STEPHEN HILL,

Grievant,

v. **Docket No. 99- CORR-110**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Stephen Hill (Grievant) alleges that officials of the Huttonsville Correctional Center (Huttonsville) have engaged in discrimination and have violated Division of Corrections (DOC) policies by reducing meal breaks for employees on the midnight shift from 30 minutes to 20 minutes. He requests restoration of 30 minute meal breaks for all midnight shift employees. This grievance was initiated on February 5, 1999, and on February 9, 1999, Grievant's immediate supervisor informed Grievant that he was without authority to grant the relief requested. The grievance was denied at level two on February 17, 1999. Upon appeal to level three, a hearing was held on February 26, 1999, before Franklin D. Phares. The grievance was denied in a written level three decision dated March 1, 1999. Grievant appealed to level four on March 10, 1999, and a hearing was held on April 21, 1999, in this Grievance Board's office in Elkins, West Virginia. Grievant was represented by Jack Ferrell of the Communications Workers of America, and DOC was represented by counsel, Leslie Tyree. The parties declined to submit written post-hearing arguments, so this matter became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made from a preponderance of the credibletestimonial and documentary evidence of record.

Findings of Fact

1. Grievant is employed as a correctional officer at Huttonsville and works the midnight shift.

2. In early 1999, Huttonsville officials decided to reduce meal breaks for midnight shift employees from 30 minutes to 20 minutes.

3. Because inmates are in the dorms during midnight shift, Huttonsville requires that there be at least one correctional officer on duty at all times at each dorm. Reduction of the time for meal breaks has insured that officers are available to cover dorms while other officers take meal breaks.

4. On June 22, 1995, former DOC Commissioner Nicholas Hun issued a "Workweek Policy Addendum to Policy Directive 425.01" (Addendum) which stated, in pertinent part:

> All full-time [DOC] employees are to be scheduled to work for a forty (40) hour workweek which shall include a daily meal period. <u>If it is possible, the employee may be relieved from his/her duty station for a thirty (30) minute daily meal period when the employee is scheduled for five 8 hour days in the workweek. If it is not possible to relieve the employee, the employee may be required to eat at his/her duty station.</u> This does not entitle the employee to additional compensation as we are paying for a 40 hour workweek to include a meal period.

(Emphasis added.)

<u>Discussion</u>

In a non-disciplinary matter, a grievant must prove the allegations in his complaintby a preponderance of the evidence. <u>Wargo v. W. Va. Dep't of Health & Human Resources</u>, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); <u>Payne v. W. Va. Dep't of Energy</u>, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant argues that the 20-minute meal break for midnight shift employees violates the Addendum and that it is also discriminatory, because all other employees receive a 30-minute break. DOC contends that the decision to reduce the meal breaks for midnight shift employees was justified by the needs of the institution and that it does not violate any DOC policies or state laws.

The only reference the Addendum makes to meal breaks is that employees may be relieved for a 30-minute meal break, if possible. However, it does no specify that all meal breaks <u>must</u> by 30 minutes. As set forth in the findings of fact, above, the midnight shift requires more correctional officers, because of the need to cover every dorm. Huttonsville officials testified that, in the past, dorms have been left without a correctional officer during the night while the on-duty officer took a 30-minute meal break. The Addendum provides for a 30-minute meal break when possible, and

Huttonsville has provided ample evidence that, during midnight shift, it is simply not possible to provide the longer break and attend to the security needs of the institution. However, rather than requiring all officers to eat at their duty stations, Huttonsville officials have elected to allow them a 20-minute meal break during the midnight shift. Because the Addendum does not state that all meal breaks must be 30 minutes, Grievant has not established it has been violated.

As DOC has noted, W. Va. Code § 21-3-10a requires that employees who work shifts of over six hours receive a minimum of twenty minutes for a meal break, unless the employee is permitted to eat while working. The Huttonsville practice also complies withthe provisions of this statute. Although there is an implication that longer breaks may be provided, it is not required.

"Discrimination" is defined by 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." A prima facie case of discrimination requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). 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, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). Grievant has established a prima facie case of discrimination.

He is similarly situated to other correctional officers at Huttonsville, who have similar job duties, and receive a 30-minute meal period.. However, DOC has provided legitimate, non- discriminatory reasons for its actions, i.e., the security needs of the institution justify the reduced meal periods for midnight shift employees. Grievant has offered no evidence which would indicate that the reasons proffered by DOC for its actions were merely a pretext for prohibited discrimination. See Burdine, supra; Frank's Shoe Store, supra; Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996).

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dep't of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. DOC employees may receive a 30-minute meal break if it is possible to relieve the employee from his work station; otherwise, an employee may be required to eat at his work or duty station. “Workweek Policy Addendum to Policy Directive 425.01" (June 22, 1995).

3. During any work shift of over six hours, an employee must receive at least a 20-minute meal break. W. Va. Code § 21-3-10a.

4. “Discrimination” is defined by W. Va. Code § 29-6A-2(d) as “any differencesin 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.”

5. A prima facie case of discrimination requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

6. Although Grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the reduction of meal breaks from 20 to 30 minutes for midnight shift employees, Respondent established legitimate, non-discriminatory reasons for the decision. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995).

7. Grievant failed to establish by a preponderance of the evidence that a 20- minute meal period violates the provisions of any statute, policy, rule, regulation, or written agreement applicable to his employment situation.

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, and 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.

Date: May 14, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge