PAMELA NICHOLSON, et al.

Grievants,

v. **Docket No. 01-CORR-031**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Pamela Nicholson, Thomas Ritchie, Shirley Lewis, and James Carr ("Grievants") initiated separate grievances on January 18, 2001, alleging entitlement to overtime pay during their attendance at the West Virginia Corrections Academy. The grievances were denied at levels one and two, and a consolidated level three hearing was held on January 29, 2001. (See footnote 1) The grievance was denied in a written level three decision dated February 3, 2001. Grievants appealed to level four on February 18, 2001, and a hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 27, 2001. Grievants represented themselves, and Respondent was represented by counsel, Leslie K. Tyree. At Respondent's request, the record in this case was held open until May 11, 2001, so that Respondent could obtain documentation regarding its policy, if any, regarding overtime pay at the Corrections Academy during the pertinent time frame. No such documentation was provided to the undersigned. The parties were allowed until May 25, 2001, to file written fact/law proposals, neither party did so, and this grievance became mature forconsideration on that date.

The following findings of fact are made from a preponderance of the evidence of record. (See footnote 2)

Findings of Fact

1. Grievants are employed as correctional officers by Respondent.

2. The West Virginia Corrections Academy ("Academy") is a mandatory residential training course required of all correctional officers. Previously six weeks in duration, the Academy was changed to a three-week course in recent years. Grievants are required to attend training and instructional classes at the Academy from Monday through Friday. They are provided free time in the evenings, although they are required to stay overnight at the Academy during the week.

3. Grievant Nicholson attended the Academy from March 18, 1996, through April 5, 1996. She has requested compensation for a total of 40 hours of overtime during her attendance at the Academy for such activities as travel, "PT", cleaning, and team building. She did not explain these activities during the level four hearing.

4. The Academy attended by Grievant Nicholson in 1996 convened at 11:00 or later on Mondays, and participants were released at 2:15 on Fridays, with the exception of the final week, which had a graduation ceremony at 2:15 on Friday afternoon. The scheduled activities did not exceed 35 hours per week for any of the individual weeks of that Academy. 5. None of the Grievants have provided any information regarding where they lived at the times they attended the Academy, so their traveling distance cannot be verified.

6. Grievant Ritchie has requested compensation for 8½ hours of overtime pay during the Academy he attended in July of 1995. He has provided no explanation of what activities he was involved in during those hours, or why.

7. Grievants Lewis and Carr have not requested any specific amount of overtime compensation and have provided no information as to when they may have worked overtime during their attendance at the Academy.

Discussion

Because this grievance does not involve a disciplinary matter, the grievants have the burden of proving their claims 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

The Federal Fair Labor Standards Act ("FLSA") requires employers to pay employees time and one-half wages for all work hours in excess of forty hours per week. See 29 U.S.C. 209-219. It is

unknown what Respondent's position is regarding the payment of overtime to Academy participants during the applicable years, due to its failure to provide the requested documentation on that issue. However, it would appear that, if Grievants can establish that they were required to work in excess of 40 hours during any week of their Academy attendance, they are entitled to time and one-half wages for those hours.

It has already been determined by this Grievance Board that “sleep” time is notconsidered working time for purposes of overtime pay. See Straughn/Pittman v. Div. of Corrections, Docket No. 97-CORR-374, 375 (Jan. 22, 1998). In fact, it does not appear that Grievants are requesting compensation for the hours during which they were required to be on-site at the Academy, but were not required to perform any training or work-related activities. Nevertheless, the undersigned finds that the evidence presented here falls far short of proving that Grievants were required to perform work activities which exceeded 40 hours in any given week during their Academy attendance. Without evidence regarding their exact travel distances and times, and in view of the varying starting and ending times of the different weeks of Academy activities, along with the lack of explanation of what activities Grievants were performing during the hours overtime is alleged, the undersigned is unable to award Grievants the requested relief.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, the grievants have the burden of proving their claims 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The Federal Fair Labor Standards Act requires that an employer compensate employees at time and one-half wages for all work hours in excess of 40 in any given work week. See 29 U.S.C. 209-219.

3. Grievants have failed to prove by a preponderance of the evidence that they were required to work overtime hours during the times they attended the West Virginia Corrections Academy.

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: June 25, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

At level three, fifteen grievances had been consolidated for hearing and decision. The grievance was granted at that level for all but the four Grievants who have appealed to level four.

Footnote: 2

The undersigned was informed at the level four hearing that it would not be possible to obtain a transcript of the level three hearing. Therefore, Grievants were instructed to introduce all pertinent evidence at the level four hearing, aside from the documentation which was forwarded to this Grievance Board from the level three record.