DENNIS BRACKMAN,

Grievant,

v.

DOCKET NO. 02-CORR-104

WEST VIRGINIA DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Dennis Brackman, filed this grievance against his employer, the West Virginia Division of Corrections ("Corrections") on February 8, 2002:

> On 24 January 2002 I was informed that my request for regular days off of Friday and Saturday would not be honored **due to seniority being a consideration in the original decision to grant the requested days off**. I was informed that seniority could not be a factor in determining my regular days off.

> § 29-6-10. Rules of division.
>
> (4) For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or **transfer is to be awarded,** or to be made, **and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar classifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.**
>
> 3.96 Transfer: The movement of an employee to a different subdivision or geographic location of the same or a different agency.

3.4 Agency: Any administrative department of state government or a political subdivision established by law or executive order.

Seniority has been used in past practice as a factor in days off when shifts were changed.

RELIEF SOUGHT

That all employees at Anthony Correctional be allowed the benefit(s) afforded under State Code in regard to seniority and prior past practices.

That grievant be made whole by allowing the requested days off (and originally granted) to go into effect.

(Emphasis in original).

The grievance was denied by Grievant's supervisor, Cpl. Henry Casto, on February 12, 2002, and by Frank Rush, Acting Warden, on March 6, 2002. A level three hearing was held on April 2, 2002, and the grievance denied by Hearing Examiner Paula K. Gardner on April 3, 2002. Grievant appealed to level four on April 19, 2002, and a level four hearing was held in the Grievance Board's Beckley, West Virginia, office on December 9, 2002. This matter became mature for decision on January 6, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant represented himself, and Corrections was represented by Charles Houdyschell, Jr., Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

January 21, 2002 memorandum from Wes Bashlor to D. Brackman re: Regular Days Off.Ex. 2 -

January 16, 2002 memorandum from Wes Bashlor to D. Brackman re:

Answer to request.

Level Three Correction's Exhibits

Ex. 1 -

W. Va. Code § 29-6-10.

Ex. 2 -

Corrections Operational Procedure Number #133: Uniform Staff Use of Leave, effective March 1, 2002.

Level Four Grievant's Exhibit

Ex. 1 -

Corrections Operational Procedure Number #124: Staff Assignments, effective July 1, 2002.

Level Four Correction's Exhibit

Ex. 1 -

Corrections Operational Procedure Number #124: Staff Assignments, effective September 1, 2001.

Testimony

The following individuals testified at level three: Grievant, Frank Rush, Wesley Bashlor, John Toth, Sgt. B. Yoakum, and Adrian Hoke. (See footnote 1) At level four, Grievant testified in his own behalf, and presented the testimony of Adrian Hoke. Corrections presented the testimony of Warden Scott Patterson.

Based upon a review of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a Correctional Officer II assigned to the Anthony Correctional Center ("Anthony") in Neola, West Virginia. Anthony has an adult, mixed-gender population. 2. Prior to March 2002, employees at Anthony were assigned five, eight-hour shifts per week. Grievant worked the night shift, 11 p.m. to 7 a.m., and had Monday and Tuesday off.

3. In January 2002, Grievant was reassigned, as part of an overall reorganization, to work day shift, 7 a.m. to 3 p.m., and still had Monday and Tuesday off.

4. After the shift change, Grievant decided it would be more advantageous to have Friday and Saturday off, and he put in a request for those days off.

5. Those days had already been assigned to a female Correctional Officer I, with less seniority than Grievant.

6. Wesley Bashlor, Unit Manager, and Associate Warden Tammy Alderman- Harper considered the request based on Grievant's work record and several other factors, including seniority. The request was granted.

7. Subsequently, Deputy Warden Adrian Hoke asked Mr. Bashlor about the decision to grant Grievant the days off, and asked if he had considered seniority when making the assignment. Mr. Bashlor told Mr. Hoke he had considered seniority as a factor, and Mr. Hoke told him to retract permission for the change in days off.

8. Mr. Bashlor retracted permission for the days off by memorandum to Grievant dated January 21, 2002. LIII G. Ex. 1.

9. The facility must be manned in a fashion that provides a balance in experience as well as male and female staffing. Seniority was not an appropriate factor to consider in allowing Grievant his requested days off because to staff Anthony solely on the basis of seniority would jeopardize that balance. 10. Since the filing of the grievance, Grievant has been allowed to take Friday and Saturdays off with the implementation of a revised schedule.

11. Grievant testified he is satisfied with these days off.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of W. Va. Educ. & State Employees

Grievance Bd., 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Hundley v. W. Va. Div. of Corrections, Docket No. 98-CORR-218 (1998).

Grievant contends the shift adjustments made in January 2002 constituted a transfer, and that his request for days off should have been considered on the basis of seniority. Grievant maintains that "days off" are a benefit, and the allocation of those days is governed by W. Va. Code § 29-6-10.

Corrections asserts that since Grievant has been given Friday and Saturdays off as a result of a schedule change, there is no longer a case in controversy, and this grievance is now moot. The undersigned agrees with Corrections.

The Grievance Board has held that when there is no case in controversy, the Board will not issue advisory opinions. Gibb v. W. Va. Div. of Corrections, Docket No. 98-CORR- 152 (Sept. 30, 1998); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb.19, 1992). This grievance was initiated because Grievant did not get Friday and Saturdays off. He now has those days off and testified he is happy with these days off.

To render a decision now as to what should have happened when Grievant was initially refused the requested days off would merely be advisory at this point. Furthermore, there is no relief to be granted, as Grievant now has the days off he wanted in the first place.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Hundley v. W. Va. Div. of Corrections, Docket No. 98-CORR-218 (1998).

3. When there is no case in controversy, the Grievance Board will not issue advisory opinions.

Gibb v. W. Va. Div. of Corrections, Docket No. 98-CORR-152 (Sept. 30, 1998); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1992). 4. Since the filing of this grievance, Grievant has been given Friday and Saturdays off, the days he requested in his grievance. As there is no longer any case in controversy, and Grievant has received the requested relief, this grievance is moot.

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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: February 20, 2003

Footnote: 1

Corrections was unable to provide a level three transcript of these proceedings due to clerical problems.