

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CHARLES CROWDER et al.¹,
Grievants,**

v.

Docket No. 2018-0417-CONS

**DIVISION OF CORRECTIONS/MOUNT
OLIVE CORRECTIONAL COMPLEX²,
Respondent.**

DECISION

Grievants, thirty-nine employees, of the Division of Corrections (“DOC”) who are working at the Mount Olive Correctional Complex (“Mount Olive”) filed a consolidated Level One grievance form on September 14, 2017. Their grievance alleges the following:

We, the undersigned staff at Mount Olive Correctional Complex, are all working in non-uniform, non-sworn positions (civilian staff). We believe that the \$1.00 per hour, \$2080.00 a year raise, approved by the State Personnel Board for uniformed correctional officers should have included the non-uniform staff who, on any given day, are required to staff multiple security posts due to the shortage in uniformed correctional officers. Additionally, non-uniform staff members are required to fulfill our own jobs while having to work many hours of security post, essentially doing two jobs for the price

¹ Grievants are all non-uniform employees at Mount Olive Correctional Facility and include: Charles Crowder, Richard Carte, Sherrie Myers, Richard Swank, Olivia DeLung, Sharon Deal, Jason Bragg, Scotty Hypes, Lisa Humphrey, Richard Bennett, Christi Blankenship, Tom Chandler, Richard Coleman, Mike Shumate, Aaron Sargent, Joshua Darnell, Matthew Clemons, Angelia Bell, Jason Wooten, Leslie Harper, Clifton Carr, Corey Robinson, Angela Hypes, Armand Brouillard, Tami McGraw, Joseph Carell, Tracy Dorsey, Joseph Brown, John Ramsey, Leighann Coleman, Ishmael Summers, John Crowder, Timothy Forren, Jerry Walton, Ryan Clifton, Jerry Auxier, Nancy Johnson, Michael Carper, and Deborah Nichols.

² The Division of Corrections has been united by statute with other agencies and is now part of the Division of Corrections and Rehabilitation, within the Department of Military Affairs and Public Safety.

of one. Also, nowhere in our job description is there a mandatory overtime clause without any form of additional compensation. We feel wronged and unappreciated when uniformed correctional officers receive \$1.00 per hour in recognition for doing a difficult job while us non-uniform staff are only given the occasional thank you for not only doing the same “difficult job,” but our own jobs as well.

As relief, Grievants seek to be exempt from all security posts or be granted the same \$1.00 per hour raise given to correctional officers plus back pay to September 2, 2017.

A Level One hearing was held on October 3, 2017, and a decision denying the grievance was issued on October 24, 2017. Grievants appealed to Level Two on October 30, 2017. An unsuccessful mediation was conducted on February 22, 2018, and Grievants perfected their appeal to Level Three on the next day.

A Level Three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on two separate days: May 21, 2018, and July 20, 2018. Grievants appeared *pro se*.³ Grievant, Lee Harper, was the main spokesman representing Grievants and others participated in the questioning of witnesses. Mark Weiler, Assistant Attorney General, represented Respondent. This matter became mature for decision on August 22, 2018, upon receipt of the Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Grievants are non-uniformed employees of Respondent who are assigned to Mount Olive. Correctional Officers at Mount Olive received a \$1.00 per hour pay increase to enhance recruitment and retention levels in that classification. Grievants allege that it

³ “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

is discriminatory to require them to work at security posts performing the same duties as Correctional Officers without giving them the same \$1.00 per hour salary increase. They also argue that it is unlawful for Respondent to routinely assign them duties outside of the classification specifications of their position.

Grievants were not similarly situated to Correctional Officers with regard to the raise. Respondent was not experiencing the emergency level of vacancies in the non-uniform classifications which were prevalent in the Correctional Officer classification. Grievants may be assigned duties outside their classification if necessary to meet the demonstrated needs of the organization and the outside duties do not become close to becoming the Grievants' predominate duties.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. All Grievants are employed by Respondent and work as non-uniformed employees⁴ at Mount Olive. Non-uniformed staff includes librarians, case workers, counselors, program specialists, substance abuse specialists, maintenance technicians, facility coordinators, cooks, electricians, inspectors, industrial supervisors, and other employees who are needed at the correctional facilities, but are not classified as correctional officers charged with prison security.

⁴ *Department of Military Affairs and Public Safety ("DMAPS") Policy, CORR OPS 2, Definitions, 8*, defines a non-uniformed employee as "a Division/Authority employee who has a Division of Personnel ("DOP") job classification other than a correctional officer."

2. Mount Olive is a maximum-security prison and has minimum security staffing levels which must be maintained to ensure the safety of the staff, the inmates and the public.

3. The routine duties of Grievants require them to be with the inmates on occasion but their predominant duties do not require them to control or supervise inmates in the same way that Correctional Officers do.

4. Non-uniformed staff are required to attend the same basic training at the Corrections Academy that correctional officers take including security issues and defensive tactics.⁵ Many Grievants have been employed as correctional officers before taking non-uniformed positions.

5. For some time, there has been a severe shortage of Correctional Officers in the State correctional facilities. That shortage reached its peak in early 2017 when there were more than 700 vacant Correctional Officer (“CO”) positions across all the State facilities. The vacancies were more acute in some facilities, but all of them needed additional security staff to meet minimum safe staffing levels.⁶

6. There were also vacancies in non-uniformed positions, but the vacancies in CO positions were three times higher.⁷

7. By Letter dated July 6, 2017, Jeff Sandy, Cabinet Secretary for the Department of Military Affairs and Public Safety (“DMAPS”), requested that the Division

⁵ Respondent Exhibit 4 shows the date that each Grievant graduated from the basic training academy. Respondent Exhibit 10, *DOC Policy Directive 800.1(V)(J)*, requires the Academy to “provide a Basic Training Program” to all DOC employees

⁶ Testimony of Michael Coleman DOC Deputy Commissioner.

⁷ *Id.*

of Personnel (“DOP”) present a proposal to the State Personnel Board (“SPB”) to allow DMAPS to increase the minimum starting salary for COs and increase the salaries for existing COs by one dollar per hour. The reason for the request was to recruit and retain COs. The agency demonstrated that there was a severe shortage of COs. There were 700 vacancies across all the jail and correctional facilities. The shortage was to the point of creating critical security concerns. The data did not support that the agency was suffering a recruitment and retention problem in the non-uniform classifications. Respondent Exhibit 1.

8. The Director of DOP notified Cabinet Secretary Sandy, by letter dated July 28, 2017, that the State Personnel Board had approved the DMAPS proposal to increase the salary of all COs by \$1.00 per hour. The State Personnel Board action (SPB #2750) did not approve an increase for any other positions classifications. Respondent Exhibit 2.

9. While SPB #2750 has begun to reduce the number of vacancies for COs in the prison facilities, the shortage of COs persists. It remains difficult to consistently place enough COs in security positions to meet the minimum standard staffing requirements to ensure public safety.

10. To meet the minimum required safety and security staffing standards⁸ DOC Assistant Commissioner, Scott Patterson, issued *DOC Protocol Number ACO-4* related to *Utilization of Non-Uniform Staff to Work Security Posts*. The protocol was issued on December 16, 2017, and states the following:

I. While all employees serve a vital role for the Division, staffing of mandatory security posts is essential to public

⁸ The *Minimum Staffing Guidelines* included in Mount Olive Operating Procedure 300 lists each post at the complex and the minimum staff which must be assigned to each post at specific times.

safety and shall take precedence over all other staffing functions of the Division of Corrections. Security vacancies and other situations that occur in a correctional facility do necessitate that appropriately trained employees of all job classifications be required to work security posts throughout the facility to achieve our mission.

II. The determination of which classifications of non-uniform employees to be scheduled to work security posts is at the discretion of the appointing authority, with the understanding that all employees who have been appropriately trained are eligible to be, **and should be**, assigned as follows:

A. If a facility has a uniformed position vacancy rate of 10% or less, non-uniform employees may be scheduled to work security posts as determined by the facility's appointing authority.

B. If a facility has a uniformed position vacancy rate of 11% to 15%, non-uniform employees **shall** be scheduled to work at least one security shift weekly.

C. If a facility has a uniformed position vacancy rate of 16% or greater, non-uniform employees **shall** be scheduled to work at least two security shifts weekly.

D. If a shift commander is assigning posts at shift change and realizes that there are enough uniformed staff to cover all posts, the non-uniform employees may be released from their scheduled assignment; however, this should only be done in cases where none of the uniformed staff present are scheduled for any mandatory overtime during the pay week; if mandatory overtime is scheduled, those uniformed staff shall be released first.

E. Supervisors shall complete schedules as far in advance as feasible so that each employee is aware of their work schedule and can make necessary arrangements. Every effort shall be made to give employees **at least** one full pay periods notice of their schedules.

III. The above guidelines specifically apply to **scheduled work time**. Employees may be utilized to work security posts more than the scheduled times to meet the needs of the

facility. Both scheduled and unscheduled coverage should be equally distributed among employees.

IV. In all cases, compensation of employees shall comply with WV DMAPS Directive CORR OPS 5: **Paying Non-Correctional Officer Employees Working a Security Post.**

(Emphasis in Original) Grievant Exhibit 4.

11. At all times these consolidated grievances have been pending, the CO vacancy rate at Mount Olive was high enough to trigger § II (B) of the protocol requiring non-uniform staff to “be scheduled to work at least one security shift weekly.” All non-uniform staff at Mount Olive are scheduled to work at least one security shift weekly.

12. When a non-uniform employee is assigned to a security position that employee is performing the same duties, and has the same responsibility for securing and controlling the inmates as a CO.

13. Non-uniform employees do not receive the \$1.00 per hour which is paid to COs pursuant to SPB #2750 at any time, including the time they work security posts.

14. Non-uniform staff have full-time job duties that do not include manning a security post. No specific accommodations have been made for the non-uniform staff to make up the time for their regular duties when their time is taken to cover a security post.⁹

15. *Mount Olive Operational Procedure 300, MOCC Security Division and Security Staffing Procedures* requires the following:

V. Security Staffing: The Shift Commander has responsibility to plan post coverage and the authority to fill all security posts listed (Attachment #1) up to the minimum staffing levels listed. The planning shall include the use of annual leave, military leave, employees assigned to training,

⁹ Conversely, there was no evidence that any Grievant had been disciplined for being behind on his or her work.

overtime, etc. and coordinating with the supervisory and management employees from other divisions.

This procedure was adopted November 13, 2017. Grievants Exhibit 1.

16. *Mount Olive Operational Procedure #1.21 Attendance, Authorized Leave & Overtime Procedure* contains the following provisions:

S. Overtime Program: On a weekly basis, Day Shift Commander will review the upcoming week's Shift Rosters to identify any known vacancies in the mandatory minimum post shift coverage for the shift throughout the upcoming week. Once vacancies are determined, the Day Shift Commander will conduct a weekly meeting with Unit Managers in an attempt to assign Correctional Staff to fill the vacancies with the intent of not incurring overtime or with the intent of reducing overtime.

1. In the event that, despite efforts made, it occurs that the number of regularly scheduled Correctional Officers on a given shift falls below the minimum mandatory number required for facility security and public safety, the procedures outlines as follows will be followed.

(a.) The Shift Commander will begin by first determining if any qualified Correctional Staff (uniformed or non-uniformed) want to volunteer for the unfilled positions . . .

2. If after following the procedures [for voluntary overtime] any positions remain unfilled, or if any unplanned vacancies (e.g. call offs) occur, the Shift Commander shall be authorized to assign [mandatory overtime to COs] or to utilize other trained Correctional staff to fill positions without incurring overtime.

This operating procedure for Mount Olive was adopted on December 1, 2014.

17. Occasionally, one or more of the Grievants have been required to remain and serve on a security post even though enough COs were assigned to the post to meet mandatory safety requirements.¹⁰

Discussion

¹⁰ No evidence was provided to demonstrate how many times this has occurred.

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievants argue that it is discriminatory for them to be assigned to serve the same security posts as COs and not receive the additional \$1.00 dollar per hour paid to COs for the time they are performing the same duties. They seek to be paid the additional \$1.00 per hour when they are assigned to security posts or to be excused from serving those posts.

They also note that pursuant to *DOC Protocol Number ACO-4*, Grievants are being routinely scheduled to work security posts for unavailable COs. They argue that these mandatory assignments are in conflict with *Mount Olive Operational Procedure #1.21*, which requires the Shift Commander to seek volunteers from uniformed and non-uniformed staff to fill shortage prior to assigning non-uniformed staff to take a security post. Finally, they object to being regularly required to perform duties which are outside their classifications of employment.

Respondent counters that the \$1.00 raise was approved by the State Personnel Board to assist with the recruitment and retention of Correctional Officers only. Respondent is not authorized to pay the raise to employees in other classifications. The DOC avers that it became necessary to assign non-uniform staff to cover security posts

because the shortage of COs is so acute that there is no other way to cover security posts.

Respondent contends that the protocol for covering security posts was established to fairly staff the security posts and provide the minimum required coverage for those positions. Respondent notes that the shortage in some facilities, such as Mount Olive, remains so severe that it is necessary to assign regularly scheduled non-uniform employees to CO posts. It also argues that scheduling the shifts in advance allows Grievants a better opportunity to schedule their regular work around the security shifts.

The discrimination issue has been addressed in *Gregory v. Div. of Juvenile Ser.*, Docket No. 2018-0179-CONS (Feb. 12, 2018) and *Prince v. Reg. Jail & Corr. Facilities Auth.*, Docket No. 2018-0583-MAPS (Sept. 18, 2018). In *Gregory supra*, the Administrative Law Judge (“ALJ”) wrote:

Respondent introduced evidence showing that only COs were included in the pay raise because recruiting and retaining COs is a critical issue for relevant state-run facilities, given that over eighty percent (80%) of correctional vacancies, as of July 27, 2017, were for Correctional Officers. Respondent correctly asserts that it does not have authority to grant discretionary pay raises to non-uniformed employees such as Grievants, and that the West Virginia Division of Personnel must authorize such raise increases.

The ALJ in *Prince supra*, further explained that:

[T]he salary increase was not given because of the risks involved with CO duties. Rather the raise was given to address a recruitment and retention problem in the Correctional Officer classification only. The State Personnel Board only authorized the payment of the wage enhancement to employees holding positions in that classification. Respondent is without authority to extend that raise to people working in other classifications at the Jail. *Gregory v. Div. of Juvenile Ser., supra*.

Consequently, even when Grievants are temporarily performing the same security duties as COs, they are not entitled to receive the \$1.00 raise because the State Personnel Board limited that increase specifically to the CO classifications, and no others. See *Prince supra*. Grievants are not similarly situated with the employees who receive the raise. The salary enhancement went to the COs to remedy a serious system-wide retention and recruitment problem in that classification alone. Hence, Grievants are not being subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).¹¹

The next issue is whether Respondent is authorized to regularly assign Grievants to security duties which are not included in their class specifications. As noted in *Prince supra*, Correctional Officers are the only employees specifically charged with the custody and control of the inmates. There is no dispute that when Grievants are assigned to security posts they are performing duties outside their various classifications. The Grievance Board has consistently held that “Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need.” See *Broaddus et al. v. Dep’t of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug. 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009).” *Barker v. Dep’t of Health & Human Ser.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016). That is what is happening at Mount Olive. Grievants are being assigned CO duties on a regular schedule. But those take up one shift a week or approximately one fifth of Grievants’ work time, more or less. That is certainly not close to constituting Grievants’ predominate duties. While this is significant, it is permissible,

¹¹ “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

especially given the fact that the assignments are necessary to ensure sufficient coverage to maintain security and safety for the staff and the public.

Grievants point to *Barker v. Dep't of Health & Human Ser.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016) as authority to demonstrate that Respondent cannot regularly assign them to perform duties outside of their classifications. In that case the ALJ concluded:

“If an employer assigns “out of class” duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification.” *Barker supra*, COL 5,

While this is an astute argument, the facts in *Barker* were significantly different from the facts in this case. In *Barker*, the grievant applied for and received a transfer to a new position. However, because she was so accomplished at her prior job, the district supervisor continued to assign her enough duties from her previous job to constitute half her time rather than employ and train another person. Grievant was being assigned sufficient responsibilities from her old classification to find that her predominate duties were not consistent with her new classification. The ALJ in *Barker* relied upon a previous decision in *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000). In that case, the grievant was an electrician but his supervisor was assigning him to perform other duties including carpentry, mowing, and mechanical work, ninety percent of the time while assigning electrical work to employees in other classifications. Once again, the grievant was being assigned enough responsibilities outside his classification to find that his predominate duties were not in the classification

assigned to his position. In both cases, the ALJ ordered that the predominate duties assigned to the grievant had to be within the classifications they held.

As pointed out above, Grievants are being assigned a significant amount of duties outside of their classifications, but not nearly enough to come close to being Grievants' predominate duties. Grievants did not prove by a preponderance of the evidence that Respondent was prohibited from assigning them occasional duties outside of their normal classification when there is a need to do so.

The Division-wide *Protocol ACO-4* issued on December 16, 2017, does seem to conflict with *Mount Olive Operating Procedure #1.21*. The operating procedure governs the daily operations of Mount Olive under normal circumstance. It dictates that when there are not sufficient COs to meet the minimum-security levels volunteers must be sought among both uniform and non-uniform staff before the non-uniform staff are involuntarily assigned to the security positions. *Protocol ACO-4* is applicable to all facilities and was issued to continue addressing the need to assign sufficient personnel to minimally staff security posts in the face of an ongoing shortage of COs. The protocol was issued by the Assistant Commission of Operations over the entire division and applied to all correctional facilities within the DOC. As such, if an operational procedure in any specific facility, including Mount Olive, is inconsistent with the protocol, the protocol will control.

Protocol ACO-4 by its very nature is intended to be temporary. Once the CO shortage drops below 11% in a facility the routine scheduling of non-uniform staff to security posts becomes discretionary rather than mandatory. When the CO vacancy rate drops below 10%, the operational procedure for the facility goes back into effect. The protocol was adopted to address an emergency security situation and will supersede the

operational procedures of the various facilities until the CO vacancy situation abates. Grievants did not prove by a preponderance of the evidence that it was impermissible for the system-wide emergency protocol to supersede the individual facility operating procedures.

There is one troubling issue remaining. *Protocol ACO-4* specifically states:

If a shift commander is assigning posts at a shift change and realizes that there are enough uniformed staff to cover all posts, the non-uniformed employees may be released from their scheduled assignment; however, this should only be done in cases where none of the uniformed staff present are scheduled for any mandatory overtime during the pay week; if mandatory overtime is scheduled, those uniformed staff shall be released first.

Id. This provision recognizes the need to routinely utilize non-uniform staff to serve in security posts when necessary to meet the minimum required staffing for the post. When the post can be filled with COs, and no COs are being forced into mandatory overtime, the shift commanders are expected to allow the non-uniformed staff attend to their regularly assigned duties which are recognized to be important to meeting the goals of the prison.

There was evidence that some Grievants have been required to remain assigned to security posts when there were enough COs assigned to meet the minimum, security standard. However, there was no evidence presented regarding how often this occurred, to whom, or whether there were COs released from mandatory overtime. Without this information any ruling or relief would be based upon speculation. The Grievance Board has routinely held that speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).

However, going forward, Shift Commanders would be well advised to keep this provision of *Protocol ACO-4* in mind.

Grievants and other non-uniform employees are understandably upset that Correctional Officers received a \$1.00 per hour increase in pay while they did not. Director Sandy told the employees that he expected and understood their anger.¹² This was the first step in resolving security issues in the correctional facilities. It cannot be disputed that correctional institutions are inherently dangerous places to work. All employees working in those facilities are subject to peril and must be constantly vigilant. The salary increase was not given because CO duties are more important to the ultimate success of the correctional facilities. Rather the raise was given to COs alone because Respondent could only demonstrate a severe recruitment and retention problem in the Correctional Officer classification.

Grievants were unable to prove their claims by a preponderance of the evidence. Accordingly, the grievance must be DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

¹² Respondent Exhibit 3, July 27, 2017.

2. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

3. Grievants are not similarly situated with the employees who receive the raise. The salary enhancement went to the COs to remedy a serious system-wide retention and recruitment problem in that classification alone. Hence, Grievants are not being subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d). *Gregory v. Div. of Juvenile Ser.*, Docket No. 2018-0179-CONS (Feb. 12, 2018); *Prince v. Reg. Jail & Corr. Facilities Auth.*, Docket No.2018-0583-MAPS (Sept. 18, 2018).

4. “Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. *See Broaddus et al. v. Dep’t of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug, 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009).”

5. Grievants were unable to prove their claims by a preponderance of the evidence.

Accordingly, the grievance must be DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be

included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

DATE: October 4, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**