RICK NOTTINGHAM,

Grievant,

v. **DOCKET NO. 02-CORR-141**

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

On April 1, 2002, Ricky A. Nottingham filed this grievance against his employer, Division of Corrections/Mount Olive Correctional Complex (MOCC), stating: "I was on annual leave the week of 20 March to 26 March 2002. On 01 April 2002 I returned to work. I went to payroll to arrange for them to use any holidays I had [accrued]. They used 3 holidays to cover the 24 and 25 March 2002, and advised I would have to use 20 hours of leave to cover the 26th and to 1500 on the 27th March 2002. This put me at 44 hours." As relief, he seeks, "Not to be charged for annual leave over 40 hours when on leave for the entire work week. To be made whole."

The grievance was denied at Levels I, II and III, and timely appealed to Level IV where a hearing was held on September 9, 2002, at the Grievance Board's Charleston office. The West Virginia Division of Personnel (DOP) was joined at Level IV, but after clarification of the issues, it was determined it need not be a party. At the hearing, Grievant was represented by Jack Ferrel, Respondent MOCC was represented by Barry L. Koerber, Esq., and DOP appeared by its representative Robert Williams, Esq. The parties agreedto submit their proposed findings of fact and conclusions of law by September 23, 2002, (See footnote 1) whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant has been employed at MOCC since January 1995, and has attained the rank of

Captain, Correctional Officer VI, and is a shift commander.

2. Grievant works 44 hours per week in regular 12-hour shifts: four days on, three days off, three days on then four days off. For the four hours per week he works over 40 hours, he is compensated at a time-and-a-half overtime rate. His work week begins at 3:00 p.m. on Wednesdays, so the 12 hours he works on that day is usually allocated eight hours to one week and four hours to the next.

3. Grievant took a vacation that included the days March 24, 25, 26 and 27, days he would normally have worked on the four-day part of the scheduling cycle. Lou Kemp, Payroll Assistant at MOCC, calculated his leave usage for this period as she does for everyone else, and noted the usage on his time sheet. Respondent's Exhibit No. 1. To cover the 24 hours grievant was scheduled to work on the 24th and 25th, Ms. Kemp used three eight-hour holidays. (See footnote 2) She then used 12 hours of annual leave for the 26th, and eight hours of annual leave to cover up to 3:00 p.m. on Wednesday the 27th. She used an additional 4 hours of annual leave for the remaining four hours on the 27th, but that was applied to the following week's schedule, and is not contested by Grievant. Total leave usage for the four-day period was 24 hours holiday leave, and 20 hours annual leave, or 44 hours. 4. Grievant requested leave for these days in January 2002 when he was temporarily working a different schedule of eight hours per day, Monday through Friday, or 40 hours per week. His request was for 40 hours of leave. He shifted back to the 44- hour schedule in March 2002, just prior to his leave usage, but did not amend his original leave request.

5. Respondent's Operational Procedure 1.21, established February 1, 2002, regulates attendance and authorized leave. Section V.G.5. states:

> The minimum charge against annual leave shall be one quarter (1/4) hour. Additional leave will be in multiples of a quarter hour. Charges against annual leave for full days will be based upon the employee's normal schedule, i.e., 8 hour shifts 8 hours deducted, 10 hour shifts 10 hours deducted, or 12 hour shifts, 12 hours deducted for each full day annual leave used.

Grievant's Exhibit No. 1.

6. Although Grievant used four hours of leave to cover the four hours over 40 he was scheduled to work, he was still paid at the time-and-a-half rate for those four hours.

DISCUSSION

Grievant contends that he should not have to use 44 hours of leave when he is absent for an entire week, as a regular week's work should be 40 hours. His theory is that, since a workweek for a full-time employee is 40 hours, he should only lose 40 hours of leave for missing a work week. He also contends that, since his leave request was put in when he was on a 40-hour per week schedule, use of the extra four hours of leave was without his authorization. Respondent avers that it properly used 44 hours of paid leave to cover the 44 hours of work Grievant missed.

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for theundersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

The DOP Administrative Rule states “annual leave” is an earned employee benefit of paid time off from work with prior approval of the [employer]. 143 C.S.R. 1 § 3.6. Grievant points to a February 17, 2000, memorandum of the Commissioner of the Division of Corrections that states, “In accordance with the Division of Corrections Wage and Hour Policy, all full-time employees are scheduled to work a forty-hour work week.” Grievant's Exhibit No. 2. He also presented a June 22, 1995 “Workweek Policy Addendum” that states, in part, “All full-time Division of Corrections employees are to be scheduled to work for a forty (40) hour workweek which shall include a daily meal period. . . . The only exception to scheduling beyond forty (40) hours in a workweek is for authorized overtime[.]” Grievant's Exhibit No. 3. (See footnote 3) While both of these documents do support Grievant's argument that a full-time employee must work 40 hours per week, neither prove that a full-time employee may only be scheduled to work 40 hours per week. In fact, Grievant's Exhibit No. 3 expressly provides for scheduling in excess of 40 hours.

However, the parties agreed that the four hours in excess of 40 were considered overtime, and Grievant is paid for those hours at the overtime rate. “Each appointing authority shall establish the work schedule for the employees of his or her agency. Thework schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time that the workweek begins and ends, and the time that each work shift begins and ends.” 143 C.S.R. 1 §

14.2. Respondent argues Grievant's regular schedule was 44 hours for the week in question, but the fact it paid Grievant overtime belies this argument, since the concept of overtime necessarily implies work in excess of the regular schedule. "[Section]15.07 [now 14.7] of the West Virginia Division of Personnel's Administrative Rule states: 'Overtime Work and Holiday Work: An appointing authority or his designated representative may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered necessary to the public interest. Compensation shall be made in accordance with the Fair Labor Standards Act of 1986, [29 U.S.C. 201] and [W. Va. Code § 21-5C-1 *et seq*.]'" Belcher v. DOT/DOH Docket No. 94-DOH-341 (Apr. 27, 1995).

The Fair Labor Standards Act requires that employers pay overtime for work in excess of 40 hours per week. 29 U.S.C. 207(a)(1). West Virginia Code § 21-5C-3(a) also sets the standard work week length at 40 hours. The DOP Administrative Rule defines "work week" as "The time period of seven consecutive days, beginning and ending at specified days and times, during which work is performed and work hours reported for compliance with applicable federal and state labor laws." 143 C.S.R. 1 § 3.102. Finally, the Administrative Rule normalizes the work week at 40 hours for leave accrual purposes in 143 C.S.R. 1 § 14.3(a).

Since overtime is based on work performed in excess of the regular workweek, and leave is based on a maximum 40-hour work week, leave should not be used to cover scheduled overtime work not actually performed. An employee earns leave only for work performed up to 40 hours per week, and one hour of leave benefit equates to one hour ofwork at the employee's regular pay rate. It follows that such leave cannot be used to cover overtime hours, which only exist if the employee is actually working, and are paid at a higher rate. In fact, using leave to cover overtime results in an inequitable exchange, since the one hour of the accrued benefit is exchanged for one and a half hour's pay, instead of the one-to-one exchange contemplated by the Administrative Rule.

It should be noted, though, that Respondent's policies of planning ahead for regular overtime and using 12 hours of leave to cover a 12-hour shift are not *per se* improper, as long as Respondent only debits an employee's leave 40 hours in a week where the employee does not actually work and only pays the employee for 40 hours that week. Further, it may only pay the employee for overtime in a week where the employee actually works in excess of 40 hours.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

2. "Annual leave" is an earned employee benefit of paid time off from work with prior approval of the employer. 143 C.S.R. 1 § 3.6.

3. "[Section]15.07 [now 14.7] of the West Virginia Division of Personnel's Administrative Rule states: 'Overtime Work and Holiday Work: An appointing authority or his designated representative may require an employee to work in excess of the prescribedworking hours or on holidays when the work is considered necessary to the public interest. Compensation shall be made in accordance with the Fair Labor Standards Act of 1986, [29 U.S.C. 201] and [W. Va. Code § 21-5C-1 *et seq*.]'" Belcher v. DOT/DOH Docket No. 94- DOH-341 (Apr. 27, 1995).

4. Both The Fair Labor Standards Act, 29 U.S.C. 207(a)(1) and West Virginia Code § 21-5C-3(a) set the standard work week length at 40 hours.

5. Administrative Rule normalizes the work week at 40 hours for leave accrual purposes. 143 C.S.R. 1 § 14.3(a).

6. An employer may not require an employee to use more than 40 hours of leave for any work week, and may not grant an employee paid time off from work at the overtime rate.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to return four hours of leave to Grievant's annual leave balance, and to discontinue its practice of using in excess of 40 hours of leave to cover one workweek. Grievant is ordered to reimburse Respondent for the four hours of pay he received, at the overtime rate, as a result of his leave use.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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 theGrievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 27, 2002

M. Paul Marteney

Administrative Law Judge

Footnote: 1

A brief was received from Respondent, but none was received from Grievant.

Footnote: 2

Grievant does not contest the use of his accrued holiday time at eight hours per day.

Footnote: 3

Respondent objected to the use of these exhibits, as it was not immediately apparent whether they were still effective policy. However, no more recent, overruling policy was submitted and no evidence was produced to indicate they are outdated despite their age. It is noted that both are only explanations of a broader policy that was not placed in evidence.