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ROBERT F. COMBS, JR.

v.

DOCKET NO. 89-CORR-632

W.VA. DEPARTMENT OF CORRECTIONS

DECISION

Grievant, Robert F. Combs, Jr., is employed by the W.Va. Department of Corrections (Department) as a Correctional Officer I at the Davis Center. Mr. Combs filed a level one grievance on August 1, 1989 in which he alleged unfair labor practice and discrimination evidenced by the denial of his request for a shift change. The grievance was denied at levels one, two and three; a level four appeal was filed on September 8 and an evidentiary hearing was conducted on October 12, 1989.

The Davis Center houses approximately fifty male juvenile offenders 16-18 years of age. Correctional officers are assigned on three, eight-hour shifts to provide round the clock coverage. Officers assigned to the 3-11 p.m. shift are referred to as group leaders and due to the intensity of this assignment it is normal procedure to make

shift changes every six months according to Superintendent James Liller¹

The grievant has been employed by the Department of Corrections since May 1977 and has been assigned the 11 p.m. to 7 a.m. shift continuously to the present. He testified at level four that he has requested a shift change several times, most recently in May 1989, and at that time he was promised a change which was not implemented. He states that he was given no reason for the denial of his request and believes that "something unofficial" prevents him from receiving the shift change. Citing a decision of the Civil Service Commission, Bryant v. Department of Health, Docket No. 607 (April 28, 1988) which held that when skills are equal seniority is a fair mechanism upon which to base personnel decisions, the grievant argues that his request should be granted because he possesses more seniority and skills equal to those employees who have been granted shift changes.

It is the position of the Department that utilization of staff is within the purview of the administration and cites the holding in Reed et al. v. Department of Corrections, Docket No. CORR-88-028 (Jan. 31, 1989) and Civil Service Regulation §16.02 as controlling. Section 16.02

¹It does not appear that all correctional officers are changed every six months but that many are to accommodate the rotating assignment of group leaders.

provides, "[e]ach appointing authority shall establish the work schedule for the employees of his agency." Reed held that correctional officers who were assigned rotating shifts were not treated in a discriminatory manner because other correctional officers were assigned permanent or semi-permanent shifts due to the nature of their work with the grass and farm crews.

When an employee charges his employer with discrimination he must establish a prima facie case by showing that he is similarly situated to other employees; that he has been treated differently to his detriment than the similarly-situated employees and that the differences were unrelated to actual job responsibilities and were not agreed to by the grievant in writing. The grievant has met this burden by showing that he is similarly employed as a correctional officer, that his requests for a shift change have been denied while others were granted; and the difference in treatment was unrelated to the employees actual job responsibilities.²

Having successfully proven a prima facie case, the presumption of discrimination exists and must be rebutted by the showing of a legitimate, non-discriminatory reason for the action by the Department. Superintendent Liller

²The Department does not state any requirements for "group leader" nor does it make any assertion that the grievant is incapable of fulfilling the duties of this assignment.

testified that he was unaware of the reasons why the grievant's requests for shift changes were denied prior to his stewardship which began May 6, 1989 and reiterated that personnel decisions were to be made for the good of the institution. He also affirmed a commitment made to the grievant in the level three decision that he would be considered for a shift change in February 1990 consistent with other staff changes.

Because the Department has failed to show a legitimate, non-discriminatory reason for the denial of the grievant's requests for a shift change it must be concluded that the grievant has been treated in a discriminatory manner.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant has been employed as a Correctional Officer I at the Davis Center since May 1977. He has worked the 11 p.m. to 7 a.m. shift continuously from the time he was first employed to the present.

2. The grievant has requested a shift change several times but has not been granted the request while other officers have received a schedule change.

3. It is normal procedure to make shift changes for correctional officers every six months.

4. The Department offered no reason at level four in support of the denial of the grievant's requested shift changes.

Conclusions of Law

1. The grievant has established a prima facie case of discrimination as defined by W.Va. Code §29-6A-2(d) by showing that he has been treated differently from similarly situated employees to his detriment and that the difference in treatment was not related to actual job responsibilities and was not agreed to by the grievant in writing. See Steele, et al. v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989).

2. The Department has failed to rebut the presumption by showing a legitimate, non-discriminatory reason for its failure to grant a shift change over a period of twelve years; therefore, discrimination has been proven.

Accordingly, the grievance is **GRANTED** and the Department is **ORDERED** to change the grievant's shift at the next regular rotation, in February 1990.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Tucker County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED December 21, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER