

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**KENNETH REXRODE, et al.,
Grievants,**

v.

Docket No. 2018-0800-CONS

**DIVISION OF CORRECTIONS/HUTTONSVILLE
CORRECTIONAL CENTER,
Respondent.**

DECISION

Grievants, Kenneth Rexrode, Steven Wyatt and David Ware, are Building Maintenance Supervisor 1s employed at the Huttonsville Correctional Center. Grievants allege that they are entitled to be paid the same rate as Correctional Officer 1s or 2s because they are required to cover a security post once a week. This grievance was denied at Level One by Decision issued on January 29, 2018. A Level Two mediation session was conducted on March 21, 2018. A Level Three evidentiary hearing was conducted before the undersigned on August 3, 2018, at the Randolph County Development Authority, Elkins, West Virginia. Grievants appeared in person, *pro se*. Respondent appeared by its counsel, John Boothroyd, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 10, 2018.

Synopsis

Grievants are non-uniformed employees of Respondent who are assigned to Huttonsville Correctional Center. Grievants allege that they are required to work security

posts, and escort contractors on the facility grounds. Grievants assert that by escorting the contractors they are performing security duties. The record established that non-uniformed staff will have their pay adjusted to Correctional Officer pay for the time they spend working a security post/duties if they make less than the entry level hourly rate for a Correctional Officer. The record did not support a finding that the Grievants were the victims of discrimination. Respondent was not experiencing the emergency level of vacancies in the non-uniform classifications which were prevalent in the Correctional Officer classification. 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 following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievants are employed at the Huttonsville Correctional Center as Building Maintenance Supervisor 1s. Prior to becoming Building Maintenance Supervisor 1s, Mr. Rexrode and Mr. Wyatt had worked as Correctional Officer 2s. Grievants left their Correctional Officer 2 positions due to the workload and stress, including mandatory overtime.

2. On July 27, 2017, the State Personnel Board approved proposal SPB #2750, which gave a one dollar an hour pay increase to current Correctional Officers one through seven positions, and increased the special hiring rate for Correctional Officer 1 positions from \$22,584 to \$24,664. The pay raise was intended to help increase the retention rate of current Correctional Officers, as well as encourage people to apply for Correctional

Officer positions, and address the high rates of vacant Correctional Officer positions throughout a number of correctional facilities.

3. Work shifts at the various correctional facilities have a minimum number of security positions which must be covered to operate the facility in a safe and secure manner. Due to the high vacancy rates of Correctional Officers at certain correctional facilities, including Huttonsville, facilities have been unable to cover the minimum number of security posts using only Correctional Officers. Respondent has had to resort to both requiring Correctional Officers to perform mandatory overtime and to using non-uniform staff to cover security posts.

4. As part of their duties as Building Maintenance Supervisor 1s, Grievants escort outside contractors through the facility, supervise inmates assigned to them, and generally make certain that basic security protocols are followed in their areas of supervision.

5. Non-uniformed staff, including Grievants, are required to complete basic security training, including completing the same training required of Correctional Officers, as a condition of employment.

6. On October 25, 2017, Respondent authorized that any non-uniformed staff, who covers a security post, receive the entry level pay rate of a Correctional Officer 1, if such pay rate is higher than their normal pay rate, while assigned to the security post.

7. On December 16, 2017, Respondent issued Protocol Number ACO-4, which set out that all non-uniformed employees who have been appropriately trained to perform security are eligible to be, and should be, assigned security 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-uniformed employees shall be scheduled to work at least one security shift weekly.

8. Prior to Protocol Number ACO-4, the use of non-uniformed staff to cover security posts had been at the discretion of the facility's Warden or Administrator. The previous practice at Huttonsville had been to use Unit Team members, such as the Unit Manager, Case Manager and Correctional Counselors, to cover security posts, but not other non-uniformed positions.

9. Huttonsville has a Correctional Officer vacancy rate in excess of 11%. As such, Grievants were required to cover security posts under Protocol Number ACO-4.

10. Grievants, as well as other non-uniform staff, were informed that Protocol Number ACO-4 would be implemented and that, effective January 19, 2018, they would be required to cover a security post once a week.

11. Since January of 2018, Grievants have been assigned to cover a security post once a week. Grievants' weekly work schedules consist of four days with eight hour shifts as Building Maintenance Supervisors, and one day with a twelve hour plus shift covering security post. Grievants are scheduled to work approximately 44 hours per week, of which approximately 25% is spent covering a security post.

12. Prior to July 1, 2018, all three Grievants' pay rates as Building Maintenance Supervisors were lower than the entry level pay rate for a Correctional Officer 1. Each time Grievants covered a security post, Grievants were paid at the entry level pay rate for a Correctional Officer 1.

13. In March 2018, Mr. Wyatt left employment at Huttonsville. Mr. Rexrode and Mr. Ware continue to cover a security post once a week.

14. Effective July 1, 2018, all current non-uniformed staff employed by Respondent received an approximate 5% raise. Due to this pay raise, Mr. Rexrode and Mr. Ware are no longer paid at the entry level rate for a Correctional Officer 1 because their regular pay rate as Building Maintenance Supervisor 1 is now higher.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievants state that they are required to work as Correctional Officers and, as such, seek to receive either the same one dollar raise received by Correctional Officers pursuant to SPB proposal #2750, and/or to receive the same overall pay as a Correctional Officer.

In essence, Grievants argue that it is discriminatory for them to be assigned to serve the same security posts as Correctional Officers and not receive the additional compensation paid to the Correctional Officers.

For the purpose of the grievance procedure, discrimination is defined as “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). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm’n., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants have failed to establish a case of discrimination. Correctional Officers have duties and responsibilities, which differ from Grievants. Correctional Officers’ primary duty is to provide for security. Grievants’ primary duty is the upkeep and management of buildings for the correctional facilities. As with all classified positions employed by Respondent, different positions are paid at different rates. As a general matter, there are both non-uniformed positions within Corrections that are paid more than Correctional Officers and non-uniformed positions that are paid less than Correctional Officers. The differing pay rates are based upon a myriad of factors. Respondent was not experiencing

the emergency level of vacancies in the non-uniform classifications which were prevalent in the Correctional Officer classification. The one dollar per hour pay raise given to Correctional Officers was part of the overall consideration of appropriate pay for the position. Respondent and the State Personnel Board determined that there was a very specific need to address the Correctional Officer vacancy rates, due to the adverse effect the Correctional Officer shortages caused on the overall operations in correctional facilities, and that a raise in pay could help attract and retain Correctional Officers. The record demonstrated that the one dollar raise given to Correctional Officers, and the decision to pay Correctional Officers at a different pay rate than that of Building Maintenance Supervisor, were acts based upon differences related to the actual job responsibilities of the positions.

Grievants have not shown that their overall work duties are substantially the same as a Correctional Officer to be required to be paid at the same rate. Grievants perform the same security duties as a Correctional Officer for approximately 25% of their work week. The other 75% of their work week is spent performing the expected duties of a Building Maintenance Supervisor. The record did not support a finding that Grievants' once a week assignment to a security post changed the nature of their overall work to conclude that they should be paid at the same rate as a Correctional Officer. Respondent acknowledges that the once a week assignment to a security post arguably constitutes being worked out of class. Accordingly, each time Grievants worked a security post assignment, they were paid at a rate equal to that received by an entry level Correctional Officer 1, if their own pay was lower.

Finally, 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. “Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need.” *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. For the purpose of the grievance procedure, discrimination is defined as “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. The record demonstrated that the one dollar raise given to Correctional Officers, and the decision to pay Correctional Officers at a different pay rate than that of Building Maintenance Supervisor, were acts based upon differences related to the actual job responsibilities of the positions.

4. Grievants are not similarly situated with the employees who receive the raise. The salary enhancement went to Correctional Officers to remedy a system-wide retention and recruitment problem in that classification alone.

5. “Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need.” *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

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

Accordingly, this grievance is **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 (eff. July 7, 2018).

Date: October 12, 2018

Ronald L. Reece
Administrative Law Judge