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SONDRA CASTO and
WILLIAM LALLATHIN

Docket No. CORR-89-022
Docket No. 89-CORR-191

v.

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

Grievants Sondra Casto and William Lallathin were employed by respondent West Virginia Department of Corrections (CORR) until terminated in early 1989 from their positions as correctional officers at the West Virginia Penitentiary after extended absences. Expedited level four grievances¹ were heard August 1, 1989.² Grievants requested reinstatement but neither was medically able to return to work.

¹W.Va. Code §29-6A-4(e) provides that a grievant may file directly at level four for certain matters involving dismissal, demotion and suspension. These grievances do not involve disciplinary action, however.

²Grievant Casto's grievance was filed in advance of grievant Lallathin's but the parties agreed to hold Ms. Casto's case in abeyance until Mr. Lallathin's termination was processed and to consolidate them for hearing and decisional purposes. Submissions of fact-law proposals were completed by September 19, 1989.

The underlying facts about grievants' terminations are not in dispute. Following on-the-job injuries, both received Workers Compensation benefits and neither was able to return to work after twelve months' personal leave without pay. Moreover, neither was able to predict an approximate date for return.

In effecting the "administrative" terminations, CORR followed the guidelines of Civil Service Regulations, §16.08(b):

1. An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

- a. The employee makes application (1) no later than fifteen (15) calendar days following the expiration of all sick leave and compensatory time or (2) no later than fifteen (15) calendar days following the date on which the employee filed a claim for Workmen's Compensation or (3) within fifteen (15) calendar days after the employee is injured or ill; and
- b. The employee's absence is due to an illness or injury which is verified by a physician's written statement that the employee is unable to perform his or her duties and giving a tentative date for the employee's return to work; and
- c. A physician's statement is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and
- d. The disability as verified by a physician is not of such nature as to render the employee permanently unable to perform his duties.

CORR asserted that its termination policy did not discriminate against injured workers such as grievants because employees recovering from work-related injuries were allowed twelve months' unpaid leave instead of only the six-month leave generally granted employees suffering non-work related ailments.

Additionally, CORR presented credible evidence that its ability to properly and effectively man prison operations was undermined when a non-working employee was retained on the employment roster. In such a situation, a new employee could not be hired until the position was vacated and overtime staffing was costly for the agency and burdensome for existing staff.

At hearing, CORR assured grievants that, while it could make no absolute guarantees, if or when they were able to return to work, their applications would be given priority consideration over new hires for existing vacancies and they would not be subject to Civil Service retesting. Assurances were given that if they had a good work record they would be reinstated with restoration of all allowable benefits.

Finally, CORR argued that, while no West Virginia Supreme Court cases were directly on point, the case of Yoho v. Triangle PWC, Inc. et al., 336 S.E.2d 204 (W.Va. 1985), could be construed to support the one-year dismissal policy even though the termination in Yoho was part of a collective bargaining agreement in force. CORR also cited a Kanawha County Circuit Court decision, W.Va. Dept. of Corrections v. Guy Cutler, Civil Action No. 87-C-AP-13 (March 15, 1988). In Cutler, Judge Canady agreed that the termination of a correctional officer was correct because appellant Corrections was operating short-handed and unable to replace appellee Cutler while he was on medical leave.

Grievants contend that there was no similar justification for their terminations. They stated that the staffing situation

which controlled in Cutler was not applicable when they were terminated because nearly a dozen true funded vacancies existed at the prison then and by August 1989, thirty-five vacancies existed, nearly twenty-one more than earlier in the year. Grievants believe their retention could not affect prison operations until the true vacancies are filled, thus, their terminations were unnecessary and arbitrary. They argue that they were dismissed without just cause and hint that CORR's reinstatement policy which entails an examination of their work records could subject them to possible discipline without due process. In their submitted proposals, grievants urged the following:

-- The Department of Corrections should maintain grievants on leave until

a) [g]rievants are physically able to return to work, [or]

b) [a] determination is made that grievants will not be physically able to return to work, or

c) [t]he Department of Corrections has filled all true existing vacancies.

CORR's personnel actions in this matter must be upheld. The evidence preponderates that it would cause an undue administrative and financial burden on CORR to maintain leave status for grievants. Gertrude Campbell, personnel officer at the penitentiary, testified that she had filled position vacancies after grievants were terminated but that the number of vacancies existing at the prison was always in flux due to the high turnover rate. She stated that when vacancies were not filled,

monies could be directed to other expenditures, but when existing staff were required to work overtime to fill in for a large number of employees on personal leave, funding necessary for overtime payments is not efficiently utilized.

Ms. Campbell agreed that all of the overtime woes and expenditures at the prison were not entirely due to the retention of non-working employees on extended leave without pay. However, she made perfectly clear that such leave-taking compounded other ongoing factors such as intermittent daily absences, protracted sick leave absences of workers with extensive sick and personal leave time remaining, and short- to intermediate-term absences for military leaves, vacations and the like, all situations which resulted in operations at the prison being short-handed and for which new personnel could not be obtained.

Furthermore, as was abundantly clear from the evidence, including grievants' assent, they suffer no real consequences of their terminations. It is true that their prior work records would be examined if they seek reinstatement when and if they are medically able to return to their former positions with CORR. However, grievants professed that they were academy-trained correctional officers, and no adverse on-the-job evaluations could be found in the record.

In addition to the foregoing facts and conclusions, the following specific determinations are appropriate. The parties' fact-law proposals have been considered and are incorporated herein to the extent that they are consistent with the findings and rulings of the undersigned examiner.

FINDINGS OF FACT

1. Grievants were terminated from their correctional officer positions at the West Virginia Penitentiary after they had exhausted all leave benefits, including twelve months' unpaid leave of absence following on-the-job injuries.

2. At the time of grievants' dismissals, and for at least six months thereafter, they were medically unable to work and could not predict if and when they could return to work.

3. CORR cannot hire new employees to fill positions being held for staff members on leave of absence.

4. Grievants have liberal reinstatement opportunities with CORR if and when they are medically able to return to work as correctional officers.

CONCLUSIONS OF LAW

1. Grievants were terminated in conformance with existing Civil Service Regulations and CORR's own policy to retain on-the-job injured workers for twelve months on personal leave without pay.

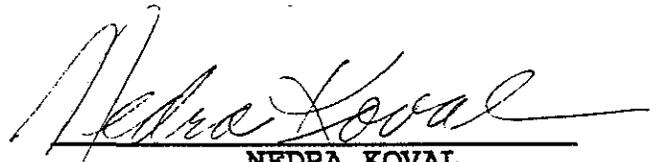
2. Notwithstanding whether true vacancies exist at the prison at any given time, CORR's retention of long-term, non-working employees such as grievants herein, exacerbates all other factors contributing to the necessity of placing and funding staff for overtime duties and causes undue administrative burdens on prison operations.

3. CORR's twelve-month policy as applied to injured workers is not arbitrary under the circumstances and is necessary for the efficient and effective operations of the West Virginia Penitentiary.

Accordingly, this grievance is DENIED and the Department of Corrections' terminations of Grievants Casto and Lallathin are upheld.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall 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: November 30, 1989


NEDRA KOVAL
Hearing Examiner