PAUL KORNTOP, et al.,

Grievants,

v. **Docket No. 01-CORR-390**

DIVISION OF CORRECTIONS/ HUTTONSVILLE
CORRECTIONAL CENTER, and
DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants, (See footnote 1) employed at the Huttonsville Correctional Center ("HCC") as correctional counselors and case managers, allege that they are being required to perform duties outside of their classifications and seek to have those duties removed. Grievants' immediate supervisors were without authority to grant relief, and the grievances were denied in separate level two decisions issued by Jerry Haney, Associate Warden, in May of 2001. A consolidated level three hearing was held on May 29, 2001, and the grievance was denied at that level on May 30, 2001. Grievants appealed to level four on June 8, 2001, and the Division of Personnel ("DOP") was joined as an indispensable party. A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on August 22, 2001. Grievants represented themselves; the Division of Corrections was represented by counsel, Leslie K. Tyree; and DOP was represented by counsel, Robert D. Williams. This matter became mature for consideration upon receipt of Grievants' fact/law proposalson September 26, 2001. (See footnote 2)

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

Findings of Fact

1. Grievants are employed at HCC as correctional counselors and case managers, and are considered part of the "unit management" team.

2. The unit management concept, under which all Division of Corrections' ("DOC") institutions now operate, divides each institution into several self-contained living areas for inmates, which also contain office space for staff, i.e. "units." This system attempts to make staff more accessible to inmates, thereby improving services provided to inmates and preventing problems as early as possible.

3. DOC's Policy Directive 401.16 provides that each unit staff "will normally consist of one (1) Unit Manager, one (1) Case Manager, one (1) Correctional Counselor, at least one Unit Officer per shift, a Unit Office Assistant and support staff[.]"

4. Since at least 1999, HCC has had insufficient correctional officers to place an officer on each unit. In order to provide security on each shift, members of each unit management team have been required to function as correctional officers. Grievants have each been required to work as correctional officers an average of one eight-hour shift per week, providing solely security services.

5. DOP's classification specifications for Correctional Counselor I and II provide, in the "Nature of Work" section, that such individuals are to provide a variety of counseling services to inmates, including such areas of specialization as "vocational counseling,diagnostic testing and evaluation, substance abuse counseling, and guidance for inmates on work release." The Examples of Work section states that such employees may assist correctional officers on the unit.

6. The classification specification for Corrections Case Manager describes the purpose of the position (in the Nature of Work section), in part, as "providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate behavior and performance, controlling inmate movement, and acting as role models for the inmates."

7. Grievants perform correctional officer duties approximately 20% of their work time.

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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants are not alleging they are misclassified, and they do not seek back pay. In fact, Grievants' positions are in a higher pay grade than the correctional officer positions. Rather,

Grievants allege they are being required to perform work outside their assigned classifications on a regular basis and seek to have those duties removed. It has been previously held by this Grievance Board that, even in the absence of a back pay claim, a grievant “still has an interest in his proper classification.” Hall v. Div. of Natural Resources, Docket No. 00-DNR-053 (Apr. 28, 2000). Accordingly, the issue to be addressed iswhether it is proper or permissible for Respondent to require Grievants to perform work outside their assigned classifications, if, in fact, these duties are not contemplated by the class specifications.

DOP's classification specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. Captain v. W. Va. Div. of Health , Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of a classification specification is its most critical section. See generally , Dollison v. W. Va. Dep't of Employment Security , Docket No. 89-ES-101 (Nov. 3, 1989). DOP's interpretation and explanation of the classification specifications should be given great weight unless clearly wrong. See W. Va. Dep't of Health v. Blankenship , 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

As set forth in the findings of fact above, the Nature of Work sections of Grievant's classification specifications discuss the general nature of their duties, and the case manager specification does, in fact, include “providing security” as part of the position's purpose. In addition, the counselor job descriptions include “[m]ay assist correctional officers on living unit” as part of the “Examples of Work” section. Lowell D. Basford, DOP's Assistant Director of the Classification and Compensation Section, testified that, when the position has mixed duties, as is the case with Grievants' positions, the predominant duties are the determining factor regarding whether the employee is properly classified. As longas Grievants are not performing correctional officer duties more than half the time, they would not be considered misclassified. Mr. Basford concluded that Grievants are properly classified and that there is nothing improper about their performance of correctional officer duties, since those duties are not predominant.

Pursuant to provisions of DOP's Administrative Rule, the employer may change the duties of a

position to meet its needs, and may assign an employee some duties which are not within the classification specification (Hager v. Dep't of Health and Human Resources , Docket No. 95-HHR-241 (Sept. 29, 1995)). However, it may not simply assign duties to an employee which are of a nature that they render him misclassified, without taking the steps necessary to have the position properly classified. If an employer assigns "out of class" duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. Reed v. WV Div. of Corrections , Docket No. 97-CORR-127 (May 22, 1998); Beer v. Div. of Highways , Docket No. 95-DOH-161 (Feb. 27, 1996); Shremshock v. W. Va. Dept. of Trans. , Docket No. 94-DOH-095 (Aug. 31, 1994) . The instant case differs from most of these cases, in that Grievants are not being required to perform duties assigned to a higher classification. Normally, employees in such cases are alleging entitlement to pay at a higher salary, to which they are entitled if they are performing out-of-class duties on a long- term, frequent basis. See Shremshock, supra.

Although Grievants are correct in their assertion that correctional counselors may “assist” correctional officers, which they do not do, the classification specifications at issue in this case clearly do contemplate that unit management employees will be involved inproviding security services on some level. It has been held previously that even 24% of an employees duties does not constitute sufficient out-of-class duties to entitle the employee to relief. Hager, supra. Based upon the testimony of Mr. Basford and the previous rulings of this Grievance Board, the undersigned finds that Grievants have not established any entitlement to relief in this case. They are clearly not misclassified. Moreover, even if the correctional officer duties assigned to them are considered “out-of- class,” they are not predominant, as set forth in Hager.

Grievants' frustration with the situation which exists at HCC is understandable. However, as Warden Haines explained at level three, DOC has simply not provided sufficient funding or staff for HCC to employ the number of correctional officers it needs. This is an unfortunate and unacceptable situation, but one over which neither the undersigned nor Grievants have any control. As to Grievants' contention that Policy Directive 401.16 has been violated, it is obvious that the policy does not mandate that a correctional officer be present on each shift. Apparently the policy provides guidelines for staffing under normal circumstances; however, as discussed above, HCC has been

functioning under abnormal conditions due to not having been provided with sufficient staff.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary grievance, 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2,1988). See W. Va. Code § 29-6A-6.

2. If an employer assigns "out of class" duties to an employee on a frequentor long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. Reed v. WV Div. of Corrections , Docket No. 97-CORR-127 (May 22, 1998); Beer v. Div. of Highways , Docket No. 95-DOH-161 (Feb. 27, 1996); Shremshock v. W. Va. Dept. of Trans. , Docket No. 94-DOH-095 (Aug. 31, 1994) .

3. Grievants have failed to prove by a preponderance of the evidence that their performance of correctional officer duties has rendered them misclassified, or that their performance of these duties has been frequent enough to entitle them to relief.

4. Grievants have failed to prove a violation of any statute, policy, rule, regulation or written agreement applicable to their employment.

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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 17, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The grievants who are parties to this action are Paul Korntop, Wesley Linn, Ben Gobeli, Larry Fidler, Patrick Graham, Adam Smith, Michael Jackson, Connie Purdum, Matthew Corcoran, Matthew Currence, Richard Haddix, and Kenneth Akins, Jr.

Footnote: 2

Respondents did not submit fact/law proposals.