KATHY SERGENT, et al.,

Grievants,

v. DOCKET NO. 03-RJA-188

REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY/SOUTH CENTRAL

REGIONAL JAIL,

Respondent.

DECISION

This grievance was filed by 40 employees of the South Central Regional Jail (SCRJ) on April 23, 2003, stating: “When security staff at SCRJ went to 12 hour shifts provisions not made to address the change in holiday pay, meal breaks, half hour meal breaks uncompensated, info not stated on pay stubs.” Grievant stated the relief sought as:

> 1. Holiday Pay: Grievants are asking that if they work twelve hours on a holiday they should be paid for twelve hours holiday pay. Likewise, if they are granted an alternate day off that they are granted twelve hours for the holiday without having to use annual time in addition to it.
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> 2. Meal Breaks: Grievants are asking provisions be made to accommodate a twelve hour shift in that meal breaks be extended to forty minutes and a twenty minute rest period be recognized and accepted. All to be considered as hours worked.
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> 3. Offset of half hour lunch break vs. half hour extra duty for roll call and count: Grievants are asking that either the half worked over and beyond the regular shift hours be monetarily compensated for or eliminated. In other words pay for the half hour or allow for roll call and count to be conducted within the regular shift hours.
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> 4. Paycheck stubs: Grievants are asking for reinstatement of providing information on their employee paycheck stubs each pay period. Specifically the breakdown of how many hours worked at time and one half and how many hours worked at the regular rate each pay period. Currently only the dollar amount beside each rate is being recorded on the paystubs.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on November 21, 2003. Grievants were represented by counsel, Jim Lees, and Respondent was represented by counsel, Chad Cardinal. This matter became mature for decision on December 5, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants (See footnote 1) are all employed, or at times relevant to this grievance have been employed, by Respondent at the South Central Regional Jail (SCRJ).

2. On March 12, 2003, SCRJ adopted a new policy requiring employees to work 12-hour shifts. In a two-week pay period, Grievants work three days, are off four, then work four days and are off three. Lt. John McKay, Chief Correctional Officer, announced the change in a memorandum that stated, in part:

> Annual leave, sick leave and holidays will be somewhat different than what you are used to. If you apply for and are granted annual or sick leave on a scheduled 12 hour work day, you will have 12 hours deducted from your accrued leave. State holidays will consist of 8 hours unless otherwise statedby the Governor. If you apply for and are granted a holiday on a scheduled 12 hour work day, 4 hours will be deducted from you [sic] accrued annual leave. . . .

Level four Grievants' Exhibit No. 1.

3. Grievants receive a 30-minute, duty-free lunch break during the day, for which they are not paid. Since Grievants report for briefing fifteen minutes prior to their shifts and stay fifteen minutes after for formal count, they are actually at the facility for 12 ½ hours per day.

4. When Grievants work on a day designated as a holiday by W. Va. Code § 2-2-1, they receive eight hours of "holiday pay" in addition to the pay they earn for working that day.

5. As an alternative to the holiday pay, Grievants may apply eight hours of "holiday leave" to an alternate day off. In order to take an entire scheduled workday off, Grievants must also use four hours of annual leave, since their workdays are 12 hours long.

6. At the time this grievance was initiated, holidays for Grievants were controlled by Respondent's Policy 3020, effective December 31, 1988, which lists 12 holidays as specified by W. Va. Code § 2-2-1, and states in part:

> When personnel are required to work on an observed holiday, an alternate day off will be scheduled within the same pay period, or those persons shall be compensated for an additional work day, at their regular rate of pay, on the payroll submitted following the payroll containing the holiday.

7. This policy was revised August 1, 2003, and now states, in part:

> ALTERNATE HOLIDAY: A work day for which an Authority employee may be scheduled off work as a result of being required to work on an observed holiday, to which an employee is entitled compensation in the amount of no more than eight (8) hours of pay at his/her regular hourly rate.
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> HOLIDAY PAY: That compensation to which an employee is entitled for an observed holiday, not to exceed eight (8) hours of pay at his/her regular hourly rate.

8. Grievants are relieved of their posts prior to their lunch breaks, and may leave the facility. However, if an “assist call” occurs while he or she is on lunch break and at the facility, he or she is expected to respond. Time spent on an assist call during a duty-free period is compensable, and may count for overtime.

DISCUSSION

In non-disciplinary matters, Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants have withdrawn their claim regarding the information on their paystubs, leaving only the issues of holidays, meal breaks and break times.

At the level four hearing, Grievants also argued they were improperly required to use 48 hours of annual leave in order to take a week off from work, and to use four hours of annual leave in order to take an alternate holiday off. Respondent objected to the addition of this issue, as it was not mentioned in the original statement of grievance. Grievants countered that it was raised at level three. After reviewing the lower level record, it appears the issue was addressed as early as level two, and the issue of using annual leave to cover an alternate holiday is mentioned in the level two decision. As these issues were previously raised and argued, Respondent has had adequate notice that they

need to be resolved. Given the procedural irregularities in the level three hearing conducted by Respondent, it has no reason to complain of a little procedural irregularity at the level four hearing. The typical leave usage and holiday policies contained in the Administrative Rule of the Division of Personnel (DOP) apply only to classified personnel. Correctional officers employed by Respondent at the various regional jails are classified-exempt employees, covered by the classified-exempt compensation plan of the DOP. *See*, W. Va. Code §§ 29-6-5 and 31-20-27. Respondent is therefore permitted to use its discretion in setting its own policies with respect to how leave is accrued and used by its employees, since the DOP rules in those areas only apply to classified employees. This discretion must, of course, be exercised reasonably, and not arbitrarily or capriciously.

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, *supra*. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of [the Respondent]." Trimboli, *supra*; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). Using this standard, each issue will be addressed in turn.

I. Holiday Pay

Grievants are scheduled to work 12 hours every work day. When an employee takes a day off, he or she therefore misses twelve hours of work. When the employee'swork day falls on a holiday listed in W. Va. Code § 2-2-1, that employee is not only paid for the twelve hours he or she works, but is also paid for eight hours of "holiday pay." As an alternative, the employee may schedule off an alternate holiday, using eight hours of holiday leave to cover the absence. However, when an alternate holiday is taken, since an employee is regularly scheduled to work 12 hours, he or she must

use an additional four hours of annual leave to fully cover the absence.

As Grievants correctly point out, this requirement, as stated in Lt. McKay's memorandum conflicts with Policy 3020, without explicitly revising it. However, Respondent asserted at level four that the issue was now moot, as Policy 3020 had been officially revised. Grievants presented no evidence that, before this revision, any employee had actually been required to use his or her annual leave to cover an alternate holiday, so there has been no harm shown and the issue is, indeed, moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." Burkhammer v. Dep't of Health and Human Resources/Sharpe Hosp., Docket No. 03-HHR- 073 (May 30, 2003).

II. Meal Breaks

Under the new 12-hour work schedule, Grievants arrive 15 minutes prior to their shifts for briefing, and stay 15 minutes after for the formal count. In all, Grievants are at work for 12 ½ hours. However, since they get a half-hour, duty-free lunch period, and are paid for 12 hours per day, they are compensated for all the time they actually work. Grievants contend that their lunch breaks are not truly duty-free, as they are required torespond to any assist calls (See footnote 2) that happen during that time. Respondent avers there is no such requirement, and Grievants are free to let their colleagues who call for assistance in a potentially dangerous or even life-threatening situation to handle it on their own.

Grievants also testified they believed there was a rule that only one person could be out of the facility at a time, so they were not free to leave if someone else already had. Contrary to this belief, there is no such rule or policy. Had there been, it would have lent credence to Grievant's contention that the lunch period was not truly duty-free. As it is, they are merely "on call" in the case an assist call occurs while they are at the facility and able to lend assistance. "In general, the factor determining when on-call time is compensable is whether the employee can effectively use the time for personal purposes. The fact that the employee is subject to certain restrictions while on-call does not entitle her to compensation under the FLSA or Respondent's policy." Wingfield v. Dep't of Health and Human Resources, Docket No. 02-HHR-031 (June 27, 2002). As Grievants are free to use their lunch period as they choose, Respondent is not required to pay them for the meal break. If a Grievant responds to an assist call during his or her lunch hour, that time will be paid, but it is that employee's

responsibility to notify his or her supervisor that he or she worked, and request to be paid for the time.

Grievants also argued they are effectively limited to staying onsite by the short length of their lunch breaks, which they stated did not give them enough time to go "off the hill" to get lunch elsewhere. Grievants request to have their meal break extended to 40 minutes. While this seems to be a reasonable request, Grievants cited no rule, policy or law that would require Respondent to comply with the request. However, Respondent'smeretricious contention that Grievant Sergent "willfully violated" policy by refusing to permit officers on her shift to leave the facility is a poor attempt at shifting blame for its own lack of oversight and poor lines of communication. In fact, Respondent's repeated attempts to characterize this entire grievance as a problem with its "middle management" displays a disappointing contempt for the grievance process as a way to air and resolve workplace concerns by employees. (See footnote 3) Middle management is still management, and upper management has as much responsibility for training and oversight of these employees as they do of their own subordinates.

If there was no written policy prohibiting more than one person "off the hill" at a time, there was certainly a standing practice. Every Grievant, supervisor or not, believed the restriction to be proper and adhered to it. Although the origin of the practice is lost, as with the expectation that every available employee respond to an assist call, even without a written policy to that effect, there was clearly an expectation that as many staff as possible should be available when trouble arises. It is incredible that "upper management" was ignorant of this expectation. However, as Grievants could present no evidence of an official origin of the unwritten policy, it will not be considered an official encroachment on the duty-free nature of the work hour.

III. Break Times

Grievants also seek to have paid break times, but again cited no rule, policy or law requiring them. It is entirely understandable that employees in such a high-stress job on long shifts would like a "breather" from their duties, but given Respondent's seemingattitude towards its staff, it is unlikely they will be granted. However, a reasonable alternative to a policy or practice does not render the current practice unreasonable, and Grievants presented no evidence Respondent's use of discretion

on this issue was arbitrary and capricious.

IV. Use of Annual Leave for Weeks Scheduled in Excess of 40 Hours

Respondent admits in its Proposed Findings of Fact and Conclusions of Law that no more than 40 hours of leave should be deducted when an employee misses a work week, including weeks the employee is regularly scheduled to work overtime. "An employer may not require an employee to use more than 40 hours of leave for any work week, and may not grant an employee paid time off from work at the overtime rate." Nottingham v. Div. of Corrections/Mt. Olive Correctional Complex, Docket No. 02-CORR- 141 (Sept. 27, 2002). Respondent agreed in its brief to discontinue the practice of deducting 48 hours of annual leave when an employee takes off for a 48-hour workweek. However, and unfortunately for Grievants, Respondent is also correct that Grievants were not entitled to be paid overtime for those weeks in which this practice occurred in the past. (See footnote 4) Overtime is only owed in weeks where an employee works in excess of 40 hours, and an employee on leave clearly has not worked at all.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Their claim must be proven by apreponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claims are more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Boylan v. W. Va. Dep't of Transportation, Docket No. 94-DOH-211 (Oct. 25, 1994); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. Id.

2. Correctional officers employed by Respondent at the various regional jails are classified-exempt employees, covered by the classified-exempt compensation plan of the DOP. *See*, W. Va. Code §§ 29-6-5 and 31-20-27.

3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the

evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See* Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, *supra* (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for thatof [the Respondent]. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01- 20-470 (Oct. 29, 2001).

4. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." Burkhammer v. Dep't of Health and Human Resources/Sharpe Hospital, Docket No. 03-HHR-073 (May 30, 2003); Pridemore v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996).

5. "In general, the factor determining when on-call time is compensable is whether the employee can effectively use the time for personal purposes. The fact that the employee is subject to certain restrictions while on-call does not entitle her to compensation under the FLSA or Respondent's policy. *See* McCarty v. Harless, 181 W. Va. 719, 384 S.E.2d 164 (W. Va. 1989)." Wingfield v. Dep't of Health and Human Resources, Docket No. 02-HHR-031 (June 27, 2002).

6. "An employer may not require an employee to use more than 40 hours of leave for any work week, and may not grant an employee paid time off from work at the overtime rate." Nottingham v. Div. of Corrections/Mt. Olive Correctional Complex, Docket No. 02-CORR-141 (Sept. 27, 2002).

For the foregoing reasons, this grievance is hereby **GRANTED in part** and **DENIED in part**. Respondent is **ORDERED** to refrain from requiring Grievants to use more than 40 hours of leave to cover a workweek, and to credit Grievants with any leave used in the past over 40 hours per workweek. All other parts of this grievance are **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, 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: December 30, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Kathy Sergent, B. J. Bailey, Keith N. Stephens, Kevin Darby, Hansford Slater, Jason Ellis, Daniel P. Woodrum, Robert T. Miller, Kathy L. Brumfield, John S. Keyser, Brent Morgan, Scott Martin, Tena Sheppard, John Slack, John Dent, Jeff Mellinger, Edith Shepard, William S. Cabell, III, Eric Croasmun, James W. Smith, George Wallace, Scott Brewer, Ronnie Thompson, Tammy D. Everson, Steve Purdue, Kevin Conley, L. Travis Frashure, Ryan Shane Hall, David Lambert, Peggy Starcher, Bill Daniel, Jimmie D. Sigmon, Steven M. Soblit, Larry A. Brown, II, Jackie Binion, Chris Randolph, Jeff Bruckner, Robert E. Koontz, Leslie Oxley, and Jeremy Cline.

Footnote: 2

Assist calls are general calls for help when an extraordinary situation arises needing extra manpower, such as a violent prisoner, escape or other emergency.

Footnote: 3

Respondent several times attempted to intimidate Grievants by characterizing their grievance concerns as admissions of wrongdoing and implied that Grievants themselves should punished for any misunderstandings, when in fact they are all legitimate complaints. Advancing such arguments, whether they originate with Respondent itself or its counsel, are not constructive or helpful either in resolving the dispute or maintaining good working relationships in the future.

Footnote: 4

While in its brief Respondent again blames Grievants for not bringing this matter to its attention sooner, it is clear Respondent knew of the practice when it happened.