**DALE C. JONES,**

**Grievant,**

**v.** **Docket No. 98-CORR-356**

**WEST VIRGINIA DIVISION OF CORRECTIONS,**

**Respondent.**

## DECISION

Grievant, Dale C. Jones, filed a grievance against Respondent, West Virginia Division of Corrections (Corrections), alleging discrimination because he was required to work on his day off and did not receive overtime pay as others have in the past. As relief, Grievant seeks 12 hours of overtime pay.

Grievant was denied relief at the lower levels of the grievance procedure. A Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on November 19, 1998 (See footnote 1) . The case became mature for decision on January 11, 1999, with the passing of the deadline for receipt of the parties' post-hearing briefs.

The following findings of fact were derived from the evidence produced at the lower levels and Level IV.

## FINDINGS OF FACT

1. Grievant is employed by Corrections as a Lieutenant and Shift Commander at the Denmar Correctional Center (DCC). 2. The duties of shift commander include the supervision of other correctional officers, preparation of a monthly work schedule and shift assignments, conducting formal/informal and emergency counts, and other duties associated with the security and operation of the correctional facility to insure the safety of staff and inmates.

3. By memorandum dated July 10, 1998, Stephen Yardley, Warden of DCC, advised all staff that, due to July 25, 1998, being a mandatory work day for those assigned, they would have the option of 1) being paid overtime for that day, or 2) taking a day off prior to July 25, 1998, but only during the same work week.

4. July 25, 1998 was originally scheduled to be an off-duty day for Grievant. Grievant worked on July 25, 1998 from 7:00 p.m. until 7:00am as the shift commander at DCC.

5. Grievant is paid overtime when he performs extra duties not included in his normal job as a Shift Commander.

## DISCUSSION

Grievant alleges that he should be considered “staff,” and “non-exempt” for the purpose of overtime pay. He states that the July 25, 1998 memo from Warden Yardley applies to him, and since he chose the “overtime option,” he should be paid as such.

Respondent argues that Grievant is an exempt employee under the Fair Labor Standards Act (FLSA) “short test” which provides that an employee compensated at a base salary exceeding the FLSA minimum guidelines, and whose primary duty consists of the management of a customarily recognized department or subdivision thereof, including thecustomary and regular direction of the work of two or more other employees therein, is exempt and not entitled to overtime compensation.

It is undisputed that Grievant's salary meets the short test criteria. It is also clear he normally supervises more than two employees, and manages a “department or subdivision”, i.e., a shift. Further, this Grievance Board has previously found that the duties of a “Shift Commander” meet the “short test” requirements and, therefore, it must be determined that Grievant is an exempt employee under the FLSA. See Reed v. Div. of Corrections, Docket No. 95-CORR-033 (April 26, 1996).

Grievant does not dispute that he performed his normal duties on July 25, 1998, and was acting as the Shift Commander that day. He states, however, that the memo was directed to “all staff”and should apply to him as well as other employees who received overtime pay for working on July 25, 1998 (See footnote 2) .

Discrimination is defined in W. Va. Code §29-6A-2(d) as "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." Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989), instructs that the burden of proof in a discrimination charge "may at least initially be met by a prima facie showing of discrimination." This is accomplished when grievants establish they were singled out by their employer from like employees for treatment which adversely affected them, and that such differences in treatment were unrelated to job requirements "and werenot agreed to by

the grievants in writing." According to the holding in Steele:

> If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. [Cite omitted.]

In the instant case, a witness, Captain Rick Nottingham of the Mount Olive Correctional Complex, credibly testified that he had earlier filed a grievance regarding overtime work for which he was not compensated. His grievance was settled by written agreement with Corrections just prior to the Level IV Hearing of his grievance (See footnote 3). In that settlement agreement, Corrections agreed to pay Captain Nottingham the sum of $5,705.64 for overtime worked and further agreed to compensate him for “any other overtime performed thereafter that would not be considered as a managerial duty.” Nottingham further testified that ever since his settlement, he is paid overtime regardless of whether he works extra hours in his normal position as a Shift Commander or volunteers for additional non-supervisory duties.

Respondent states that the settlement with Captain Nottingham is not relevant to the present matter. Respondent asserts that DCC, where Grievant is employed, is different from other correctional facilities in the state, in that it has its own separate budget and payroll policies. Respondent's assertion, however, is not convincing. Respondent does not dispute that employees similarly situated to Grievant, but employed at other correctional institutions under the jurisdiction and control of Corrections, are paid overtimewhen they perform supervisory duties. Therefore, the undersigned believes Grievant has established a prima facie case of discrimination. Respondent's argument that DCC is just different, and its employees should be treated as such, is not convincing.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

## CONCLUSIONS OF LAW

1. In non-disciplinary matters a grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Crow v. W. Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989).

2. Under W. Va. Code §29-6A-2(d), an employer engages in unlawful discrimination when it treats similarly situated employees differently, "unless such differences are related to the actual job

responsibilities of the employees or agreed to in writing by the employees."

3. "If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext." Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant established a prima facie case of discrimination, which Respondent failed to rebut. See Barber v. W. Va. Div. of Highways, Docket No. 94-DOH-267 (Feb. 28, 1995); Phillips v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992).

5. Grievant proved by a preponderance of the evidence that Respondentdiscriminated against him by failing to compensate him for the overtime hours he worked on July 25, 1998.

6. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party (Grievant) in the same position he would have been, had he not been deprived of the sum owed him and would have benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, the grievance is **GRANTED**. Respondent, Division of Corrections, is **ORDERED** to provide Grievant with twelve (12) hours of overtime pay for work performed on July 25, 1998, plus interest. It is also **ORDERED** that Grievant be awarded all other benefits he would have received consistent with this decision.

Any party, or the Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County or 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 number so that the record can be prepared and transmitted to the appropriate court.

Dated: March 30, 1999

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R.K. MILLER

ADMINISTRATIVE LAW JUDGE

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Footnote: 1

*Respondent was represented by its counsel, Charles Houdyschell. Grievant represented himself.*

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Footnote: 2

*No evidence was introduced to indicate how many, if any, employees received overtime compensation for working on July 25, 1998.*

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Footnote: 3

*A copy of Captain Nottingham's Settlement Agreement was introduced and admitted into evidence as Grievant's Exhibit 1.*