DAVID COLE, et al.,

Grievants,

v. **Docket No. 01-CORR-354**

DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievants, eighteen individuals employed by the Division of Corrections (Respondent) as Correctional Officers at the Northern Regional Jail and Correctional Facility, state that in April or May 2001, they learned that Correctional Officers assigned to the Huttonsville Correctional Center received overtime compensation when they attended the Correctional Academy. Grievants seek similar compensation. (See footnote 1) The grievances were waived at levels one and two, by mutual agreement of the parties. After the grievances were denied in part at level three, appeals were made to level four on May 23 (Cole group) and June 11 (Patterson), 200l. A level four hearing was conducted at the Grievance Board's Wheeling office on July 18, 2001. Only Grievants Cole and Knight appeared on behalf of all Grievants. Respondent was represented by Leslie Tyree, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.

The following facts essential to this claim are undisputed.

Findings of Fact

1. Grievants are employed by Respondent as Correctional Officers at the Northern Regional Jail and Correctional Facility.

2. Grievants have completed the required training at the Corrections Academy at various times between 1979 and 2000.

3. Due to a ruling in a previous grievance filed by an employee at Huttonsville Correctional Center, Respondent has compensated Correctional Officers for verifiable overtime earned while at the Academy during the past two years.

4. Grievants offered no verification of overtime worked while they attended the Academy.

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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievants argue they are entitled to overtime compensation for the time they were required to attend the Corrections Academy, beyond forty hours per week. (See footnote 2) Although Grievants requested the same sixty-one hours of overtime paid to other employees on their grievance form, Mr. Cole amended that request at the level four hearing to reflect their actual hours worked. Grievants rely upon the Fair Labor Standards Act (FLSA) and theWest Virginia Minimum Wage and Maximum Hours Standards for Employees in support of their claim. Finally, Grievants question Respondent's determination to limit the back pay awards to two years.

Respondent does not contest the claim that employees are entitled to additional compensation under the FLSA when overtime is required, but asserts that Grievants were aware of this fact when they were at the Academy, yet failed to file grievance until they learned that other employees had been granted the compensation. Furthermore, Respondent contends that Grievants have failed to provide evidence of their verified overtime.

It is undisputed that employers are required to pay employees time and one-half wages for all work hours in excess of forty hours per week. See 29 U.S.C. 209-219, and W. Va. Code § 21-5C-3(a), which states:

On and after the first day of July, one thousand nine hundred eighty, no employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Of course, employers are only required to compensate employees for verified overtime. Grievants offered no type of verification, but suggested that Respondent should have records to establish their claim. (See footnote 3) Unfortunately for Grievants, employers are only required to keep payroll records for two years by W. Va. Code § 21-5C-5. This provision also supports Respondent's decision to limit the back pay awards to two years. Finally,W. Va. Code § 21-5C-8(d) provides that when

employees initiate an action for back pay, “the amount recoverable shall be limited to such unpaid wages as should have been paid by the employer within two years next preceding the commencement of such action.”

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, the grievants have the burden of proving their claims 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. The Federal Fair Labor Standards Act, 29 U.S.C. 209-219, and W. Va. Code § 21-5C-3(a) requires that an employer compensate employees at time and one-half wages for all work hours in excess of 40 in any given work week.

3. Grievants have failed to prove by a preponderance of the evidence that they were required to work overtime hours during the times they attended the West Virginia Corrections Academy.

Accordingly, the 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. 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, andshould not be so named. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 31, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievants David Cole, Robert Knight, Ralph Morris, Judy Townsend, Pete Nanney, Jeff Taylor, Bill Koloski, William

Osborne, Chris Miller, David Young, Ronald O'Neil, John Drake, Paul Simmons, Sammie Neely, Herb Stevey, Margaret Gray, and Jeff Chambers have proceeded in this matter as a group. Ray Patterson filed separately, but his grievance was later consolidated with the others.

Footnote: 2

Grievants indicated an understanding that "sleep" time is not considered working time for purposes of overtime pay. See Straughn/Pittman v. Div. of Corrections, Docket No. 97-CORR-374, 375 (Jan. 22, 1998).

Footnote: 3

Grievant Cole testified that he completed 240 hours of training in three weeks, which would have required that he work 16 hour days, with 120 hours of overtime. He did not have any documentation to support his claim.