WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA HAMMONDS,
Grievant,

v. **Docket No. 2010-1622-MAPS**

DIVISION OF JUVENILE SERVICES /LORRIE YEAGER JR. JUVENILE CENTER,
Respondents.

D E C I S I O N

Grievant, Donna Hammonds, filed a grievance against her employer West Virginia Division of Juvenile Services (DJS)/Lorrie Yeager Juvenile Detention Center (LYJDC), Respondent on June 24, 2010. Grievant's written grievance statement reads in part that "I was forced to leave the Lorrie Yeager Jr. Juvenile Center at 1615 hours, which was 45 minutes before my scheduled shift was to end at 1700 hours, due to having accrued 45 minutes of overtime on 1 June 2010." Grievant alleges favoritism and discrimination in that she was treated differently than another officer who was permitted 19.00 hours overtime during the month of May 2010. Lastly, Grievant contends that the alleged discrimination created a hostile work environment for her.

As relief, Grievant requested that; 1) she receive four hours overtime, the amount she would have received had she been permitted to finish her scheduled shift; 2) that an overtime system be put in place which is fair and equal to male and female officers; and 3) no retaliation of any kind stem from this grievance being brought.

A video conference was held at level one on June 29, 2010, and the grievance was denied at that level on July 21, 2010. Grievant appealed to level two on July 31, 2010, and a mediation session was held on September 29, 2010. After an agreed period of abeyance,

Grievant appealed to level three on November 21, 2010. A level three hearing was held before the undersigned Administrative Law Judge on March 8, 2011, in the Grievance Board's Charleston office. Grievant appeared *pro se*. Respondent was represented by Steven R. Compton, Senior Assistant Attorney General. This matter became mature for decision on March 28, 2011, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant contends she is entitled to overtime pay. Grievant alleges that Respondent's actions in making her take compensatory time while allowing another Correctional Officer to work and accrue overtime demonstrates favoritism for certain officers and discriminatory practices toward her resulting in what Grievant characterizes as a hostile work environment. Respondent disagrees.

Grievant was not similarly situated to the employee to whom she compared herself in that the difference in treatment was related to the job responsibilities at the time pertinent to the overtime. Further, during the time period identified as relevant to this grievance, Grievant had the highest amount of overtime received by any correctional officer, male or female. Grievant did not prove her claims of favoritism, discrimination or a hostile work environment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Correctional Officer II (COII) at the Lorrie Yeager Juvenile Detention Center ("LYJDC"). Grievant began employment with Respondent in the year 2000.

2. During the time period relevant to this grievance, Respondent was operating under directive(s) to limit and curtail the use of overtime. Further, Respondent operates Lorrie Yeager Juvenile Detention Center with compulsory minimum staffing ratio requirements.

3. Grievant was scheduled to work 7:00 a.m. until 5:00 p.m. on June 5, 2010.

4. Grievant was told to clock out at 4:15 p.m. on June 5, 2010, this being the time that Grievant would mathematically reach 40 hrs for the week.

5. There is an overlap of the day and evening shifts at LYJDC. Grievant's presence was not necessary the last 45 minutes of her shift to maintain minimum staffing levels at Lorrie Yeager Juvenile Detention Center on June 5, 2010.

6. Correctional Officer Joshua Lott was identified by Grievant as a comparative COII, who accrued 19.00 hours of overtime over a two week period in May of 2010.

7. Upon reaching 40 hours of accrued work hours, Officer Lott, began to accrue overtime while in the process of transporting residents (inmates). Officer Lott's overtime was necessary to accomplish the duty he was in the midst of performing. This is the only overtime this officer received from the period of January 1, 2010 through May 31, 2010.

8. During the period of January 1, 2010 through May 31, 2010, Grievant received a total of 49 hours of overtime, the highest amount of overtime received by any officer. The second highest amount of overtime received was 26.75 hours by another female COII. (R. Ex. 1).

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Other than a brief statement specifying that she was sent home on June 5, 2010, which translated into her not accruing the overtime she desired, Grievant offered very little, if any, evidence in support of her case. Grievant's opinion is not proof. Grievant believes Respondent's conduct was inappropriate and insinuates the motivation for the various actions were nefarious. Respondent presented testimony and evidence to explain its administrative decisions.

With some restrictions, the Fair Labor Standards Act ("FLSA") permits state agencies to allow employees to take compensatory time in lieu of overtime for time worked over regular business hours.[1] *Dewese v. Dep't of Health & Human Res.*, Docket No. 2009-

[1] FLSA puts a cap on the amount of hours where compensatory time may be taken. *See* 29 CFR § 553.21 §7(o)(3)(A). The term "compensatory time" here should be interpreted as used interchangeably with "flex time." "Compensatory time" tracks the

1263-DHHR (April 28, 2010). Grievant was basically asked to take 45 minutes of compensatory time for the additional time she had worked during the same week.[2] Grievant claims that Respondent's actions in making her clock out on June 5, 2010, while allowing another officer(s) to work overtime in May of 2010, demonstrates favoritism toward male officers and discrimination against her resulting in what she characterizes as a hostile work environment.

The Grievance Board is authorized by statute to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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language of the FLSA. With some restrictions, the FLSA permits state agencies to allow employees to take compensatory time in lieu of overtime for time worked over regular business hours. Grievant only put forth evidence of 45 minutes which is within the cap placed by FLSA.

[2] Respondent's actions in having Grievant clock out, prohibited her from accruing overtime on June 5, 2010. In her statement of grievance, Grievant states that she would have received 3 additional hours of overtime if she had finished her shift and in the relief requested she states that she would have received 4 hours of overtime if she had been permitted to complete her shift. Grievant did not explain this discrepancy and the only testimony provided was that she would have received 45 minutes of overtime if she had been permitted to finish her scheduled shift on June 5, 2010.

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008); also see Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievant has not met her burden of proving she was treated differently than similarly-situated employees. The employee to whom Grievant compared herself was not similarly situated to her in regard to the responsibilities and circumstances of their respective duties at the time pertinent to the overtime. The difference in treatment was related to the actual job duty being performed. The responsibilities of Officer Lott's duties at the time he obtained 40 work hours was not conducive to ceasing services and going home. The officer's overtime was necessary, he was in the midst of transporting residents. Grievant's presence was not necessary the last 45 minutes of her shift to maintain minimum staffing levels at Lorrie Yeager Juvenile Detention Center on June 5, 2010. Officer Lott and Grievant were not similarly situated. The difference in treatment was directly related to the duty being performed. Officer Lott received overtime during a different pay period and was accrued because he was performing a duty not feasible for another to readily cover or perform in fact.

Grievant offered no plausible evidence as to why she is of the opinion that overtime is not awarded equitably between male and female officers. Grievant is desirous of additional overtime. Respondent highlighted that during the time period relevant to this grievance, Grievant was the Corrections Officer with the most overtime hours. Grievant is a female officer; further, the second highest amount of overtime received was by another female COII. The evidence presented by Respondent established that Grievant received almost double the amount of overtime as any other officer at the facility during the period of January 1, 2010 to May 31, 2010. Grievant's contention that male correction officers at LYJDC receive an inequitable amount of overtime is not supported by the facts. Grievant did not establish that the overtime system in place at the facility unfairly deprives female correction officers of overtime.

Grievant offered no evidence to substantiate a claim of harassment[3] or hostile work environment. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore*

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[3] "Harassment" is defined as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997).

Servs., Inc., 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."*Harris, supra* at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). Grievant has not established that Respondent's lawful conduct has been an instrument of harassment or created a hostile work environment. While it is recognized that Grievant works in a prison setting, routinely with individuals of dubious character, it is not established that Respondent created for Grievant a working environment any more hostile than the average office environment, where staff must govern their activity in accordance with applicable personnel rules and regulations.

Lastly, Grievant has requested relief against any retaliation of any kind from her supervisors for the filing of this grievance. Grievant provided no evidence that retaliation has occurred or is likely to transpire.[4] This Grievance Board has continuously refused to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30,

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[4] WEST VIRGINIA CODE § 6C-2-3 (h) *Reprisal.* -- No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). While it is understandable that no grievant would want to be retaliated against for the filing of a grievance, there is no relief available for this type of speculative future claim of harm. Therefore, the request by the Grievant is premature.

Grievant has failed to meet her burden of proof in this non-disciplinary grievance matter. The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

3. Grievant did not establish favoritism or discrimination in the facts of this matter. Grievant was not similarly situated to the employee to whom she compared herself in that the difference in treatment was related to the job responsibilities at the time pertinent to the overtime.

4. Respondent provided credible evidence and rational explanations for its administrative actions in the facts of this case.

5. Grievant has failed to meet her burden of proof in this matter.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 9, 2011

Landon R. Brown
Administrative Law Judge