demonstrate the problems that are created when the activities of state workers are not controlled by the state. Grievants, as the first offered and the first to accept the overtime,would be expecting to return on Sunday if anyone was to return. Mr. Quintrell was aware of this belief, and his awareness is demonstrated by the fact he did not inform

Mr. Pauley or Grievants that he and Robert Dingess would be returning the following day. Additionally, the National Guard may have specifically asked Mr. Quintrell to return, but there is little evidence to support the need for Robert Dingess' return.

Robert Dingess' testimony on this issue is very unclear. When asked if he was told he would not be needed Sunday, he said, "I'm sure they might have said that." He also repeatedly testified he just "didn't pay no attention" to what was said, and it was Mr. Quintrell who told him they were needed to come back to pick up some garbage on Sunday.

Mr. Braley testified the work was not paid for by DOH, but the overtime was reported on DOH time sheets, and Mr. Braley did not know who, where, or how DOH was compensated for this overtime. He thought it was with federal monies.

After looking at the information presented in this grievance, it appears Mr. Quintrell orchestrated events so if anyone was to return on Sunday, it would be he. (See footnote 4) He did not tell his supervisor, Mr. Pauley, or Grievants he was to return, so if this was not the correct course to follow, he could not be corrected. Robert Dingess was not asked by the National Guard to return, but when Robert Dingess asked Mr. Quintrell, Mr. Quintrell said he would pick him up as usual. Robert Dingess knew Mr. Quintrell would be returning. It is also clear from these facts that DOH did not violate its policy. The equitable thing to do in this set on facts is one not necessarily directed by law or policy, but by fairness. The actions an administrative law judge may take to fashion an equitable remedy are discussed in W. Va. Code § 29-6A-5(b), and this Code Section states:

> (b) Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§§ 29A-5- 1], article five, chapter twenty-nine-a of this code, provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

(Emphasis added.)

Here the fair thing is to allow Grievants to work a day, 7½ hours, of overtime for the day they should have worked instead of Mr. Quintrell and Robert Dingess. (See footnote 5) This overtime should be offered off the rotational chart, and would compensate Grievants for the day they lost.

Additionally, the relief granted by the Level III Hearing Examiner is affirmed. Mr. Quintrell and Robert Dingess are to be skipped on the scheduled overtime, rotational chart. This action is appropriate to provide equitable relief to all concerned. Further, while it is unclear how this situation can be corrected in the future, but it would be helpful if some meaningful dialogue could take place between DOH and the National Guard.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 29-6A-5(b) states an administrative law judge may "provide relief as is determined fair and equitable in accordance with the provisions of this article" and, "the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole."

3. With this narrow, specific set of facts, Grievants have met their burden of proof and demonstrated they were entitled to the scheduled overtime worked by Mr. Quintrell and Robert Dingess.

Accordingly, this grievance is **GRANTED**.

Respondent is directed to schedule Grievants to work a day, 7½ hours, of overtime, at their convenience and based on the needs of the District. This overtime should be offered off the rotational chart. Respondent is also directed to assure Mr. Quintrell and Robert Dingess are skipped on the rotational chart.

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 StateEmployees 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 17, 2002

Footnote: 1

Hearing Examiner Ellis stated in the Level III Decision that Darrell Quintrell should be "skipped" the next time scheduled overtime was offered, but she did not speak to Robert Dingess. It is unknown if this relief has been granted.

Footnote: 2

Grievants represented themselves, and Respondent was represented by Attorney Barbara Baxter. At Level III, Grievants were represented by fellow employee, Billy Topping, and DOH was represented by Attorney Nedra Koval.

Footnote: 3

Grievants do not object to this overtime as this was the piece of equipment Mr. Terry usually operated; Equipment Operators regularly operate the same piece of equipment.

Footnote: 4

The undersigned Administrative Law Judge takes administrative notice that there have been quite a few grievances filed concerning the amount of overtime Mr. Quintrell receives as compared to his co-workers.

Footnote: 5

Grievants explained that while Mr. Quintrell and Robert Dingess worked 9 ½ hours, two hours of this time was allotted to travel.