DENNIS BRACKMAN,

Grievant,

v.

DOCKET NO. 03-CORR-166

WEST VIRGINIA DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Dennis Brackman, filed this grievance against his employer, the West Virginia Division of Corrections/Anthony Correctional Center ("Corrections"), on April 16, 2003:

> I have discovered that Anthony Correctional Center is in violation of W. Va. Division of Personnel's "ADMINISTRATIVE RULE":
>
> * Section 14.3 Annual Leave @ Amount, Accrual; and normal work week ... "shall not exceed 40 hrs."
>
> * Section 14.4 Sick Leave @ Accrual and ... "normal work week shall not exceed 40 hours."
>
> * Section 14.1 Official Holidays = scheduling work on holidays, other days as proclaimed, days of special observance or thanksgiving and days for the general cessation of business in excess of 8 hrs per full day holiday.
>
> My schedule is now defined as 12 hours per work day - not 8 hours - by Anthony Correctional Center.
>
> I have over 5 years of state service; therefore I am entitled to accrue 1.50 days of annual leave per month - example (1.50 days x. 12 hrs (1 day) = 18 hours of annual time accrued each month).
>
> Sick leave = 1.5 days of sick leave per month for full time employees - example (1.5 days x 12 hrs(1 day) = 18 hours of sick leave accrued per month).
>
> Whereas the total payment of paid time off for holidays shall not exceed eight hours per full day holiday; therefore any classified employee can not be scheduled in excess of eight hours per full day

holiday.

Relief sought:

1) All employees scheduled 12 hour shifts at Anthony Correctional Center to be properly compensated for leave time by using the 12 hour day in leave equations - instead of the 8 hour figure. Compensation to be awarded for past days scheduled at 12 hours.

2) No classified employee at Anthony Correctional Center to be scheduled - by fact or omission - to work in excess of eight hours per full day holiday, other days as proclaimed, days of special observance or thanksgiving and days for the general cessation of business.

3) All employees at Anthony Correctional Center that have been scheduled to work in excess of eight hours on any of the days noted above in 2) to be awarded the hours worked in excess of eight hours on the day as compensation and paid at overtime rate (1-1/2 times). Example: I was scheduled and worked Christmas Day 2002. I was allowed to take only 8 hours off as compensation in April 2003. I should be awarded the time over eight hours (4 hours) at overtime rate (1-1/2 times).

4) Practice of scheduling employees in excess of 40 hours per week to cease immediately.

5) Practice of Anthony Correctional Center Administrative Personnel determining if holiday time or annual leave time is to be used to cease immediately.

Grievant's immediate supervisor, Cpl. Calvin Cox, denied the grievance on April 22, 2003, and following a level two conference, Deputy Warden Adrian Hoke denied the grievance on May 12, 2003. A level three hearing was held on June 9, 2003, and Grievance Evaluator Paula Gardner recommended denial on June 10, 2003. Commissioner Jim Rubinstein denied the grievance on June 11, 2003. Grievant appealed to level four on June 23, 2003, where the Division of Personnel (“DOP”) was joined as a party, and a level four hearing was held in Beckley, West Virginia, on August 11, 2003. This matter became mature for decision on October 1, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant representedhimself, Corrections was represented by Charles Houdyschell, Jr., Assistant Attorney General, and the Division of Personnel was represented by Steve Forsythe.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

DOP Administrative Rule 14.1 Official Holidays; 14.3 Annual Leave; 14.4 Sick Leave.

Ex. 2 -

April 22, 2003 level one response from Cpl. Calvin R. Cox.

LIV Corrections' Exhibit

Ex. 1 -

March 5, 2002 letter from Jim Rubinstein to Nichelle Perkins. (See footnote 1)

Testimony

Grievant testified in his own behalf. Corrections presented the testimony of Scott Patterson. Steve Forsythe testified on behalf of DOP.

Based upon a review of the evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed as a Correctional Officer by Corrections at the Anthony Correctional Center.

2. Prior to March 13, 2002, Anthony employees worked 5 day, 8 hour shifts from Sunday through Saturday.

3. Effective March 13, 2002, Anthony amended its work week to twelve (12) hour shifts beginning at 1:00 a.m. Wednesdays to 12:59 a.m. Wednesdays. LIV Corrections' Ex. 1. 4. The result of the schedule change is that officers at Anthony end up working 42 hour weeks. They are paid overtime for all hours in excess of 40 hours per week.

5. Anthony has to have coverage 24 hours a day, 7 days a week, which means that from time to time, employees are scheduled to work on holidays. Employees are paid for 8 hours when they work a holiday, plus they receive 4 additional hours in compensatory time, to be taken within 60 days, to make up the 12 hours they worked.

6. Grievant accrues annual and sick leave at the rate of 1.5 days per month.

7. Different state agencies have different work weeks ranging anywhere from 37.5 to, in Anthony's case, 42 hours per week.

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 the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant challenges Anthony's interpretation of DOP's Administrative Rules governing holiday pay, annual and sick leave. Corrections and DOP deny any violations of the rules.

DOP's Administrative Rule 14.1. Official Holidays, states, in pertinent part:

> (b) ... When an agency must modify holiday schedules to accommodate around-the-clock shifts or other special needs, the agency should notify employees in advance of altered holiday work schedules and should scheduled altered holidays on days as close as possible to the normal holidays. *The total payment of paid time off for holidays shall not exceed eight hours per full day holiday*.

LIII G. Ex. 1 (emphasis added).

Grievant contends the last sentence of the Rule (emphasized above) stands for the proposition that an agency cannot schedule an employee to work more than 8 hours on a holiday, and since Anthony employees work 12 hour days, even on holidays, this rule is being violated.

This same argument has previously been addressed by the Grievance Board in Self, et al. v. W. Va. Dept. of Transp., Docket No. 90-DOH-450 (Feb. 28, 1991), when Division of Highways employees were scheduled to work 10 hour days, but only got paid for 8 hours on holidays. It was held in that case that the grievants had failed to prove the policy was “arbitrary, capricious or otherwise in violation of state law or public policy.” Id.

While it is understandable that Grievant here would like to either be paid for the entire 12 hours he works, or be restricted to working only 8 hours, the plain language of the Administrative Rule does not preclude state agencies from scheduling employees to work more than 8 hours on a holiday. It merely restricts an agency from paying an employee for more than 8 hours. In order to adequately

compensate its employees, Corrections pays them for 8 hours when they work a holiday, plus awards them 4 hours of compensatory time to be taken within 60 days of working the holiday, for a total of 12 hours.

Grievant has pointed to no authority to support his contention that Corrections cannot schedule employees to work more than 8 hours on a holiday, nor has he proven this Rule is arbitrary or capricious.

DOP's Administrative Rule 14.3. Annual Leave, provides in pertinent part:

> (a) ... Annual leave is accrued at the end of each pay period or on the last work day for separating employees. ... Annual leave cannot be accrued for hours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours.

LIII G. Ex. 1.

Likewise, DOP's Administrative Rule 14.4. Sick Leave, provides:

> (a) Accrual - Except as otherwise provided in this subdivision, each employee shall receive accrued sick leave with pay and benefits. Sick leave is computed on the basis of hours equal to 1.5 days per month for full-time employees. ... Sick leave cannot be accrued for hours not paid nor for hours worked beyond the normal week which shall not exceed 40 hours.

LIII G. Ex. 1.

Grievant currently accrues 1.5 days per month of annual and sick leave pursuant to DOP's Administrative Rules. Grievant believes the accrual rates for annual leave are based on a formula using an 8-hour work day, i.e., 1.5 times 8 equals 12 hours per month. Because Grievant works a 12 hour day, he believes his annual leave rate should be calculated accordingly, or 1.5 times 12, for a total of 18 hours accrued per month.

Corrections and DOP argue the Rule contains no such formula, nor is it based upon hours worked, but simply specifies that an employee with Grievant's length of service shall receive 1.5 days of annual leave per month. The Respondents are correct. Rule 14.3 contains no “formula” for calculating annual leave; it merely awards, in increasing increment, days off for employees of the state, depending upon their length of service. There is no support or authority for Grievant's contention that annual leave is based upon hours worked per day.

Grievant's argument regarding Administrative Rule 14.4 is similarly without merit. That Rule provides simply that full-time employees accrue 1.5 days per month of sick leave.

Additionally, Grievant points to the language in both Rules that states that annual and sick “leave cannot be accrued for hours not paid nor for hours worked beyond thenormal week which shall not exceed 40 hours.” Grievant interprets this sentence to mean the work week for all state employees shall not exceed 40 hours, and therefore, the 42 hour work week at Anthony violates the Rules. Clearly, since state agencies have varying lengths of work weeks, from 37.5 to 42, this Rule cannot be interpreted as Grievant would like. What it means is that a “normal work week” for purposes of overtime compensation shall not exceed 40 hours per work, and sick and annual leave are not accrued for overtime hours worked. Anthony adheres to the “normal work week” of 40 hours, and pays its employees overtime for the additional two hours they work due to their round-the-clock scheduling.

The above findings of fact and discussion are supplemented by the following conclusions of law.

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 the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. DOP's Administrative Rule 14.1. Official Holidays, states, in pertinent part:

> (b) ... When an agency must modify holiday schedules to accommodate around-the-clock shifts or other special needs, the agency should notify employees in advance of altered holiday work schedules and should scheduled altered holidays on days as close as possible to the normal holidays. *The total payment of paid time off for holidays shall not exceed eight hours per full day holiday*.

LIII G. Ex. 1 (emphasis added).

3. DOP's Administrative Rule 14.3. Annual Leave, provides in pertinent part:

> (a) ... Annual leave is accrued at the end of each pay period or on the last work day for separating employees. ... Annual leave cannot be accrued for hours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours.

LIII G. Ex. 1.

4. DOP's Administrative Rule 14.4. Sick Leave, provides:

> (a) Accrual - Except as otherwise provided in this subdivision, each employee shall receive accrued sick leave with pay and benefits. Sick leave is computed on the basis of hours equal to 1.5 days per month for full-time employees. ... Sick leave cannot be accrued for hours not paid nor for hours worked beyond the normal week which shall not exceed 40 hours.

LIII G. Ex. 1.

5. Grievant has failed to prove by a preponderance of the evidence that Anthony Correctional Center has violated any of the above Rules with regard to holiday pay, or accrual of annual and sick leave.

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: October 8, 2003

Footnote: 1

Corrections elicited testimony at level four regarding this communication, and the undersigned Administrative Law Judge ordered the document be produced. The memorandum is hereby admitted as Corrections' Exhibit 1.