JIMMY R. BONNETT,

Grievant,

v.

DOCKET NO. 98-HHR-320

WEST VIRGINIA DEPARTMENT

OF HEALTH & HUMAN RESOURCES,

Respondent.

DECISION

Grievant, Jimmy Bonnett, alleges that overtime has been distributed in a discriminatory fashion at William R. Sharpe Hospital (Sharpe Hospital), where he is employed as a security guard. He requests compensation for overtime pay he has allegedly lost, due to Sharpe Hospital's practices. This grievance was initiated on May 8, 1998, and it was denied at level one on May 20, 1998. Upon appeal to level two, a conference was held on June 3, 1998, followed by a written decision denying the grievance dated June 17, 1998. Grievant appealed to level three, and a hearing was conducted by Paul Marteney on August 4, 1998. The grievance was denied in a level three decision dated August 18, 1998. A level four appeal was filed on August 24, 1998. After the grievance was held in abeyance at the Grievant's request and one continuance was granted for good cause shown, a level four hearing was held on December 14, 1998. Grievant represented himself, and Respondent was represented by Meredith Harron, Assistant Attorney General. This matter became mature for consideration on January 15, 1999, the deadline for submission of the parties' post-hearing arguments.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed as a security guard by the Department of Health & Human Resources (DHHR) at Sharpe Hospital.

2. It is the policy of DHHR to use schedule adjustments and to avoid paying employees overtime as much as possible. Schedule adjusting allows a supervisor to give an employee unpaid time off when emergencies or staff shortages have necessitated that the employee work all of his usual number of hours prior to the end of his regular work week. (See footnote 1)

3. The security department at Sharpe Hospital uses schedule adjustments more often than it awards overtime to employees.

4. Grievant has been allowed to work overtime as a security guard during staff shortages, and he did so within two months of filing this grievance.

5. Beginning in March of 1998, due to critical staff shortages, the administration of Sharpe Hospital gave the nursing department a waiver from the requirement that schedule adjustments be used in lieu of overtime. 6. The nursing department is required to meet acuity requirements set by DHHR, which are the minimum staffing needs for patients in the hospital at any given time. Because emergencies and admissions cannot be predicted, the nursing department normally has a few staff above acuity level on most shifts.

7. Since the nursing department has been suffering its critical staff shortages, non-nursing employees, including Grievant, have been offered the opportunity to work overtime in the nursing department. (See footnote 2) To date, Grievant has refused these opportunities to work overtime.

Discussion

In a non-disciplinary matter, Grievant must prove the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Grievant contends that Sharpe Hospital has awarded overtime to the nursing department, and not to the security department, resulting in discrimination. He argues that nursing staff and others have been allowed to work overtime when it was not necessary.

"Discrimination" is 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." A prima facie case of discrimination requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

Grievant has failed to establish a prima facie case of discrimination, for several reasons. First, he has not established that he and the employees to whom he has compared himself are "similarly situated." With regard to the nursing department, the record reflects more than ample evidence establishing that the nursing staff has been operating under vastly different working conditions and requirements from other departments. They are subject to minimum staffing levels, and the security department is not. Grievant has argued extensively that, because the nursing department is usually staffed slightly above acuity levels, they should not be allowed to pay their employees overtime. However, pursuant to DHHR Policy Memorandum 2102, such decisions are left within the discretion of management and administration. The director of Sharpe Hospital's nursing department explained at level four that, because emergencies arise and patients are admitted without notice, keeping nursing staff only at acuity levels would often result in shortages. Also, the acuity levels are only minimum staffing requirements. Surely it is preferable for a health care institution to provide more than enough nursing staff to care for patients than to have too few.

Moreover, the nursing department has been given a waiver, approved by hospital administration, from the schedule adjustment requirement. Grievant is correct in hisassertion that Policy Memorandum 2102 requires schedule adjusting as much as possible, and it disfavors overtime, except when absolutely necessary. However, because of critical nursing staff shortages, that department has been given an exemption from that requirement, in order to ensure that patients'

needs are met. Grievant has not alleged that this decision has violated any law, policy or regulation. There can be no dispute that nursing employees provide very close, one-on-one care to patients, which the security employees do not. Grievant's responsibilities are quite different from those of nursing employees.

In addition, Grievant has failed to establish that he has actually been treated differently from other employees to his detriment. At levels three and four of this grievance, Grievant introduced numerous exhibits reflecting the overtime hours of various employees. However, no documents have been provided which show whether or not these employees were schedule adjusted within the same week in order to avoid overtime pay. Moreover, Grievant has not disputed that he has been offered the opportunity to work overtime in the nursing department since the staff shortage began in 1998. Accordingly, he has been offered the same opportunities as the employees whom he believes have unfairly received overtime. It has been Grievant's personal choice not to work this offered overtime.

Even if Grievant were able to establish a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va.53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). In the instant case, DHHR and Sharpe Hospital have provided extensive justification for allowing the nursing department to use overtime instead of schedule adjusting, due to critical staff shortages which do not presently exist in the security department.

The foregoing findings and discussion will be supplemented by the following formal conclusions of law.

Conclusions of Law

1. In a non-disciplinary matter, Grievant must prove the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

2. In order to establish a prima facie case of discrimination, pursuant to W. Va. Code § 29-6A-

2(d), a grievant must prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

3. Grievant has failed to establish a prima facie case of discrimination.

Accordingly, this grievance 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, and 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.

Date: January 29, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

For example, an employee who normally works forty hours between Monday and Friday has to work all forty hours before Thursday, due to an emergency situation. In such a case, in order to avoid paying overtime, the employee's supervisor could give him the remainder of the week off.

Footnote: 2

From the evidence of record, it appears that, if he did accept this overtime work, Grievant would function as a health

service worker, not as a security guard.