HARVEY KINCAID, et al.,

Grievant,

v. **Docket No. 98-CORR-144**

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Harvey Kincaid, Johnny Richmond, and Bryan Yoakum (Grievants) are employed by the West Virginia Division of Corrections (Corrections), as Correctional Officers at the Anthony Correctional Center (ACC). They filed this action on February 12, 1998, alleging they were the victims of favoritism regarding emergency leave. This grievance was denied at Level II, by James Rubenstein, on March 3, 1998. On April 22, 1998, this grievance was denied at Level III by Commissioner William K. Davis.

A Level IV hearing was held on September 16, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievants represented themselves, and Corrections was represented by Assistant Attorney General Charles Houdyschell, Jr., Esq. The parties were given until October 16, 1998, to submit proposed findings of fact and conclusions of law and this grievance became mature for decision at that time.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants are employed as Correctional Officers at the ACC, and were so employed on January 28, 29, and 30, 1998.

2. On January 28, 1998, Governor Underwood declared a state of emergency for the 12

counties in the vicinity of the ACC, due to heavy snow.

3. Grievants reported to work on January 28, 29, and 30, 1998. One Grievant was already at ACC when the snow emergency occurred, and was “frozen over” at ACC.

4. Grievants traveled up to 50 miles to report to work, clearing roadways of downed trees as they traveled. Grievants reported to work despite storm damage and power outages at their homes.

5. The ACC was without electricity during the snow emergency.

5. Other Correctional Officers, some of whom lived within sight of ACC, did not report to work during the snow emergency.

6. Governor Underwood's Chief of Staff, James Teets, issued a memo dated February 2, 1998. This memo approved leave, without loss of pay or charge to annual leave, for employees who were absent from work due to the snow emergency.

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. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A- 6. A preponderance of the evidence is defined as “evidence which is of greater weight ormore 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievants allege that they were the victims of favoritism when Corrections approved leave, without loss of pay or charge to annual leave, for employees who were absent from work due to the snow emergency. Grievants seek to be paid a second time for the hours they worked during the snow emergency or, in the alternative, to be awarded annual leave as “comp time” for those hours. Corrections argues that it is not authorized to pay Grievants twice for the same work, and that Grievants were not subjected to favoritism.

Employees may be released from work without loss of pay or charge to annual leave by declaration of the Governor or his designee as result of emergency situations or inclement weather

conditions. W. Va. Div. of Personnel Policy, Emergency Situations/Inclement Weather, II. B, W. Va. Code § 15-5-6 (1973).

Four previous cases of alleged snow leave favoritism or discrimination have been decided by this Grievance Board. Three were denied because the grievant was not similarly situated to the employees to whom the grievant sought to be compared. Rogers v. Jackson County Bd. of Educ., Docket No. 96-18-104 (Aug. 30, 1996); Sullivan, et al. v. Jackson County Bd. of Educ., Docket No. 96-18-087 (Aug. 30, 1996); Bond-Davis & Galiano v. W. Va. Dep't of Human Resources, Docket Nos. 93-HHR-390, 445 (July 26, 1994). The fourth was denied because the grievant was not treated differently than otheremployees. Bennett v. Fayette County Bd. of Educ., Docket No. 95-10-256 (Aug. 31, 1995).

Favoritism, as defined by W. Va. Code § 29-6A-2(h), means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. A prima facie showing of favoritism consists of a grievant showing: 1) that he is similarly situated, in a pertinent way, to one or more other employee(s); 2) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and, 3) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing. If a grievant establishes a prima facie case, a presumption of favoritism exists, which a respondent may rebut by articulating a legitimate reason for its action. However, a grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. Rogers, supra. See W. Va. Inst. of Technology v. WVHRC and Zavareei, 181 W. Va. 525, 383 S.E.2d 490 (1989); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievants established a prima facie case of favoritism. They have shown that they were similarly situated, in a pertinent way, to one or more other employee(s) because they were Correctional Officers scheduled to work at ACC during the snow emergency of January 28, 29, and 30, 1998. They have demonstrated that other employees were given advantage or treated with preference in a significant manner not similarly afforded them in that other Correctional Officers, who did not report to work during the snow emergency, were granted leave, without loss of pay or charge to annual leave, for those days. Thispreferential treatment was unrelated to Grievants' job responsibilities and was not agreed to by the Grievants in writing. This resulted in substantial inequity to Grievants, who had to

work to earn the same pay and leave accrual as Correctional Officers who did not.

However, Corrections has articulated a justification for this difference in treatment. As noted above, Corrections has a policy permitting employees to be released from work without loss of pay or charge to annual leave by declaration of the Governor or his designee as a result of emergency situations or inclement weather conditions. Corrections chose to implement this policy during the snow emergency.

Grievants argue that ACC's Staff Notice 402 provides that employees may not be paid for 40 hours of work unless they work 40 hours. Section IV of Staff Notice 402 is entitled Work Week. Sub-section B provides; “[i]n accordance with the Fair Labor Standards Act, every employee must work a minimum of forty (40) hours a week in order to receive a full paycheck.” However, Grievants' reliance on only this portion of Staff Notice 402 is misplaced.

Sub-section C provides; “[i]f forty hours are not worked, the difference must come from approved paid leave.” Sub-section D provides; “[i]f a full time employee does not work forty (40) hours and the balance does not fall under approved paid leave, then payroll will adjust the employee's paycheck accordingly.”

Read as a whole, this section of Staff Notice 402 means that an employee must work 40 hours to be paid for 40 hours, unless s/he can substitute approved paid leave for some or all of those hours. Furthermore, Sub-section E of Staff Notice 402 prohibits compensatory time, one of the remedies sought by Grievants. Grievants have cited nolaw, regulation, or policy, other than Staff Notice 402, to support their plea to be paid twice for their hours worked or given comp time. (See footnote 1) Accordingly, Grievants' argument on this point must fail.

Throughout this grievance, Grievants have made the very reasonable and persuasive argument that rewarding officers, some of whom live within sight of ACC, for staying home during a snow emergency creates a powerful disincentive for other officers to make the extra effort needed to report to work during future emergencies. It is understandable that Grievants see inequity in Respondent's action. Grievants distinguished themselves as highly dedicated and motivated employees by the extraordinary efforts they took to report to work under very difficult circumstances. The undersigned cannot believe that the Governor intended to discourage such exemplary employees by doing no more for them than their less diligent co-workers. However, and as the Level III hearing evaluator noted, that is likely to occur under such a policy.

Because Corrections' action was permitted by its policy, and because Grievants can point to no law, regulation, or policy which would permit them to be paid twice for their hours worked or given comp time, this grievance must be denied. Nevertheless, Grievants have raised valid questions regarding Corrections' policy on snow emergency leave, and have demonstrated sufficient inequities to warrant Corrections' review of its policies.

Accordingly, the grievance will be granted only to the extent that Corrections will bedirected to review its snow emergency policy. Corrections, at its discretion, may reconsider Grievants' request for relief, bearing in mind the implications of its policy for future emergencies. No other relief will be provided.

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. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Favoritism, as defined by W. Va. Code § 29-6A-2(h), means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. A prima facie showing of favoritism consists of a grievant showing: 1) that he is similarly situated, in a pertinent way, to one or more other employee(s); 2) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and, 3) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing. If a grievant establishes a prima facie case, a presumption of favoritism exists, which a respondent may rebut by articulating a legitimate reason for its action. However, a grievant can still prevail if he can demonstrate that the reason proffered by respondent was mere pretext. Rogers, supra. See W. Va. Inst. of Technology v. WVHRC and Zavareei, 181 W. Va. 525, 383 S.E.2d 490 (1989);Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

3. Respondent articulated a justification for its difference in treatment of Grievants with its policy permitting employees to be released from work without loss of pay or charge to annual leave

by declaration of the Governor or his designee as a result of emergency situations or inclement weather conditions. W. Va. Div. of Personnel Policy, Emergency Situations/Inclement Weather, II. B, W. Va. Code § 15-5-6 (1973).

4. Grievants established a prima facie case of favoritism.

5. Respondent rebutted Grievants' prima facie case of favoritism.

Accordingly, the grievance is **GRANTED IN PART** only to the extent that Corrections is directed to review its snow emergency policy. Corrections, at its discretion, may reconsider the Grievants' request for relief, bearing in mind the implications of its policy for future emergencies. All other relief is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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 intent to appeal and provide the civil action number so that the record can be prepared and

transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated November 23, 1998

CERTIFICATE OF SERVICE

I, Andrew Maier, Administrative Law Judge for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this 23rd day of November, 1998,

served a true copy of the foregoing DECISION upon the following by Certified United States Mail in properly addressed and stamped envelopes to their addresses as follows:

Harvey L. Kincaid

HC 68, Box 1799

White Sulphur Springs, West Virginia 24986

Charles Houdyschell, Jr.

Assistant Attorney General

112 California Avenue

Building 4, Room 300

Charleston, West Virginia 25305

Furthermore, a true copy of same was serviced by First Class Mail to the following:

Edison Casto, Director

Division of Personnel

Building 6, Room 416

Charleston, West Virginia 25305

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievants maintained at the Level IV hearing that Corrections has had an informal policy of granting comp time when employees came to work under emergency conditions. However, Grievants failed to establish this by a preponderance of the evidence, and Staff Notice 402 forbids such a practice.***