ROBERT W. KNIGHT, et al.

v. Docket No. 95-CORR-389

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Robert W. Knight, classified as a Correctional Officer II, is the lead Grievant in this action involving a number of correctional officers (CO) at the Northern Regional Jail and Correctional Facility (NRCF), located in Moundsville, Marshall County, West Virginia. Grievants were temporarily assigned to the recently-opened State prison, Mount Olive Correctional Complex (MOCC), in Fayette County, for a week in Summer 1995. Grievants allege discrimination and/or favoritism in conjunction with this work assignment. The case was heard at level four on October 11, 1995. However, CORR agreed that the record could remain open pending a specified period at NRCF to gather signa tures of all of the affected employees who wished to join the grievance. This data was provided on November 2, 1995, and the case became mature for decision on that day.

As a preliminary matter, it is noted that Grievant Knight timely filed a grievance over certain aspects of the Summer 1995 work assignment at MOCC, and other affected COs attempted to follow suit. The other employees were discouraged by NRCF administrators from filing grievances pending the outcome of the Knight grievance. However, at Grievant Knight's level four hearing, the parties agreed that it would be proper to join the other employees to the Knight grievance. Additional grievants are Edward E. Amos, William Arnold, Donald Dobbs, David Druschel, Harry P. Frey, Larry R. Fordyce, Sr., Larry Furbee, Patrick B. Glasscock, James Greathouse, Michael Henthorn, Glenn

E. Highley, Robert Hill, Paul Howard, Leslie D. Howearth, Roger Johnson, Richard Littell, Christopher Miller, Barry Milbert, Ralph Morris, Sammie Neely, William B. Osborne, Mark Reynolds, William Richmond, Herbert Stevey, Junior Smith, Jeff Taylor, Roger Tyrrell, David Whetzel, James R. Whorton, Ralph L. Wolfe, III, and David Young. Administrative notice is taken that some of these Grievants were formerly COs at the West Virginia Penitentiary (WVP) prior to the prison's closure.

There is little dispute about the underlying facts giving rise to this grievance. Based on all matters of record, the following findings of fact are made.

Findings of Fact

1. Beginning with the week of July 5-11, 1995, a set number of COs from NRCF were assigned to serve for a week at a time at the newly-opened and understaffed MOCC, to assist with operations. At that point, most of the inmates at MOCC had been transferred there from WVP.

2. The first contingent of COs assigned to MOCC was transported by CORR in one van. Later groups were transported in two vans.

3. At MOCC, the COs were housed in a building apart from where inmates are located. The sleeping rooms had no nightstands, dressers, or lockers. There were no curtains or other coverings at some of the windows. Some workers would not use the sheets and blankets that were provided because they suspected the linens had been previously used by inmates. Others suspected there had not been enough time to properly clean the linens after one group of COs departed MOCC and another group arrived. There were no private baths. At least one CO refused to stay in the building and camped at a nearby

campground, instead.

4. Meals at MOCC are prepared by inmates under the supervision of an outside food contractor. While on duty, some MOCC staff regularly buy meals which have been prepared by the inmates in the prison.

5. The COs temporarily assigned to MOCC were permitted to eat meals at the facility at no cost to them. However, some COs worked at times other than day shift, and meals were not avail able for them.

6. Generally, when certain guidelines are met, a state employee receives a meal allowance of $26.00 per day while traveling in conjunction with an approved, work-related activi ty.

7. CORR determined that Grievants should be reimbursed for meal expenses while at MOCC. However, due to the availabil ity of inmate-prepared free meals at MOCC, the COs from RCF were reimbursed at only sixty percent (60%) of the full meal allow ance, or $15.60 per day.

8. Some NFCF COs, including Grievant Knight, drove their own vehicles to MOCC because they were concerned they would not have transportation home should an emergency occur with their families back in Moundsville. Grievant Knight testified that his wife had a medical problem, but he did not say that her condition was either acute or critical.

9. The NRCF COs do not trust inmates to prepare food for their consumption, and would not eat inmate-prepared meals while at MOCC. They bought food outside of the prison.

10. During the period that the first group of NRCF COs was assigned to MOCC, a NRCF investigator and a personnel specialist were also assigned to the facility for a few days.

11. The investigator and personnel specialist, also former WVP workers, were permitted to drive their own cars to MOCC. In addition, they were housed at a motel and permitted to eat their meals at local restaurants or bring their own food to work while on duty at MOCC. They were reimbursed for the travel and lodging and permitted to claim the full daily meal allotment of $26.00.

12. Gertrude Campbell, the NRCF personnel specialist, testified that, due to her husband's serious illness, she had a medically necessary reason to bring her own vehicle to MOCC. She also claimed she worked beyond the business day and into the night in her motel room, something she could not have done had she been housed at MOCC. However, she stated she would not eat food prepared by inmates under any circumstances.

13. In the past when emergencies occurred at various correctional facilities, COs from Moundsville who were assigned to temporary duty at alternate sites were permitted to drive their own cars, and were provided housing and meals at local hotels/motels and restaurants. Those expenses were reimbursed at the prevailing full-allowance rates.

Discussion

At issue in this grievance is whether Grievants were improperly transported to, housed at, and required to eat some of their meals within MOCC, in contrast to more favorable treatment afforded other employees, non-correctional officers, who were also sent to MOCC at about the same time. Also at issue is whether these arrangements were improper in light of the much different treatment afforded COs in the past for performing emergency duties at alternative correctional sites. Grievants claim discrimination and/or favoritism on CORR's part,

in that they were treated differently, to their detriment, in this situation. In particular, Grievant Knight requests reim bursement for travel back and forth to MOCC in his personal vehicle, for motel/hotel expenses and the full daily meal allotment of $26.00.

CORR disavows any discrimination and favoritism or other wrongdoing in this situation. It maintains that Grievants' "past practice" argument must fail because the CO assignments at MOCC in Summer 1995 were for assistance and training exercises, and not a call-out of workers from their designated work head quarters to an alternate work site because of an inmate uprising or other crisis. CORR also argues that the COs and non-correc tional officer staff sent to MOCC were not similarly-situated, in that their work schedules and missions were different. Finally, CORR maintains that all COs sent to MOCC were treated exactly the same.

With regard to the discrimination and favortism claims, CORR's arguments are well-taken.1 Ceertainly, circumstances prompting CORR's use of call-out workers from various correc tional facilities due to inmate disturbances or other emergency situations are dissimilar to the situation requiring extra workers at MOCC. Moreover, the personnel who were treated differently than Grievants in Summer 1995 were not CO workers and were not similarly situated. The duties of the non-CO

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1Discrimination is defined in W.Va. Code §29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

Favoritism is defined in §29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advan tageous treatment of another or other employees." See also, Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

personnel in question were different than those of the CO workers. While the record is silent about how long the investi gator remained at MOCC, Ms. Campbell testified that she stayed there only a few days, not an entire week as had the COs. Finally, Grievants showed absolutely no instances of discrimina tion or favoritism among the COs sent to MOCC during Summer 1995.

While Grievants have not established discrimination or favoritism, as contemplated by W.Va. Code §§29-6A-2(d) and 29-6A-2(h), respectively, the question remains whether CORR's action regarding the temporary assignments was an abuse of discretion. Generally, a worker is not entitled to reimbursment for driving expenses for a work-related activity when the employer has provided transportation. Froats v. Hancock County Bd. of Educ., Docket No. 93-15-453 (Aug. 28, 1995). In this case, no Grievant offered any compelling reason to drive a private automobile to MOCC. It is accepted that, had a tempo rary MOCC worker experienced an emergency which would have required his return home, MOCC officials would have provided the transportation by some means.

It was also not unreasonable for CORR to use available MOCC facilities to house the temporary CO workers. While the accomodations were not the finest, they were probably better than those provided for sericemen on bivouac or other military training exercises. There was no evidence from any Grievant

that a private room and/or bathing facility or specially equiped sleeping room was necessary for health purposes or other reasons. In any event, no damages could be awarded on this claim because Grievants made no showing that any of them de clined to stay at MOCC and lodged at a motel or hotel.

The food situation is quite another matter. CORR abused its discretion and acted arbitrarily and capriciously when it disallowed Grievants from claiming the full meal allowance. Of record is a July 3, 1995, memorandum from a CORR administrator which advises that "meals will be provided in the [MOCC] staff dining hall for officers" temporarily working at MOCC during the time in question. Then, inexplicably, it is stated that, "if an officer chooses to eat some meals off-site, he/she will be reimbursed for those meals not to exceed $15.60 per day which is 60% of the authorized daily rate . . . ."

Seemingly, long-time WVP workers now working at NRCF, including those other than correctional officers, simply do not trust inmates and will not eat food prepared by inmates. This objection is deep-rooted and goes beyond any desire for fancier fare. CORR offered no explanation why every employee who worked temporarily at MOCC was not required to eat his meals at the facility. Nor was there any explanation why COs who worked shifts when food was not available also had their meal allowance cut to 60 percent of the allowable maximum. In fact, CORR never explained how it arrived at the 60 percent figure it did allow.

"Under W.Va. Code §29-6A-5, the administrative law judges employed by the Grievance Board have 'the authority to provide appropriate remedies including, but not limited to, making the employee whole.'" Hickman v. W.Va. Public Service Comm., Docket No. 94-PSC-610 (Mar. 2, 1995). Given the facts in this case, it

is deemed equitable that Grievants be reimbursed 100 percent of their daily meals, up to the allowable amount of $26.00.

In addition to the foregoing findings and determinations, the following conclusions of law are made.

Conclusions of Law

1. Grievants must prove all of the allegations constitut ing 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. The record in this case does not support claims of discrimination or favoritism as contemplated by W.Va. Code §§29-6A-2(d) and 29-6A-2(h), respectively.

3. Grievants are not entitled to reimbursement for driving private automobiles to a temporary work assignment in a far-removed county when the employer provided adequate transpor tation to the site. See Froats v. Hancock County Bd. of Educ., Docket No. 93-15-453 (Aug. 28, 1995).

4. Grievants have not established they are entitled to the costs of motel lodging under any theory of law.

5. Grievants have demonstrated they are entitled to be reimbursed for the costs of their daily meals up to the allow able $26.00 per day.

Accordingly, the grievance is GRANTED IN PART, and the Division of Corrections is Ordered to reimburse Grievants in a manner not inconsistent with the holdings in this Decision. No other relief is awarded.

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: December 11, 1995