SHAWN STRAUGHN and DAVID PITTMAN,

Grievants,

v. **Docket Nos. 97-CORR-374, 375**

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievants Shawn Straughn and David Pittman, employed by the Division of Corrections (Respondent) at the Northern Regional Jail and Corrections Facility, filed level one grievances on April 16, 1997, in which they alleged that they worked more than forty (40) hours a week while attending the W. Va. Corrections Academy, and were not compensated for the overtime. The grievances were denied at levels one and two. Following an evidentiary hearing at level three, Grievants were awarded overtime for one and one-half (1½ hours) worked during the second week of the Academy. Upon appeal to level four the matters were consolidated for hearing in the Grievance Board's Wheeling office on September 17, 1997. The grievance became mature for decision on October 17, 1997, the last date for filing proposed findings of fact and conclusions of law.

___Grievant Straughn attended the West Virginia Corrections Academy at West Liberty State College from May 6, 1996, through May 24, 1996. Grievant Pittman attended the Academy from January 15, 1997, through February 2, 1997. This training is residential, with the participants' presence required full time from Monday morning through Friday evening. Participants are to complete classes and other scheduled activities, but are afforded free time throughout the day and evenings. As a general rule, the participants do not work in excess of forty (40) hours per week. At level four, Grievants claim they are entitled to overtime pay for ninety-three (93) hours and five (5) minutes, in addition to the overtime they received as a result of the level three decision. Grievants account for the hours requested as follows:

a) Thurs. (Week 1) Team Building 6:00 p.m. - 7:30 p.m. - 30 minutes over

Fri. (Week 1) Class till 2:35 p.m. - 20 minutes over

Thurs. (Week 2) Legal Quiz 5:30 p.m. - 6:00 p.m. - 30 minutes over; Team Building 6:00 p.m. -7:20 - 20 minutes over

Thurs. (Week 3) Team Building 6:00 p.m. - 7:25 - 25 minutes over

Total: 2 hours 5 minutes

b) Games Criminals Play - 10 hours

c) 11:00 p.m. - 5:30 a.m 12 days - 78 hours

d) Travel time - 3 hours

In support of their claim, Grievants assert that the 78 hours of sleep time was involuntary attendance which they completed only because a failure to do so would subject them to expulsion from the Academy and possible loss of employment. They assert entitlement to compensation for this time under the provisions of the Fair Labor Standards Act, Sections 785.16 and 785.28, which state in pertinent part:

Section 785.16 (a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

Section 785.28 Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is givento understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

Grievants additionally offered the testimony of co-workers Andrea Dernberger and Gene Groetzinger, who stated that they received overtime pay while attending the Academy.

Respondent denies that Grievants are entitled to additional overtime compensation. Kathryn Lucas, Director of Training at the Academy, testified that she attempts to keep the training schedule at forty (40) hours per week, excluding travel, although the hours may be exceeded occasionally

when she finds it necessary to schedule a night class. Ms. Lucas prepared a daily schedule, admitted as Grievants' Exhibit 2, on which she noted that daily schedule was as follows:

0530	Reveille
0550-0545	Roll Call
0600-0615	Fitness Training
0620-0640	Work Details
0640-0740	Showers, Dress, Breakfast
0740-0800	Personal and Detail Inspection
0800-1145	Class Advisory & Morning Classes
1145-1230	Lunch Break
1230-1615	Afternoon Classes
1800-1900	Team Building (Thursday only)

___Participants are not required to report to the Academy until 12:00 p.m. on Mondays, and are released at 2:15 p.m. on Fridays. Ms. Lucas noted that time allocated to Showers, Dress, Breakfast, Lunch, and evenings are free time, so the work week consists of 3.75 hours on Monday, 9 hours each on Tuesday and Wednesday, 10 hours on Thursday, and 7 hours on Friday, for a total of 38.75 hours. She noted that the only variation to this schedule during Grievants' attendance was the addition of a 1½ hour “Key, Tool & Weapon Control” class, for which Grievants were compensated at levelthree. She concluded that the schedule had been reviewed and approved by Respondent's Legal Division and the Federal Wage and Hour Office in Charleston, West Virginia, both of which advised that the sleep time was not compensable.

While Grievants' complaint regarding the sleep time is understandable, the evidence of record does not support the claim for additional overtime compensation. It would appear that their attendance was involuntary under the FLSA definition; however, Section 785.16 does not favor Grievants, who were in fact completely relieved from duty, and apparently allowed to use the time for their own purposes, so long as they were on-site. (See footnote 1)

Neither party addressed the ten (10) hours requested for “Games Criminals Play”, and lacking any information as to what was required of Grievants, no credit may be given for this time. Neither is the requested three (3) hours of travel time supported by the evidence. Grievants live and work in

Moundsville. At that time the Academy was held in West Liberty, approximately thirty (30) miles away. Such a distance would not require three (3) hours of travel time. Further, the late start time on Monday, and early dismissal on Friday, appears to provide more than adequate time for travel.

Because Respondent did not respond to the claim for two (2) hours and five (5) minutes which Grievants' attribute to classtime conducted beyond that scheduled, it is accepted that they worked this additional time. However, the amount of time during any given week does not exceed fifty (50) minutes. When added to the regular 38.75 hour week, Grievants' work time did not exceed forty (40) hours, and no overtime was accrued.

Although Grievants did not specifically allege discrimination, their comparison to co-workerswho received overtime compensation would appear to constitute that claim. It is unnecessary to further evaluate this issue; however, because Paul Kirby, Warden of the Northern Regional Correctional Facility, testified that he had approved the overtime for the two cited individuals who attended the Academy during a transitory phase when it was moved to Montgomery, West Virginia, and that in retrospect, the compensation had been improperly awarded. Grievants cannot be awarded additional compensation based upon an erroneous award made to other employees. See generally Swanger v. Dept. of Highways, Docket No. 95-DOH-063 (Nov. 19, 1997).

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants are employed by the Division of Corrections at the Northern Regional Jail and Corrections Facility.

2. Grievants attended the West Virginia Corrections Academy at West Liberty State College in May 1996, and January 1996, respectively.

3. The Corrections Academy is a three week program which requires the participants be in residence from noon Monday through Friday afternoon.

4. In addition to an overtime award made at level three, Grievants' class time exceeded that which was scheduled by two hours and five minutes throughout the three week period, but no more than fifty (50) minutes during any one week.

5. Grievants were allocated seventy-eight (78) hours of sleep time during the three week

period. 6. Grievants live and work in Moundsville, West Virginia, approximately thirty (30) miles from West Liberty State College.

7. The record contains no information regarding the ten (10) hours Grievants charge to "Games Criminals Play". It is unknown what the activity required or when Grievants completed it.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving each element of 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); Parsons and Clemmer v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 97-DOH-289 (Oct. 30, 1997); See W. Va. Code §29-6A-6.

2. Grievants have failed to prove that they are entitled to any additional overtime compensation for the weeks they attended the Training Academy.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: January 22, 1998 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

For additional discussion of Respondent's residency requirement at the Training Academy, see Grishaber and Crist v. W. Va. Div. of Corrections, Docket Nos. 97-CORR-067/068 (Oct. 27, 1997).