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ROBIN HAMMER

v.

DOCKET NO. 89-CORR-95

W.VA. DEPARTMENT OF CORRECTIONS

DECISION

Grievant, Robin Hammer, is employed by the W.Va. Department of Corrections (Department) as a Correctional Officer I at the Huttonsville Correctional Center. Mr. Hammer filed a level one grievance on January 1, 1989 in which he alleged that he had been removed from the 11-7 shift in violation of Policies 458.02 and 413.01 as the change prevented his attending college and adversely affected his opportunity to receive a promotion. He requested that he be assigned the 11-7 shift for the duration of his college enrollment. The grievance was denied at levels one, two and three; a level four hearing was conducted on April 24.

At the level four hearing the grievant testified that he had earlier filed a grievance in which he had charged that the administration acted with favoritism in the assignment of duties. He prevailed at level two of that grievance and a "fair and equitable" scheduling of duties

was implemented. Warden William White later resigned and the grievant's shift was thereafter changed to 3 p.m.- 11 p.m. Although not explicitly stated, the grievant clearly believes the change was motivated by retaliation or reprisal for his first grievance in addition to the alleged policy violations.

Norris Weese, shift commander, testified that he had recommended that the grievant be transferred to another shift as he was harassing and intimidating other officers and conducting his own investigation of the scheduling system.

William Duncil, Warden since January, testified that shift changes were made at Huttonsville based upon institutional needs and not to accommodate the staff. He denied that shift changes were used for disciplinary purposes but stated that an employee may sometimes do better on another shift. The Warden stated that as the new administrator he had personally investigated the grievant and the situation pertaining to this and other grievances. Based upon the information he had received he determined the grievant to be uncooperative, exhibit a poor attitude and show resistance to supervision. He also had found that the grievant had been harassing other employees to file grievances. The Warden concluded that the recommended shift change was warranted and observes the grievant to be doing better on the 3-11 shift.

Associate Warden Steve Yardley testified that he had agreed to the grievant's transfer as it was in the best interest of the institution, the shift and the grievant. Mr. Yardley cited staff problems including hostility being directed towards the grievant and other conflicts resulting from dissatisfaction with the "fair and equitable" scheduling system.

Correctional Officer Bobby Chenoweth further corroborated the testimony of the previous witnesses that morale had been rapidly deteriorating and the employees were unhappy with the "fair and equitable" system. In a letter dated December 26, 1988 Officer Chenoweth reported specific instances on which he observed the grievant conversing with others about his and their job dissatisfaction. The officer concluded that the "fair and equitable" system was not wanted by the rest of the employees and resulted in the assignment of inexperienced employees to various duties with little supervision causing potential security risks for the institution.

The grievant called five other Correctional Officers as witnesses in his behalf. Three of the witnesses stated that the "fair and equitable" scheduling implemented as a result of the grievant's first action led to a decline in employee morale. A fourth witness stated that he was less happy now that he was scheduled to work indoors and the fifth witness had no comments on either matter.

The grievant denies the charges that he attempted to incite employee unrest but argues that if he did engage in any improper actions he should have been appropriately disciplined with counseling rather than having his shift changed. He concedes that he is not guaranteed a specific assignment but asserts that he had made it clear that he wanted the 11-7 shift and had planned his college attendance around working that shift.

The grievant cites two Civil Service Commission decisions in support of his position. In the matter of Scott v. Department of Health, Docket No. 309 (July 11, 1985) the Commission held that an employee with a great deal of seniority should be assigned to day shift so as to be given every opportunity to better her skills. In Bryant v. Department of Health, Docket No. 607 (April 28, 1988) seniority was held to be a secondary factor upon which to base personnel decisions when all other merit factors are equal.

The testimony of the grievant himself establishes that there has been no violation of Department of Corrections Policy 458.02 which provides for educational leaves of absence since he stated that he had not requested such leave.¹ Neither has the grievant established a specific

¹The grievant testified that he has completed eight to twelve classes over an unspecified period of time but that he is not enrolled in a degree program. He completed a
(Footnote Continued)

violation of Department of Corrections Policy 413.01 because he has not shown that he has been denied promotion or even that an opportunity for promotion has existed since the change in his shift.

In summary it is clear that the grievant is unhappy that his shift was changed but that there is no rule or regulation prohibiting such an action. Further, the grievant has not suffered any loss of promotion nor has he been forced to discontinue his education. It does not appear that the shift change was taken in reprisal for a previous grievance but as a result of the continuing activities of the grievant which were disrupting the functioning of the shift.

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 is employed as a Correctional Officer I at the Huttonsville Correctional Center.

(Footnote Continued)

three hour class in the spring of 1988 and was enrolled in a psychology class in the spring of 1989. He asserts that the shift change allowed him to take only one class instead of two which he had intended; however, it does not appear that the grievant has been impeded in obtaining a college education at the same rate of progress established in prior semesters.

2. In 1988 Mr. Hammer filed a grievance in which he alleged that job duty assignments were made in a way which resulted in favoritism being shown to certain employees including himself.

3. The grievance was granted at level two by then Warden William White and a "fair and equitable" method of assigning duties was implemented. This method of assignment resulted in the employees being rotated from position to position rather than always working at a specific post.

4. A substantial number of employees, some of whom had enjoyed a permanent post assignment, did not like the "fair and equitable" method. Staff disputes began to occur and morale deteriorated.

5. Upon the resignation of Warden White the "fair and equitable" assignment of duties was dropped and the former method reinstated.

6. Throughout this time the grievant remained discontented with the situation and encouraged other employees to join him in his efforts.

7. The grievant's scheduled shift was subsequently changed from 11:00 p.m. to 7:00 a.m. to 3:00 p.m. to 11:00 a.m.

8. The grievant has continued to pursue a college education at a rate consistent with his prior record of matriculation.

9. The grievant has not been denied promotion or the opportunity to apply for promotion since the shift change.

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Reed v. Department of Corrections, Docket No. CORR-88-028 (Jan. 31, 1989); Payne v. Department of Energy, Docket No. ENGY-88-0150 (Nov. 2, 1988).

2. The grievant has failed to prove any violation of Department of Corrections Policies 458.02 or 413.01 as he has not applied for educational leave or promotion.

3. The grievant has failed to prove reprisal as defined by W.Va. Code §29-6A-2(p) as the change in shift assignment occurred not as a result of a previous grievance but was based upon credible evidence of his inability to work harmoniously with his co-employees, a legitimate reason for the change.

Accordingly, the grievance is DENIED.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Randolph 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

July 26, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER