SHERMAN GLASSCOCK

v. Docket No. 93-CORR-529

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Grievant, a Correctional Officer (CO) employed by Respon
dent West Virginia Division of Corrections (CORR) and assigned
to the West Virginia Penitentiary (WVP) at Moundsville, filed
the following level one grievance on October 28, 1993:

Recently I was informed that my vacation, that I put
in for back in Jan. 1993, was cancelled. This is in
violation of Staff Notice 1.19 dated 21 Jan. 93 and
signed by Warden George Trent. Part of my vacation
has been given to an officer with six years of service
with the Division of Corrections. I believe the
administration is taking advantage of the grievance
process. I further believe that this action is
harassing, shows favoritizm [sic], and borders on
discrimination.

Relief Sought:

To have my grievance heard in a timely and expedient
manner. To have my vacation reinstated in acordance
[sic] with Staff Notice 1.19 (as submitted). To stop
this harassment.

Adverse decisions resulted at levels one and two on October
28, and November 15, 1993, respectively. When asked by the
grievance evaluator during the December 7, 1993 level three
evidentiary hearing about the relief he sought, Grievant stated
that he wanted a week's pay because it was too late to restore
his vacation days. By decision dated December 13, 1993, the

evaluator ruled "in favor of the grievant," declaring the restoration of the vacation days a moot issue and declaring his intention not to consider Grievant's amended relief request. Finally, the evaluator granted Warden George Trent leave to appeal the decision to level four.1

Thereafter, Grievant appealed to level four on December 20, 1994 and basically requested consideration of his amended relief.2 Thus, one issue presented here is whether an adminis trative law judge can consider and rule upon the question of amended relief which had been sought and denied below. Depend ing upon the answer, it may be necessary to determine whether Grievant is entitled to the new relief, based on the merits of the case and other considerations.

Grievant, holding over twenty years' seniority, submitted a vacation request on January 22, 1993 for ten vacation days

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1It is not known why the grievance evaluator framed his decision in this manner. The grievance procedure for State employees does not provide for a level four appeal by the respondent.

2Grievant did not state whether he desired a hearing at level four. However, in January 1994, the parties agreed to a record decision. The record consists of Grievant's pleadings, the lower-level decisions and a transcript and exhibits of the December 7, 1993 level three hearing (the copy of the transcript transmitted to the undersigned contains no page numbers, thus, there will be no cites to it herein). Since the parties never submitted an agreed-upon date for the submission of briefs, they were given notice that they had until November 4, 1994 to

augment the record with written fact/law proposals.

beginning November 21, 1993 through December 2, 1993 and for five more days at the end of December.3 Exhibit A. In February 1993, after Grievant's initial vacation request for the late November-early December 1993 vacation had been submitted, he was reassigned to another work unit within WVP. Apparently, Brian Gray, an officer in Grievant's new unit with just over six years' seniority, had also requested some vacation days during the time slot in November 1993 that Grievant had selected. Sometime in late October 1993, WVP Director of Operations Dennis Eisenhauer compiled a vacation schedule for November 1993 which listed Grievant's name on the calendar for vacation days on November 21 through November 25, 1993 as well as November 28 through November 30, 1993. Officer Gray's name was listed for the days of November 21 through November 24, and November 27-28, 1993. Exhibit D. According to Grievant's testimony, his previously-approved vacation days of November 27, 28 and 29, 1993 were "given" to the less-senior Officer Gray. As reflected by the record, when Grievant learned of the alteration of his vacation days, he requested a level one grievance conference with Officer Eisenhauer, the party who had effected the schedule change.

3Grievant indicated on the request form that his regular days off for the period of November 21 through December 2 were November 19-20, 26-27 and December 3-4. In conjunction with the five days he requested for December 26-30, he indicated his regular days off were December 24-25, 31, 1993 and January 1, 1994.

Of record are Grievant's entire 1993 vacation requests which included five vacation days for each month beginning in May and continuing through October, ten days for November and five days for December. Exhibit A. According to Officer Eisenhauer, prior to November 1993, all of Grievant's requests had been granted, including an extra day in July, although Grievant declined to take the vacation days he had selected for September 1993. A list prepared by Officer Eisenhauer also indicated that the ten days Grievant had requested for November had been "changed" and the five for December "denied." Officer Eisenhauer continued that, counting Grievant's "RDO's," Grievant still received ten days off and, because of the "new schedule change," Grievant would be scheduled off on Thanksgiving, Christmas, New Year's day and ten days "during deer season." Finally, Officer Eisenhauer indicated that Officer Gray also had two days cut from his five days of requested leave.4

In support of his argument that he is entitled to the amended relief of a week's salary for the withheld vacation days, Grievant wrote on his level four filing as follows:

[#4]Although the hearing evaluator ruled in my favor, the wrong that was done me CAN NOT be corrected without this amendment. There are six areas that my employer was in violation, and for this reason I believe I should be allowed to amend my relief sought.

1. Violation of Past Practice

2. Unfair Treatment

4See the written October 28, 1993 level one decision. It is noted that Officer Eisenhauer did not appear at the level

three hearing. However, Grievant did not dispute any of the information contained in Officer Eisenhauer's decision relative to his vacation requests for 1993.

3. Violation of Institutional Policy
4. Violation of Other Written Agreements
5. Reasonable Person Rule
6. Employer DID NOT act in good faith to resolve this issue at the lowest level possible of the grievance procedure.

W.Va. Code 29-6A-3(k) provides, "Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." Thus, the answer to the question previously posed is that the Grievance Board's administrative law judges (ALJ) have the discretionary power at level four to grant a grievant's request for amended relief. In addition, the ALJ is permitted to "provide such relief as is deemed fair and equita ble" and/or fashion "appropriate remedies . . . making the employee whole." Code 29-6A-5(b).
Code 29-6A-4(d)(1) sets forth the process by which a grievant may appeal to level four if he or she "is not satisfied with the action taken by the chief administrator or his desig nee." Here, Grievant appealed a level three decision which favored him on the merits of the case but provided him no relief. However, while the undersigned is permitted to consider Grievant's request for monetary damages, the merits of Grievant's case must also be reexamined in light of the evi dence, the applicable law and the requested relief. The statute does not state that the ALJ at level four is bound by the lower

level decisions. Finally, Grievant bears the burden of proof to establish each and every element of his grievance by a prepon derance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

With respect to the merits of the case, the record supports that WVP administrators are to grant vacation requests on the basis of seniority whenever possible. Three higher-ranking officers testified to this effect at Grievant's level three hearing. In addition, a memorandum issued by Warden Trent in January 1993 states, "Although an officer is reassigned and/or rotated, any vacation scheduled prior to rotation and/or reas signment will be honored." Exhibit B. While the alteration of Grievant's vacation schedule for November 1993 appeared to be contrary to practice and policy, all parties were in agreement that vacations could be cancelled or modified under certain circumstances such as emergency or need. In this case, there is evidence of record that a situation occurred in Grievant's work unit which compelled some vacation alterations in November 1993. Gertrude Campbell appeared on behalf of WVP at the level three hearing. While she agreed that more-senior officers had priority over less-senior ones for vacation requests and voiced sympathy with Grievant because his vacation days had been changed, she testified that the work unit in question experi enced staff resignations and other employee movement which necessitated the changes. She said Officer Eisenhauer had can celled his own vacation and the vacation of three other officers and had altered the vacation days of at least one other officer. Ms. Campbell also noted that Grievant had requested quite a few vacation days throughout 1993, all of which he had received

in the new work unit prior to November 1993, except those he declined to take. Grievant did not refute any of Ms. Campbell's statements, except to state that the other officer whose sched ule had been changed had agreed to the change.5

Viewed in its entirety, the record establishes that good cause existed for the change in the November 1993 vacation schedule within Grievant's work unit. In addition, no evidence was presented which would tend to establish that Grievant was subjected to ill will, harassment, or unfair treatment on the part of Officer Eisenhauer.6 Certainly, Grievant was not the only worker affected by the November 1993 vacation schedule alterations.

Moreover, Grievant did not establish that he suffered money damages as a result of the altered vacation days. He did not allege that he expended any funds to reserve vacation transpor tation or housing or even that he or his family were particular ly inconvenienced in any manner as a result of the altered vacation days. In fact, while Grievant's request for vacation

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5Apparently, after Grievant instituted this grievance, Officer Eisenhauer wrote an October 29, 1993 memorandum to his men in which he stated that he had changed the vacation schedule in order to "be fair to everyone." Exhibit A.

6Grievant suggested that Officer Eisenhauer waited until October 1993 to change the November vacation schedule to thwart the grievance procedure, i.e., that due to the grievance procedure time lines, it would be too late to restore the vacation days should Grievant prevail on the merits of his formal protest over the lost days. There was absolutely no

evidence presented that Officer Eisenhauer "manipulated" the grievance procedure in this manner or that he delayed acting promptly on the vacation requests when conditions became known to him.

was denied for some days in November 1993, his request for five days during the last week in December 1993 was completely denied at the same time, but Grievant made no protest about that event. Grievant is simply angry, perhaps understandably so, because a less senior officer was permitted to keep a few days of vacation that were initially also selected by him.

In short, Grievant failed to establish that he was entitled to a week's wages simply because his ten-day vacation was disturbed to the tune of three of his preselected days. Never theless, the WVP official exercised bad judgment when he failed to restore the three days when Grievant pushed the issue and refused to "agree" to a change as had another affected officer. However, the only remedy available to Grievant is an opportunity to select any five vacation days of his choosing, over the requests of any other officers in his work unit, including those who are more senior than him. Grievant is not entitled to money to make him "whole" because he lost no money. See W.Va. Code 29-6A-5(6).

Findings of Fact

1. In January 1993, Grievant requested approximately forty-five vacation days spread over the months of May through December 1993. Shortly after Grievant submitted his year-long vacation request, he was reassigned to a new work unit.

2. Prior to November 1993, Grievant took all of the vacation days he had selected, except for five days in September 1993 which he declined.

3. The November 1993 vacation schedule (calendar form) for Grievant's work unit was compiled in October 1993. At about that time, Grievant learned that three of his requested vacation days for November 1993 had been denied as well as all five of his vacation days for December 1993.

4. Other officers had vacations cancelled or altered because of resignations and rotations within the unit. At least one officer whose vacation days were altered agreed to the change.

5. Grievant protested about the three disallowed November 1993 days, not because he suffered any actual damages but because a less-senior officer in his work unit was permitted to remain on the schedule for those particular days.

Conclusions of Law

1. The grievant must prove all of the allegations consti tuting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. According to long-standing practice and in-house written directives, WVP administrators are to grant vacation re quests on the basis of seniority whenever possible.

3. Because Grievant's vacation days were altered without his consent and because a less-senior officer retained the days preselected by Grievant, Grievant is entitled to relief.

4. Grievant failed to establish that he was entitled to monetary damages in this matter.

Therefore the grievance is GRANTED to the extent set forth above; any other relief is denied.

Any party or the West Virginia Division of Personnel may

appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: November 30, 1994