MICHAEL ADKINS,

Grievant,

v.

DOCKET NO. 01-DOH-625

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Michael Adkins, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways") on August 8, 2001:

> Lost wages on scheduled overtime during the flood. Or any other scheduled overtime. This is the second time I had to file grievance on overtime.
>
> Relief sought: I want to be asked to work schedule overtime before anyone with less seniority. I want to be paid for the same hours that they had since I was not asked. I would have went if asked.

The grievance was denied by the level one and two evaluators and Grievant appealed to level three on September 7, 2001. The level three hearing was held on December 5, 2001, and a decision rendered by Grievance Evaluator Brenda Craig Ellis, Esq., on December 12, 2001. (See footnote 1) Grievant appealed to level four on December 21, 2001, anda level four hearing was held on March 4, 2001. The parties declined the opportunity to submit proposed findings of fact and conclusions of law, and this grievance became mature at the end of the hearing on March 4, 2001. Grievant appeared pro se, and Highways was represented at level three by Carrie Dysart, Esq., and at level four by Belinda Jackson, Esq.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibit

Ex. 1 -

West Virginia Department of Transportation Daily Work Reports July 16-29, 2001; Daily Use of Truck Report July 19-29, 2001.

Level Four Grievant's Exhibits

Ex. 1 -

1999, 2000, and 20001 Overtime Hours for 0222-Lincoln County Headquarters.

Ex. 2 -

February 28, 2002 memorandum from Cynthia Lucas to Michael Adkins re: employees classified as Equipment Operator 3.

Highways' Exhibits

None.

Testimony

Grievant testified in his own behalf, and Highways presented the testimony of Wilson Braley.

FINDINGS OF FACT

Based on the testimony and evidence of record in this matter, I find the following facts have been proven by a preponderance of the evidence. 1. Grievant has been employed by Highways in Lincoln County, District Two, since August, 1978.

2. Grievant is currently classified as a Transportation Worker Equipment Operator III, and is assigned to the Yawkey location.

3. Jeffrey Hughes is employed by Highways as a Transportation Worker Equipment Operator

III in District Two, Lincoln County, and is assigned to the Harts Creek location.

4. Scott Dingess is employed by Highways as a Transportation Worker Equipment Operator II in District Two, Lincoln County, and is assigned to the Harts Creek location.

5. Robert Dingess is employed by Highways as a Transportation Worker Equipment Operator II in District Two, Lincoln County, and is assigned to the West Hamlin substation.

6. Darrell Quintrell is employed by Highways as a Transportation Worker Equipment Operator III in District Two, Lincoln Count, and is assigned to the West Hamlin substation.

7.

Wilson Braley is the District Engineer in District 2, Lincoln County.

8. In early July 2001, Mr. Braley was contacted by the Governor's office and requested to send employees to the Pineville area for flood cleanup work. Pineville is in Wyoming County, District Ten.

9. Due to the lack of overnight facilities for employees in the Pineville area, Mr. Braley contacted Warren Miller, Assistant County Administrator, and requested that hecontact employees assigned to the Harts Creek substation in Lincoln County to volunteer for the work in Pineville.

10. Mr. Braley selected Harts Creek because he believed it was closer in proximity to Pineville than other substations in the area. He also directed Mr. Miller to contact employees in West Hamlin and then Yawkey, if he could not get enough volunteers from Harts Creek. West Hamlin was the next closest location to Pineville, with Yawkey being the farthest of the three.

11. Mr. Miller succeeded in getting two volunteers from Harts Creek, Scott Dingess and Jeffrey Hughes, and two volunteers from West Hamlin, Darrell Quintrell and Robert Dingess.

12. Mr. Quintrell was an Equipment Operator II, but while working at the Pineville cleanup, received a promotion to Equipment Operator III.

13. Scheduled overtime in Lincoln County is handled by seniority within the classification on a rotating basis within each substation.

14. The Pineville cleanup job was scheduled overtime.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges he should have had the opportunity to work in the Pineville flood cleanup

from July 19 through 21, 2001, because he had more seniority than Darrell Quintrell. Highways argues that the Pineville flood cleanup was anemergency and not scheduled overtime, and thus it was not required to follow the seniority rules.

Highways' overtime policy states, in pertinent part:

> 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 of the standard forty hour work week, regardless of the rate at which it is compensated. This Policy in no way precludes the Agency from requiring employees to work overtime as needed, or in situations which affect the public interest.
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> Policy
>
> It is the Policy of the West Virginia Department of Transportation 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.
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> Procedure
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> 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....A work unit is considered to be the Count Headquarters or a Substation.
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> . . .
>
> 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.

LIII Decision, December 12, 2001.

The level three grievance evaluator found that the overtime in the instant grievance was scheduled overtime. The evidence presented indicates management learned on a Friday that

overtime would be required to begin on that Sunday. Thus, she found the Pineville flood cleanup work assignment should have been assigned according to the above overtime policy as it applies to scheduled overtime. Highways offered no further evidence at level four to dispute the Grievance Evaluator's conclusion that the Pineville cleanup should have been treated as scheduled overtime.

However, the Grievance Evaluator also found that the Pineville cleanup was one of those instances referred to in the Policy which dictates that the seniority roster not be consulted in the assignment of overtime, and the undersigned agrees. In this particular instance, it was important to obtain employees within proximity to Pineville due to the lack of overnight facilities. Mr. Braley determined that Harts Creek was the closest in proximity to Pineville, with West Hamlin coming in as second closest. Mr. Braley had asked Mr. Miller to begin looking for volunteers at Harts Creek, then West Hamlin, and then on to the Yawkey substation if he needed to. As it turned out, Mr. Miller was able to get a sufficient number of volunteers from Harts Creek and West Hamlin, and did not need to go on to the Yawkey substation, where Grievant works. The evidence establishes that, within each substation, the overtime list was followed in calling volunteers for the overtime work.

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ.& State Employees Grievance Bd., 156 CSR 1 § 4.21 (2000); Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Grievant has failed to establish by a preponderance of the evidence that the overtime policy was violated or that he was entitled to work the overtime during the Pineville flood cleanup.

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: March 21, 2002

Footnote: 1

A partial level three hearing was conducted on September 11, 2001, but continued due to terrorist activity in New York. The tape of the September 11, 2001, proceedings didnot record properly and necessitated beginning the hearing again as if none of the proceedings had taken place. The hearing was scheduled for October 4, 2001, but continued at the request of Grievant, and rescheduled for December 5, 2001.