



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

RICHARD LOHR

Docket No. 89-CORR-107

v.

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

Grievant Richard Lohr is employed by respondent Department of Corrections as Chief Correctional Officer at the West Virginia Penitentiary in Moundsville. He advanced a grievance to level four in late March 1989 and complained of past assignments to Officer-of-the-Day (OD) duties. Grievant sought back overtime wages and asked,

[t]o have Staff Notice #1.0 rewritten stating compensation will be given to all Officers-of-the-Day and a written agreement signed by all Officers-of-the-Day stating what additional compensation is to be awarded with the agreement to said compensation in the future.

Adverse decisions on the grievance were issued at the lower administrative levels, one through three, February 2, February 15 and March 4, 1989, respectively. A level four hearing was

conducted May 4, 1989,¹ and submissions of proposed findings of fact and conclusions of law were completed by June 12, 1989.

Grievant contends that he is a non-exempt employee under state and federal law relating to the Fair Labor Standards Act. He argues that he is thus entitled to time-and-one-half wages for all hours, including 24-hour weekend periods, served as OD from 1986 through January 1989 when the practice was discontinued. Respondent maintains that grievant did not timely file a grievance, i.e., not in July 1988 when the grievance procedure, W. Va. Code §§29-6A-1, et seq., went into effect or otherwise within ten days from the date of his last OD assignment, and he had worked as OD without protest for over two years prior to filing the instant grievance.

The parties are not in disagreement about the basic facts giving rise to the grievance. According to the evidence of record, on August 29, 1986, then-Warden Jerry Hedrick issued "Staff Notice #1.0 (Revised)" to dispense with "that issued . . . July 1, 1984" and to "establish the OD procedure for this

¹Some delay on a hearing date ensued because respondent, on April 10, 1989, filed a motion that the grievance be dismissed on the basis of timeliness and laches and grievant responded in writing. Due to discrepancies in the facts set forth by the parties, the motion to dismiss was denied and respondent's counsel was advised that he could renew the issue at hearing.

This grievance was subsequently consolidated, only for hearing, with a separate but similar grievance transferred from Elkins to Wheeling. Both grievants wished to maintain the integrity of their separate views on the issues and were assured by the undersigned that their wishes would be honored. See Eisenhauer v. W.Va. Dept. of Corr., Docket No. 89-CORR-123 (Aug. 25, 1989).

institution, designed to enhance efficient and effective communication and operations after the normal business hours." The notice set forth the following:

O.D.'s are designee[]s of the Warden and whenever they are assigned they will act on behalf of the Warden, and have his authority.

The assignment hours for O.D.'s will be from 4:00 P.M. to 8:00 A.M. daily, seven (7) days a week.

The O.D. vehicle will be picked up . . . on the Friday beginning the . . . O.D. duty . . . [and] turned in . . . at the conclusion of the . . . O.D. duty.

The O.D. vehicle will be equipped with an emergency light and two-way radio. The O.D. officer will be equipped with a "handi-talkie" and a pager.

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 memo of September 10, 1986, designated Officers Clutter, Eisenhower, Gillispie, Hepburn and grievant herein as OD staff and scheduled their duties on a rotating basis through January 2, 1987.

According to the record, after grievant served as OD once, October 3-10, 1986, Jt. Ex. 3, he issued a November 5, 1986, memorandum to Warden Hedrick and asked that he be temporarily relieved of his upcoming OD duty, November 7-14, 1986, because of a family medical emergency. On November 6, 1986, he filed a grievance protesting the OD duty. He complained that he had to

remain home-bound to receive calls because the pager and "handi-talkie" did not reach his residence, placing him in an "engaged to wait status" without compensation for the time. He alleged that his being placed on OD duty was violative of the "Fair Labor Standard Act" since he had not agreed to the arrangement. In November 1986, he sought as relief:

To be compensated for all time spent on Officer-of-the Day duty, past, present or future, by overtime pay. To have Staff Notice #1.0 rewritten with the agreement to this Staff Notice, by all assigned persons to OD duty.

Resp. Subm. 1, Apr. 10, 1989. On November 13, 1986, Warden Hedrick ruled against grievant. The decision, in memorandum format, also contained handwritten notations that grievant withdrew the grievance on November 20, 1986, and, in a different hand, the initials "J.C.H. 11/21/86" appear. Resp. Subm. 2, Apr. 10, 1989. Grievant thereafter performed OD duty without protest.

In 1987 grievant participated with Officer Eisenhower on a task directed by Warden Hedrick. On October 22, 1987, they submitted to the warden a list of prison staff members, with various Civil Service titles, deemed to be in exempt status "in accordance with Federal Labor Standards Act." Among the designated exempt-status personnel were: Dennis Eisenhower, Section Chief IV; Harry Gillispie, Section Chief IV; John Hepburn, Supervisor III; and Richard Lohr, Correctional Chief, grievant herein. Grievant and most of the other named personnel remained on a yearly OD duty roster prepared by Warden Hedrick.

Warden Hedrick was replaced by Acting Warden Manfred Holland in early 1989. By memorandum dated February 1, 1989, Mr. Holland formally 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.

In the event of a strict emergency that needs our attention at once, and should efforts to make contact fail, you should contact the following persons in descending order:

Lt. Col. D. R. Eisenhower
Major Richard P. Lohr
Major John E. Hepburn
Lt. Col. Harry Gillispie

According to the last published roster, Jt. Ex. 3, the last time grievant could have served as OD was January 6-13, 1989, and he filed the instant grievance on or about February 1, 1989, at least 19 days later.

Grievant presented a novel theory about his case, but the logic is somewhat difficult to follow. Grievant stated that he performed the OD duty in the past because of representations made to him that his assumption of the duty would enhance his career.² Grievant contends that, if his past OD efforts were not for career advancement but for the employer's benefit, he is now entitled to back overtime wages. Grievant attaches great significance to Mr. Holland's February directive and appears to focus on that act as the grievable event in this case. Grievant's position seems to be that, because Mr. Holland discontinued the practice, a premise was somehow established

²Grievant said he dropped his grievance in 1986 for that reason.

that the career advancement rationale for which he, grievant, agreed to perform the OD duty was faulty. Grievant's position is not compelling because the evidence simply does not establish that Mr. Holland in any way suggested the administrative acts of the former warden were improper. Mr. Holland testified that his acts were based on his own management philosophy and he never stated to anyone that the OD duty was improperly assigned to staff.

Respondent avers that this grievance was not timely filed. It argues that the grievance procedure does not grant an employee a right to acquiesce in a possible continuing practice and later disclaim it. Respondent urges that, because grievant did not timely pursue resolution of a possible violation of his rights or show valid reason for delay, the matter is untimely and barred by the doctrine of laches. Respondent's position on the timeliness issue has merit.

Mr. Holland's administrative act cannot possibly be construed as the grievable event in this matter and grievant did not timely file his complaint³ or show good cause for delay in prosecuting the grievance. He did not, in fact, establish a basis on which to grant him any of the relief he seeks. Whether grievant is an exempt or non-exempt employee need not be addressed because he presented no evidence that his existing work

³Because of the finding and conclusion that the grievance was untimely filed and therefore disallowed, there is no need to address respondent's argument concerning laches.

situation was pertinent to the situation. Moreover, requests made with respect to "Staff Notice #1.0" cannot be addressed. That issue is moot inasmuch as the policy is no longer in effect and the West Virginia Education and State Employees Grievance Board will not issue advisory opinions when grievants merely speculate about a possible future employment problem. See Greivant's Proposals.

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

FINDINGS OF FACT

1. Grievant is a Chief Correctional Officer at the West Virginia Penitentiary.

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

3. In 1986, grievant was one of several other officers assigned to OD duty. The OD duty required the officer be on call during his normal off-duty hours should an emergency arise

at the penitentiary and significantly restricted his freedom during his off-duty hours. An initial protest to the duty was dropped by grievant.

4. In 1987, grievant complied with an administrative directive to identify exempt and non-exempt staff and he assisted in the preparation of data and conclusions that he was among the exempt status staff members. He now disputes that he is exempt status.

5. Grievant performed OD duties without protest until January 1989; in February 1989 Acting Warden Manfred Holland removed him and other designated staff from OD duty and placed that responsibility upon himself and the Deputy Warden.

6. Grievant last performed OD duties in late December 1988 or early January 1989. He filed the instant grievance February 1, 1989, after he learned the OD duty had been discontinued.

CONCLUSIONS OF LAW

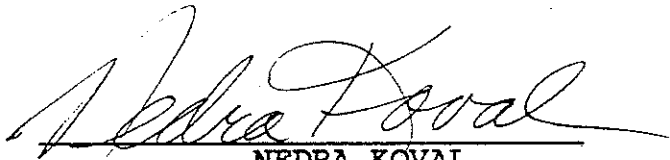
1. Grievant failed to file his grievance "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance," and his claim is thus precluded by the filing requirements contained in W.Va. Code §29-6A-4(a).

2. Respondent's "Staff Notice #1" was not in effect at the time the grievance was filed or heard and the West Virginia Education and State Employees Grievance Board will not address moot issues or author advisory opinions on speculative future employment matters or issues not properly before the Grievance Board. Smith v. Marshall Univ., Docket No. BOR2-87-229-1 (June 29, 1988), see Bentz v. W.Va. Div'n. of Voc. Rehab. Svcs., Docket No. VR-88-057, (March 28, 1989).

Accordingly, this grievance is **DENIED** in its entirety.

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