

JAMES REED

v. Docket No. 95-CORR-033

DIVISION OF CORRECTIONS/DIVISION OF PERSONNEL

DECISION

Grievant, James Reed, employed by the Division of Corrections (Corrections) at Pruntytown Correctional Center (PCC), alleges violations of the minimum wage/maximum hour laws, the Fair Labor Standards Act (FLSA), and Division of Personnel (Personnel) Rule 15.07, when he was denied overtime compensation. After the grievance was denied at levels one, two, and three, appeal was made to level four on January 30, 1995. The level four hearing, continued several times for good cause shown, was held on December 8, 1995. The matter became mature for decision with the filing of post-hearing proposals on or before February 23, 1996.

The following facts are not in dispute.

1. Grievant is classified as a Correctional Officer-VI (Captain) at PCC, which houses between 230-240 minimum security male and minimum to maximum security female inmates.
2. Grievant has been employed as a Correctional Officer (CO) for 33 years and is presently assigned as shift commander from 7:00 a.m. to 3:00 p.m.
3. The duties of shift commander, as stated by Grievant on his position description form, include the preparation of a monthly work schedule and shift assignments, conducting formal/informal and emergency counts, and other duties associated with the security and operation of the correctional facility to insure the safety of staff and inmates.
4. In a prior grievance, the Level III decision, dated October 31, 1994, held that Grievant had been improperly denied overtime when other similarly-situated employees were awarded such compensation.
5. By memorandum dated November 3, 1994, J. N. Liller, Warden of PCC, advised all staff that, effective immediately, employees classified as CO-VI or above would not be paid overtime.

6. Grievant's subsequent requests for overtime compensation have been denied.

Grievant argues that his position should not be classified under the FLSA "Executive" exemption because his primary duties do not require that he manage a recognized department or subdivision. Grievant disagrees with Respondents' characterization of a shift as a department or subdivision and that his primary duties involve the management of said division. Rather, Grievant characterizes himself as a "middleman" who does not exercise discretion or independent judgment in the performance of his duties. Grievant states that he acts under the direction of the Warden, Deputy Warden, and Chief Correctional Officer, all of whom are on duty during Grievant's shift. He claims that he does not exercise discretion in his role and directs the correctional officers and correctional counselors within Respondents' specific policies and procedures.

As shift commander, Grievant does not act as the Warden's designee. Either the Chief Correctional Officer or the Duty Officer, one of five upper-level administrators assigned on a weekly basis, makes decisions in the Warden's absence. Grievant further notes that employees classified as less than CO-VI who work as shift commanders are paid overtime, and that he received overtime when working as a shift commander while he was classified as a CO-V, approximately one and one-half years ago. Grievant argues that FLSA exemptions are not properly determined by classification, and, in any event, the decision to pay a CO-V who works as a shift commander overtime, but not to award the same pay to a CO-VI working as a shift commander, is arbitrary.

Grievant also asserts that Correction's denial of his requested overtime constitutes disparate treatment because other CO-VI's receive the additional compensation. In support of this claim Grievant offered the testimony of Patrick Glasscock, a CO-VI formerly assigned to the West Virginia Penitentiary and presently at the Northern Regional Jail. Mr. Glasscock stated that he works as shift commander and that he is paid overtime. Other similarly-situated employees were also present, ostensibly to testify that they also received overtime compensation. [\(See footnote 1\)](#)

Respondents argue that Grievant is an exempt employee under the FLSA short test which provides that an employee compensated at a base salary of not less than \$345 per week, effective February 1983, and whose primary duty consists of the management of a customarily recognized department or subdivision thereof, including the customary and regular direction of the work of two or more other employees therein, is exempt and not entitled to overtime compensation.

It is undisputed that Grievant's salary meets the short test criteria and that he supervises more

than two employees. Thus, the only factor to be considered is whether Grievant manages a department or subdivision. Respondents argue that Grievant meets the second criteria because he manages a recognized subdivision, i.e., a shift. Respondents cite the CO-VI classification description, which provides that the incumbent “plans, directs and reviews the work of subordinates to ensure the overall orderly function of a facility or a specialized unit.”

Respondents further argue that a position description completed by Grievant indicates that his work is managerial. Specifically, Grievant listed his duties to include preparing the monthly work schedule, insuring all security posts are manned, evaluating the job performance of subordinates, assisting in hiring/promotion procedures, and conducting formal/informal and emergency inmate counts.

Respondents do not deny that other similarly-situated employees may be paid overtime, but argue that the decision to deny Grievant the additional compensation was not arbitrary because it was based on FLSA guidelines.

Notwithstanding Grievant's characterization of his work as that of a middleman, with no discretionary authority or responsibility for the management of a recognized department or subdivision, the evidence establishes that he does provide the customary and regular direction of the work of more than the minimum number of employees. Therefore, it must be determined that Grievant meets the short test requirements and is an exempt employee. Whether employees classified as Correctional Officers II - V who work as shift commanders are paid overtime is not controlling in this matter because the record does not reflect that their duties and responsibilities were identical to those of a CO-VI.

Grievant's claim of disparate treatment is in fact an allegation of discrimination, defined by 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.” Because this is a non-disciplinary issue, Grievant bears the burden of establishing a prima facie showing of discrimination by proving:

- (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him;

and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

If Grievant successfully proves a prima facie case, a presumption of discrimination exists, which Respondent can rebut by articulating a legitimate reason for its action. However, Grievant may still prevail if he can demonstrate the reason proffered by Respondent was mere pretext. Swiger v. W.Va. Div. Of Environmental Protection, Docket No. 95-DEP-569 (March 12, 1996); Parsons v. W.Va. Div. Of Highways, Docket No. 91- DOH-246 (May 20, 1992).

Grievant has presented evidence that at least one other individual employed by Corrections as a CO-VI is compensated for overtime work. [\(See footnote 2\)](#) Corrections does not deny the evidence presented by Grievant, nor does it offer any evidence that the employee is not similarly situated to Grievant, or any explanation that the circumstances surrounding that employee are in some way different than Grievant's. Corrections simply states that the decision to deny Grievant the overtime compensation was made in compliance with the FLSA. Notwithstanding the proper application of federal guidelines, Grievant has proven that said guidelines were not uniformly applied to similarly-situated employees, thereby establishing a prima facie case of discrimination which Corrections has failed to rebut. In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters it is incumbent upon the Grievant to prove all of the allegations constituting the grievance by a preponderance of the evidence. Randall, et al., v. W.Va. Public Service Commission, Docket No. 94-PSC-001 (Feb. 28, 1996).

2. Discrimination is defined 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." W.Va. Code §29-6A-2(d).

3. Grievant has established a prima facie case of discrimination by showing that at least one other employee classified as a Correctional Officer-VI is paid overtime. 4. Respondent has failed to offer a legitimate reason for its different treatment of Grievant and other employees.

Accordingly, the grievance is **GRANTED** and Corrections is hereby **ORDERED** to pay Grievant for overtime worked on January 23, 1995, and October 27, 1995, and to compensate him for such future work consistent with other employees classified as CO-VI who are paid overtime.

April 30, 1996

[Footnote: 1](#)

Personnel Regulation §15.07 provides that “[a]n appointing authority or his designated representative may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered necessary to the public interest. Compensation shall be made in accordance with the Fair Labor Standards Act of 1986 and WV Code §§21-5C-1, et seq.” Although stated as a separate violation in the complaint, this provision requires no further evaluation in the context of this decision.

[Footnote: 2](#)

Assistant Director of Personnel Lowell T. Basford testified that under the FLSA provisions an employer may, but is not required, to pay exempt employees overtime.