RICHARD SIMMS,

Grievant,

v. **DOCKET NO. 03-CORR-315**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

On June 30, 2003, Grievant Richard Simms filed a grievance against the Division of Corrections/Anthony Correctional Center (ACC), Respondent, stating:

> Anthony Correctional Center does not comply with Policy Directive 130.01 or its own Operational Procedure 140. Both P.D. 130.01 and O.P. 140 contain a staffing formula, that when met will allow for training, annual leave, holiday time and even sick leave not to cause overtime. Overtime has been paid for all of these reasons. Most all shifts are being scheduled at minimum staff levels. This is allowed to continue even though it goes against O.P. #124 Part IV Section E. which states: [“]The practice of supervisors scheduling only the minimum number of staff to cover the needs of an area/shift/ or department is ineffective, inappropriate, inefficient, and is to be strongly discouraged.[”] Even minimum shifts contain overtime sometimes.

As relief, Grievant seeks:

> Relief Sought will be that ACC work the formulas in O.P. 140 and P.D. 130.01 using Correctional Officer's Average sick leave, training time, annual leave, etc. Take the result from this formula and staff accordingly. In short meet their own Operational Procedure and Division of Corrections Policy Directive.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on June 3, 2004. Grievant was represented by coworker Dennis Brackman. Respondent was represented by counsel, John Boothroyd, Assistant Attorney General. The matter became mature for decision on July 2, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

At the level four hearing, Respondent adduced the testimony of Warden Scott Patterson and

Human Resource Manager Kimberly Wiley, and introduced Policy Directive 103.01 as Respondent's Exhibit No. 1, and Operational Procedure No. 140 as Respondent's Exhibit No. 2. Grievant presented no witnesses, but introduced a memorandum dated May 6, 2004 from Warden Patterson as Grievant's Exhibit No. 1.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent at ACC.

2. PD 130.01 is a poorly-written policy that requires each correctional facility to use a formula to determine the number of staff needed for essential positions, and to develop operational procedures implementing the formula with factors specific to the institution.

3. Attached to the PD is a formula for determining a “Shift Relief Factor,” as follows:

(1.)
Number of days per year that the institution/facility/center is closed, i.e., no services = 0 (A)

(2.)

Number of institution/facility/center work days per year = 365 (B)

(3.)
Number of regular days off per employee per week [usually fifty-two (52) weeks/year X two (2) days off per week] = 104 (C)

(4.)
Number of vacation days off/employee/year = ____ (D)

(5.)
Number of holidays off per employee per year = ____ (E)

(6.)
Number of sick days off per employee per year (actual average for institution/facility/center staff) = ____ (F)

(7.)
Number of other days off per employee per year (including time off for injuries on the job, filling vacancies, military leave, funeral leave, unexcused absences, disciplinary time off, special assignments, etc.) = ____ (G)

(8.)
Number of training days per employee per year = ____ (H)

(9.)

Total number of days off per employee per year [(C) + (D) + (E) + (F) + (G) + (H)] = ____ (I)

(10.) Number of actual work days/employee/year [365 - (I)] = ____ (J)

(11.) Lunches and breaks (J) X 0.0625 down time factor = ____ (K)

(12.) Actual work days per employee = (J) - (K) = ____ (L)

(13.) Shift relief factor = 365 (B) divided by ___ (L) [sic]

(14.) Shift relief factor [M] = ____

4. ACC OP 140 implements PD 103.01 at ACC by requiring comprehensive, on- going records of positions and vacancies, and use of the Shift Relief Factor formula.

5. For ACC, the shift relief factor (M) was calculated for three categories of employees: Lt/Sgt; Cpl/COI (See footnote 1); and Armory/Safety/Support. The results were as follows:

	A	B	C	D	E	F	G	H	I	J	K	L	M
Lt./Sgt	0	365	104	31.09	14	6.55	6	10.14	249.78	115.22	4.80	110.42	3.31
Cpl/CO I	0	365	104	6.06	14	7.52	4.02	11.75	225.35	139.65	5.82	133.83	2.73
A/S/S	0	365	104	19.27	14	16.33	16.03	16.03	181.63	183.37	11.46	171.91	2.12

6. A staffing analysis is done yearly at ACC in July. Ms. Wiley compiles the figures used to calculate the Shift Relief Factors, and supplies them to Warden Patterson. 7. Warden Patterson attended training on how to use the shift relief factor in making a staffing analysis. He was taught that a shift, as used in the formula, is the number of times a post is changed in a twenty-four hour period.

8. Grievant stipulated that the shift relief factors used by ACC are correct.

9. The shift relief factor is the actual number or people needed to fill a certain post or position on each shift.

10. ACC operates 24 hours per day, every day. It staffs its positions in two, twelve-hour shifts, one from 7:00 a.m. to 7:00 p.m., and the other from 7:00 p.m. to 7:00.
a.m.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving, by a preponderance of the evidence, a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works. *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Grievant cites two policies - Division of Corrections Policy Directive (PD) 130.01, and ACC Operational Procedure (OP) 140. Both of these policies address staffing standards applicable to ACC, and Grievant alleges they have not been followed, resulting in an understaffed facility. Respondent maintains these policies have been applied correctly in setting the staffing level at ACC.

Grievant presented almost no evidence, and no evidence at all to support his claim. Grievant's entire problem with the staffing formula is that he believes ACC has four shifts instead of two, because there are four groups of employees working the two shifts. As Warden Patterson explained, the number of shifts is equal to the number of times a post changes in a twenty-four hour period, and is unrelated to the number of people filling thepost. While Grievant believes the shift relief factor should be multiplied by four, he presented no authority to support his assertion. If he were right, it would likely increase the number of staff at the facility, easing some of the problems Grievant complains of. However, while claiming generally that ACC's policies have been violated, he is unable to show how.

Nothing in either the OP or PD describes how to apply the shift relief factor or defines “shift,” but Warden Patterson was trained in the use of the formula and his testimony on the issue is therefore persuasive. In any event, Grievant's relief sought is for Respondent to follow Policy Directive 103.01 and Operational Procedure No. 140, and the evidence supports Respondent's position that it does exactly that. Nothing in either policy addresses application of the shift relief factor to the staffing analysis, and Grievant agreed that Respondent properly completed the formula to arrive at a valid shift relief factor.

Although Grievant stipulated at the level four hearing the shift relief factor was calculated correctly, his post-hearing proposals argue it is mathematically incorrect due to the number of significant figures used in the calculations. Raising the issue for the first time after the hearing, after expressly stating he agreed with the calculations, denies Respondent the opportunity to address this

argument, and it has not been considered.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works. His claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersignedAdministrative Law Judge to decide that his 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 Grievant has not met his burden. *Id.*

2. Grievant failed to meet his burden of proving a violation of Policy Directive 103.01 or Operational Procedure No. 140.

For the foregoing reasons, 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: July 9, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Although the parties stipulated to the accuracy of these figures, a review of the math used shows Factor G for A/S/S should be 8. It appears from level three DOC Exhibit No. 2 that the Respondent determined 480.5 = 128.24, when in fact the solution is 96. This correction changes the final shift relief factor to 2.07, an insignificant change.