CLARK PATTERSON

v. DOCKET NO. 95-CORR-308

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Clark Patterson is employed by Respondent West Virginia Division of Corrections (CORR) as a Counselor II at the recently-opened Northern Regional Jail and Correctional Facility (CF) in Moundsville. At issue in this grievance is whether Grievant is entitled to overtime wages during a time when CF workers were required to log eight hours of actual work time within a designated eight and a half hour workday, in contrast to CORR employees at other facilities, including the West Virginia Penitentiary (WVP) prior to its closure, who were required to work only seven and a half hours and who received a paid half hour lunch break within a designated eight-hour workday. A level four hearing was conducted on August 10, 1995, but the record remained open pending the submission of additional evidence. The case became mature for decision on September 27, 1995, upon receipt of the last of the parties' fact/law proposals and rebuttals.

Based on all matters of record, the following findings of fact are made.

Findings of Fact

1. Before WVP closed, Grievant and most other non-correctional officer employees were scheduled for an eight-hour work day, normally from 8:00 a.m. to 4:00 p.m. These workers had a half-hour "paid" lunch break; however, most were not permitted to leave the facility and, due to staffing problems, they often had to remain at their duty station while eating lunch.

2. High-ranking CORR officials determined that work schedules for non-correctional officer employees at both the new penitentiary at Mount Olive and the new CF at Moundsville should be based on a eight and a half hour workday, generally from 8:00 a.m. to 4:30 p.m. The schedule was thought to be an improved managerial approach which, among other things, permitted affect ed employees to "clock out" of the work place/work station for a half hour uninterrupted lunch break on their own time.

3. Immediately prior to the closure of WVP, CORR Counsel or II Sean Markey was assigned to CF for four days, March 6-9, 1995. While there, Mr. Markey worked the eight and a half hour CF schedule. However, his immediate supervisor at WVP approved the payment of overtime wages for the extra half hour (unpaid lunch) he was on duty on each of those days.

4. During the week of March 6-10, 1995, Grievant worked his regular eight-hour shift at WVP, from 8:00 a.m. until 4:00 p.m. CORR Ex. 1 (8/24/95).

5. Grievant transferred to CF at the closure of WVP on or about March 27, 1995. At that point, while Grievant was re quired to work the eight and a half hour CF schedule, a half hour longer than his WVP schedule, he continued to receive only the wages he had earned prior to the transfer.

6. CORR did not dispute Grievant's claim that, despite the intent of the new work schedule at CF, there were times when workers were required to return to their work station during the middle of their meals. However, Grievant did not identify any specific day or days in which he was recalled to his work station during his lunch break.

7. Mr. Markey was also permanently transferred to CF on March 27, 1995, and was thereafter required to work the eight

and a half hour work schedule. There is no evidence that, after the permanent transfer, Mr. Markey received any overtime wages for the half hour beyond 4:00 p.m. that he was required to remain at work.

8. Grievant initiated a grievance about the eight and a half hour per day work schedule on or about April 25, 1995.

9. Prior to Grievant's level three hearing on June 13, 1995, CORR Commissioner Nicholas Hun decided to abolish CF's eight and a half hour work schedule. Thereafter, an eight-hour work day, from 8:00 a.m. to 4:00 p.m., was established for all affected non-correctional officer employees at CF and Mount Olive.

Discussion

Grievant seeks overtime wages of one half hour per day for each day he worked the eight and a half hour schedule at CF, from the day he transferred to the facility until the day the eight hour work day was instituted. Grievant claims he has established violations of DOP and CORR policies, regulations and rules. In particular, he reasons that overtime wages for the time in question are required because workers must be paid "in proportion to actual time worked," pursuant to the West Virginia Division of Personnel's (DOP) Administrative Rule, Section 5.04(c).1 He additionally contends that, according to DOP's "Policy #15.02," all employees "will work the same amount of hours as those doing like work or are classified the same."2

1Section 5.04(c) addresses the rates of pay for covered civil service employees as follows:

The compensation plan applies to all classes of

positions in the classified service. It provides standard pay rates for full-time employees for regularly established working hours in all offices and departments. The salary or wages paid shall be determined by the pay grade to which the classification of the position has been allocated. All employees, including those serving in positions on a part-time basis, shall be paid in proportion to the actual time worked.

2DOP's Administrative Rule, Section 15.02 provides that each appointing authority shall establish the work schedule for the employees of his agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time that the workweek begins and ends, and the time that each work shift begins and ends. The work schedules and changes thereto must be submitted to the Director within fifteen (15) calendar days after employees commence work under the schedule.

In addition, Grievant seems to be making a claim of unlaw ful discrimination. He essentially argues that CORR must supply a "legal reason" for instituting a work schedule of eight and a half hours per day for a select group of CORR employees while permitting the retention of an eight-hour work schedule and workday for other "similarly situated" CORR employees. CORR denies all wrongdoing in this matter and claims Grievant has not met his burden of proof. In its view, during the time in question, Grievant received payment for all of the hours he actually worked at CF. CORR also relies on Boylan v.

W.Va. Dept. of Transportation, Docket No. 94-DOH-211 (Oct. 25, 1994). In its level four brief, CORR proposed the following: "Boylan established the appropriateness of different agencies establishing different work schedules for their employees. It further approved of agencies establishing different work sched ules within their agency in order to accommodate and achieve the goals of the agency." CORR essentially argues that the CF's initial work schedule of eight and a half hours was justified, under the circumstances. The decision was proper at the time, CORR urges, because CF was a new facility, unlike any other existing correctional facility. CORR also reasons that the effort to correct a long-standing problem at WVP and to provide a guaranteed, undisturbed half hour lunch break for employees justified the initial extended work schedule at CF.

Contrary to his assertions, Grievant has not established a violation of any DOP rule, regulation or policy.3 Grievant did not allege that he was not paid the proper salary for his classification after his transfer to CF. Moreover, he was paid for eight hours per day, "in proportion to actual time worked," eight hours, pursuant to DOP's Administrative Rule, Section 5.04(c). Notably, the regulation does not require that employ ees be paid for any time they are not actually working. In addition, while DOP Administrative Rule, Section 15.02, compels an employer to establish precise employee schedules, it does not require an employer to limit employees' "actual attendance on duty" to only seven and a half hours. Section 15.02 also does not require an employer to schedule all employees at every work site to remain at the work place for a like number of hours. Neither of the cited rules requires any employer to provide any employee with a "paid" lunch period. See Boylan, supra.

The remaining question is whether Grievant has been sub jected to discriminatory treatment.4 In order to prevail on such a claim, or to establish a prima facie case and a presump tion that discrimination occurred, Grievant must demonstrate that he is similarly situated, in all respects, to the employee

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3In his two post-hearing letter submissions, Grievant also commented at length about some prior practices at WVP and current conditions at CF; however, these matters have no bearing upon the issue raised in this grievance.

4Discrimination is defined in Code 18-29-2(d) as "any differences in the treatment of employees unless such differ ences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."
or employees with whom he compares himself. Reilly v. W.Va. Div. of Highways, Docket No. 95-DOH-323 (Oct. 3, 1995). See also Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant has not met his burden of proof in this matter.
It is true that Counselors at some other CORR facilities were never required to remain at work for eight and a half hours in order to receive a lunch break. However, Grievant was not similarly situated to those workers because he reported to an altogether different correctional facility. In addition, all former WVP counselors and other non-correctional officer workers at CF were also required to work the eight and a half hour schedule when they transferred to that facility. Thus Grievant was not singled out and required to conform to a different work schedule than like-classified workers at CF.

Despite Grievant's belief to the contrary, it is also not significant that Mr. Markey received overtime wages while temporarily assigned to CF. Grievant did not allege he was ever required to work at CF before his transfer from WVP to CF, and there is no evidence that Mr. Markey ever received overtime wages upon his permanent transfer to CF. Therefore, there has been no showing of discriminatory treatment with respect to Grievant and Mr. Markey. Grievant did not work at CF prior to his transfer there. Hence, Grievant has no basis for expecting the same treatment (overtime wages) that Mr. Markey received during the time-frame Mr. Markey temporarily worked an eight and a half hour schedule at CF.

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

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. Grievant failed to prove a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works. See Boylan v. W.Va. Dept. of Transporta tion, Docket No. 94-DOH-211 (Oct. 25, 1994).

3. Grievant failed to establish discrimination, as contemplated by W.Va. Code 18-29-2(d), or any other basis for which to grant the relief requested in this case.

Accordingly, the grievance 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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing 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: October 13, 1995