



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone 238-1040

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

DENNIS EISENHAUER

Docket No. 89-CORR-123

v.

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

D E C I S I O N

Grievant Dennis Eisenhower, Section Chief IV (SC IV), is employed by respondent Department of Corrections and assigned to the West Virginia Penitentiary in Moundsville. He advanced a grievance to level four in late March 1989 and complained of matters pertaining to his past assignment to Officer-of-the-Day (OD) duty. Grievant sought overtime wages from 1986 to early 1989 for performing the duty. Adverse decisions were issued on the grievance at levels one through three February 15, February 22 and February 20, 1989, respectively.¹ After some delay on

¹It is not known why the level three decision preceded the level two issuance.

the matter, the grievance was scheduled and heard May 4, 1989.² Submissions of proposed findings of fact and conclusions of law were completed by June 12, 1989.

Grievant contends that several officers in respondent's employ were classified as SC IV, yet he was the only SC IV assigned to the OD duty. He argues that respondent's practice in that regard was unlawful discrimination against him and he is now entitled to back overtime wages for all hours he served as OD. Respondent contends that the grievance procedure does not grant an employee a right to acquiesce in a "possible continuing practice" and later disclaim it. It argues that, because grievant did not at any relevant time pursue resolution of a "possible violation of his rights" or show valid reason for delay, the matter is untimely and should not be considered.

The basic facts giving rise to the grievance are not in contention. According to the record, on August 29, 1986, then-Warden Jerry Hedrick issued "Staff Notice #1.0 (Revised)" with intent to "establish the OD procedure" at the prison to "enhance efficient and effective communication and operations after the normal business hours." The OD assignment consisted of a one-week "tour of duty," from 4:00 p.m. until 8:00 a.m.

²This matter was originally assigned to the Elkins hearing examiner but transferred to Wheeling at grievant's request. By order of April 27, 1989, the grievance was consolidated, only for hearing, with that of a grievance which arose from the same set of factual circumstances. The grievants had separate theories of their cases and were assured the integrity of their separate positions would be maintained. See Lohr v. W.Va. Dept. of Corr., Docket No. 89-CORR-107 (Aug. 25, 1989).

daily, for the Warden's "designee" who would "act on behalf of the Warden, and have his authority." A car and radio equipment were provided so the OD would be available for immediate contact from the prison. The OD was also on notice that:

It will be the responsibility of the Watch Commander to advise the O.D. of all unusual occurrences and/or intuitive presumption during his shift. Any emergency situation must be reported to the O.D. [who] in turn will have the responsibility of advising the Warden.

The O.D. will be held responsible for unscheduled visits and telephonic communication with the Watch Commander. He should remain in radio contact with the Watch Commander, and will keep him advised of his location at all times.

The Warden will be responsible for establishing an O.D. roster and schedule which will be posted in appropriate places and locations in the institution.

Gr. Ex. 1. Warden Hedrick's next memo, dated September 10, 1986, designated Officers Clutter, Lohr, Gillispie, Hepburn and Eisenhower, grievant herein, as OD staff and scheduled their duties on a rotating basis through January 2, 1987.

According to the record, on October 22, 1987, grievant submitted to Warden Hedrick a list of prison staff members with various Civil Service titles that he deemed to be in exempt status "in accordance with Federal Labor Standards Act." Among the designated exempt-status personnel were: Dennis Eisenhower, SC IV, grievant herein; Harry Gillispie, SC IV; John Hepburn, Supervisor III; and Richard Lohr, Correctional Chief. Those four persons, as well as "B.C. Clutter" appear on the September 12, 1986, OD roster for 1986, and presumably performed the duty until June 1987. Grievant remained on a newly-issued roster, bearing the date June 8, 1987, but Mr. Gillispie, the only other

SC IV on the duty roster besides grievant, was replaced³ by "F. McKain." The list remained intact until May 1988, when Mr. Clutter's name was removed due to his retirement. On December 20, 1988, a year-long roster was published and "Ed Myers" became the fifth OD staffer. Grievant performed the OD duty without protest from the time of its inception, according to the record.

Warden Hedrick was replaced by Acting Warden Manfred Holland in early 1989. By memorandum dated February 1, 1989, Mr. Holland announced the following about OD duties:

This is to advise that effective February 1, 1989, until further notice, Mr. Frank McKain and I will handle the Officer of the Day duties.

Mr. Holland noted that Officer Eisenhower, grievant herein, or Officers Lohr, Hepburn and Gillispie, in descending order, were to be contacted only for a "strict" emergency in the event that he or Mr. McKain could not otherwise be reached. Grievant filed a grievance at level one on February 8, 1989. He appended a personal statement to the level four filing form in which he averred that he was informed on January 25, 1989, that he would no longer be required to serve as OD.⁴

Seemingly, grievant attached significance to Mr. Holland's decision to discontinue the OD duty. However, grievant does not

³The details were not entirely clear, but apparently Mr. Gillispie was removed from the OD duty as the result of a grievance settlement.

⁴Duty rosters, Gr. Ex. 3, showed that grievant had been scheduled for OD duty December 9-16, 1988, and would have next performed the duty January 27-February 3, 1989.

dispute his designation of exempt status and does not find fault with the OD duty on the basis of existing law on the matter. Rather, he advances the notion that he was "taken advantage of" by respondent and was the victim of unlawful discrimination because no other SC IV had been assigned the OD duty. He contends and argues that, since the duty was imposed on him in a discriminatory manner, he is entitled to redress.

Respondent maintains that grievant had worked as OD for over two years prior to January 1989 and did not timely file a grievance, i.e., not prior to July 1988, not in July 1988 when the grievance procedure, W. Va. Code §§29-6A-1, et seq., went into effect, or not within ten days from the date of his last OD assignment. It argues that the grievance is time-barred.

Respondent's position in this matter must be given its due. The evidence simply does not establish that Mr. Holland's administrative act in any way suggested the policies of the former warden were improper. Mr. Holland testified that his actions were based on his own management philosophy and he never stated to anyone that the OD duty was improperly assigned to any OD staff members. In any event, the date that Mr. Holland discontinued the OD policy and duty cannot serve as a point for the grievance filing time to toll. Grievant did not timely file his grievance and his claim is thus precluded by the filing requirements of the grievance statute.⁵ Because of a finding

⁵Based on this finding and conclusion, respondent's laches argument need not be addressed

and conclusion that the grievance was untimely filed, there is no need to address the issue of whether grievant was discriminated against since he presented no evidence that existing duty assignments are pertinent to that situation.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made. Proposed findings and conclusions of the parties have been analyzed and considered and are incorporated herein to the extent that they are consistent with the probative evidence and the determinations of the undersigned hearing examiner.

FINDINGS OF FACT

1. Grievant is one of several other officers at the West Virginia Penitentiary classified as SC IV.

2. The duties performed by grievant are supervisory and executive in that he routinely supervises more than two employees; exercises on-the-job discretion of a high order; assists with management of the enterprise for which he is employed; and advises on personnel matters, with his suggestions and recommendations on hiring, firing and discipline given particular weight.

3. In 1986, grievant and other variously classified officers were assigned OD duty on a rotating basis. The duty required the officer to be on call during his normal off-duty hours should an emergency arise at the penitentiary and significantly restricted his freedom thereby. A SC IV other than

grievant was originally designated OD but was relieved of the duty as the result of a grievance settlement.

4. In 1987, grievant complied with an administrative directive to identify exempt and non-exempt staff and he prepared and presented data that he was among the exempt staff members. Grievant does not now protest his exempt status.

5. Grievant performed OD duties without protest until January 1989. In February 1989 Acting Warden Manfred Holland discontinued the OD policy and practice; that action prompted this grievance, filed February 8, 1989.

CONCLUSIONS OF LAW

1. A grievant must file a grievance "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance," W.Va. Code §29-6A-4(a).

2. Grievant failed to timely file his grievance and his claim is thus precluded by the filing requirements contained in Code §29-6A-4(a).

Accordingly, this grievance is DENIED.

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: August 25, 1989


NEDRA KOVAL
Hearing Examiner