WILLARD CLIFFORD,

Grievant,

v.

Docket No. 02-CORR-124

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievant, Willard Clifford, against his employer, Respondent, Division of Corrections/Mount Olive Correctional Complex ("Corrections"). The statement of grievance reads:

> I submit this Grievance in hope that it will right several wrongs.
>
> I feel that myself and certain other non security trained staff are being discriminated against for the following reasons:
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> 1. When certain non security trained staff are ordered to stand security posts, we must flex off this extra duty instead of receiving overtime.
>
> 2. I believe favoritism is being shown, because security trained staff do not have to flex off this extra duty and are

allowed to receive overtime.

3. Also certain non security trained staff do not have to stand post (Extra duty).

4. And last certain non security trained staff are paid overtime when they stand security post (Extra duty).

I do not mind standing a security post (Extra duty), however, this has caused a hardship in my own department, the Business Office. Where we are working short staffed to begin with, as I am replacing two (2) former staff. My current assignment is paying the bills for MOCC. I am working out of class here as well.

I was hired to do the assignment for forty (40) hours a week. Since I am doing the work of two (2) former staff any loss of my forty (40) hours a week is detrimental to the Business Office and the Complex.

With less time to do my job I am forced to cram all of my real work assignments into a shorter time frame. My work is done hurriedly and prone to more mistakes.

This can lead to bills not being paid on time. The taxpayers of the state foot the bill for late fees, penalties, and even the loss of vendors critical to the mission of the DOC and MOCC.

Since non security staff do not receive the same rate of pay raise, and sometimes even the pay raise as security staff, even though we do their jobs plus ours, and MOCC gives few if any merit raises, I feel overtime is fair compensation.

As relief Grievant sought:

1. No non security trained staff stand security posts. If this is not possible then see 2.

2. If non security trained staff must stand security posts, then all non security trained staff must stand security posts, reguardless [sic] of position or title. I suggest a freeze roster such as the one used by security for their security trained staff. If this is not possible then see 3.

3. All non security trained staff should receive overtime for these extra hours that they are spending away from the real job that they agreed to do. Then getting staff to work a post would be no problem or else we should receive all the benefits as security trained staff. Pay raises, training, rate of pay.

At the Level IV hearing, Grievant withdrew his relief request numbered two above, and was allowed to amend his relief sought to include a request for an investigation by a separate department, and the temporary cessation of non-qualified, non-uniformed, non-security staff covering security posts, until completion of the investigation. Grievant then attempted to amend his statement of grievance, to include a claim that it was a breach of security for him to cover a security post. Respondent objected to this amendment, and it was not prepared to present evidence to address this amendment. In accordance with W. Va. Code § 29-6A-3(j), the undersigned declined to allow the amendment of the grievance atLevel IV, or to allow evidence which Grievant believed supported a conclusion that there was a breach of security. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

Findings of Fact

1. Grievant is employed at Mount Olive Correctional Complex in the Business Office as an Accounting Technician III. Grievant was employed as a Correctional Officer at Mount Olive, until January 16, 2001, when he was transferred to the Business Office, at his request, in an effort to get away from security. Grievant took a pay cut when he transferred to this position, in the amount of $1,080.00 annually.

2. Beginning in February 2001, Grievant has been called upon from time to time to cover security posts. From July 3, 2001, to April 2002, Grievant had worked at a security post 74.5 hours, or about 5% of his work time.

3. Grievant and other Mount Olive employees who are not Correctional Officers are called upon to cover security posts due to a shortage of uniformed officers on staff, and in order to save on overtime costs, both in money and in the toll placed upon uniformed officers who would otherwise be called upon to continually work overtime.

4. The security posts which non-uniformed staff cover for other employees from time to time are the tower, which is 100 feet secured above central control, and involves observing and using remote controls to open gates; central control, which is a securelocation behind glass; the medical front desk, in the area where nurses and other employees are located; the reception front desk; and the main dining room during meal time.

5. The reception front desk is supervised by an employee who is classified as a Secretary I. This employee is responsible for assigning employees to cover this area, and the employees covering this area are Office Assistants. Correctional Officers do not staff this area at this time.

6. The medical front desk is covered by a Correctional Officer if one is available; otherwise it is covered by non-uniformed staff. A Unit Manager supervises this area.

7. The main dining room is staffed by uniformed and non-uniformed staff. Those staffing this area supervise inmates to assure they take medication issued to them and do not get in line a second time, and they also watch the inmates eat. If there is a situation which develops, the two uniformed officers outside the dining room door are to be contacted. (See footnote 2)

8. Each department head at Mount Olive decides each week which employees can be spared from their regular assignments to cover a security post for a certain number of hours, and volunteers those employees to cover security posts. Each supervisor decides whether the employees he has volunteered to cover posts need to work overtime to complete their regular job duties. A supervisor who needs his employee to work overtime must then ask his supervisor for permission to pay his employee overtime.

9. Terry Fry, maintenance supervisor, is not required to cover a security post, nor are those employees who work in payroll, or two employees in the Business Office. Rebecca Hildebrand, Laura Angel, and Gladdis Kauff are not required to cover security posts. Mr. Fry does not cover a security post due to a disability. Those who work in payrolldo not cover security posts because payroll has to get done, and their supervisor cannot spare them. The record does not reflect why the supervisors of the other listed employees believe these employees cannot be spared and have not been

volunteered to cover a security post.

10. Those who work the reception front desk have at times worked overtime and received overtime when they were required to cover this area, and maintenance shop personnel have worked overtime and received overtime pay when they have covered security posts.

11. Ruthie Willis, an Office Assistant III at Mount Olive, has at times worked overtime, and received overtime pay, when she has been required to cover a security post. She is secretary to the Associate Warden. She often works overtime when she works the reception front desk.

12. Any Mount Olive employee interested in working overtime can volunteer for it by contacting the watch commander or the shift commander, and asking that their names be placed on the list for emergency situations. Grievant was not aware of this list, and has never asked to have his name placed on it.

13. Since he accepted his position as an Accounting Technician III, Grievant has never worked in excess of forty hours in a week.

14. Covering a security post is not a duty of an Accounting Technician III.

15. Grievant has not been disciplined for failure to complete his work assignments, nor has he received a bad evaluation. He did receive a comment on his last evaluation that he needed “to be more aware of his attitude toward assigned tasks,” which Grievant stated referred to his attitude toward standing post.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant claims discrimination and favoritism,

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-

2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
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> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Storev. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Corrections demonstrated that each department head determines which employees can be spared from their regular assignments, and which employees need to work overtime to complete their regular assignments when they have covered a security post. Respondent has put forth a legitimate reason why some employees are required to cover security posts while others are not, and why some employees work overtime and receive overtime pay, while others do not. Grievant has not been discriminated against, nor has favoritism been shown, and he has not demonstrated any entitlement to overtime pay.

As to Grievant's claim that he is being worked out of his classification when he is covering a security post, Corrections did not dispute that covering a security post is not a duty of an Accounting

Technician III. However, employees can be assigned duties which are not specifically duties of their position, on an infrequent basis, without additional compensation. The question is whether the duties have been assigned so frequently that the differential is required, or that the duties should be removed.

> Employees can perform duties outside their job description, as class specifications are to characterize the type of work to be performed, not to identify every task of the position. Class specifications are descriptive, not exhaustive, and are to give a "flavor" of the difficulties, complexities, and duties of the position. Hager v. Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995).

. . .

> 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. 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).

Reed v. W. Va. Div. of Corrections, Docket No. 97-CORR-127 (May 22,1998). In Reed the grievants were Cooks who were required to supervise inmates preparing food in thekitchen all day, every day. These Cooks were awarded a salary differential in the amount of the difference between their pay as Cooks, and the salary of a Correctional Officer.

LeMasters v. Division of Juvenile Services, Docket No. 00-DJS-050 (June 30, 2000), also discussed this issue, noting,

> "As noted in Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994), an employer may not be required to compensate employees for work performed outside their classifications on 'infrequent short-term assignments.' However, in that case, the employer was required to compensate the grievant, who was performing the duties an average of 25% of her work time. In Shremshock, supra, four weeks over the course of one year was determined not to be de minimis, and compensation was required."

Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999).

In Parsons, 49 days within approximately a six-month period was not considered

> infrequent or short-term, and the employer was ordered to compensate the grievant for each day he was required to perform the duties which were in the higher pay grade classification.

The Grievant in LeMasters had worked out of classification 11 days in December, and was found to be entitled to compensation for the work in the higher classification, and his employer was ordered to cease assigning him shift supervisor duties.

Except when he is covering the reception front desk, and the record does not reflect whether Grievant has ever covered this security post, when Grievant is covering a security post, he is performing a duty which would otherwise be assigned to a Correctional Officer. He has been performing this duty periodically since February 2001, over 16 months, and there is no end in sight, as Mount Olive still does not have enough Correctional Officers on staff. Although the record does not reflect the pay grades of the various levels of the Correctional Officer class series, or that of Grievant's classification, the parties acknowledged that Correctional Officers are assigned to a higher pay grade than Grievant's classification, and Grievant, in fact, took a pay cut when he transferred to his present position from his Correctional Officer position. The undersigned concludes that Corrections has assigned Grievant to cover a security post for such a long period of timethat this duty assignment is not de minimis. Grievant is entitled to a pay differential for those hours he has been required to cover a security post since March 18, 2002 (10 days preceding the filing of the grievance), except when he has covered the reception front desk, if ever. He is also entitled to this pay differential in the future when he is required to cover a security post, or Corrections can choose not to assign Grievant to cover a security post in the future.

Grievant's concern that bills will not be paid is not an issue which this Grievance Board can address. W. Va. Code § 29-6A-2(i) defines grievance as:

> (i)."Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

> Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§ § 5-16-1 et seq.], chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

Whether the State of West Virginia's bills are paid on time is not in any way related to the rules under which Grievant works. If Grievant at some point receives a bad evaluation or is disciplined for not getting his work done, then he could file a grievance. The record does not reflect that Grievant's supervisor, or anyone else in authority, is dissatisfied with Grievant's work performance. Grievant testified he is badgered weekly because bills are not paid, but he did not demonstrate any harm he has suffered.

> The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Wilds v. W. Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996).

Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

3. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant did not demonstrate he was the victim of favoritism or discrimination. 6.

> Employees can perform duties outside their job description, as class specifications are to characterize the type of work to be performed, not to identify every task of the position. Class specifications are descriptive, not exhaustive, and are to give a “flavor” of the difficulties, complexities, and duties of the position. Hager v. Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995).

. . .

> 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. 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).

Reed v. W. Va. Div. of Corrections, Docket No. 97-CORR-127 (May 22,1998).

6. Except when he is covering the reception front desk, when Grievant is covering a security post, he is performing a duty which would otherwise be assigned to a Correctional Officer. He has been performing this duty periodically since February 2001, over 16 months, and there is no end in

sight, as Mount Olive is still does not have enough Correctional Officers on staff, which is not de minimis.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant the difference between his salary as an Accounting Technician III and the salary he would earn if he were a Correctional Officer for all hours he has covered a security post since March 18, 2002, and to continue to compensate him in this manner when he is required to cover a security post in the future.

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 the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 29, 2002

Footnote: 1

This grievance was filed on April 1, 2002. Grievant's supervisor responded on that date that he was without authority to grant the relief sought. Grievant appealed to Level II, where the grievance was denied on April 16, 2002. Grievant appealed to Level III on April 17, 2002. A Level III hearing was held on April 24, 2002, and a decision denying the grievance at Level III was issued on April 29, 2002. Grievant appealed to Level IV on May 6, 2002. The Level IV hearing was held on June 14, 2002. Grievant represented himself, and Corrections was represented by Heather A. Connolly, Esquire. Although the Division of Personnel was joined as an indispensable party, it did not appear at the Level IV hearing. This matter became mature for decision upon receipt of Corrections' post-hearing written argument on July 5, 2002. Grievant declined to submit written argument.

Footnote: 2

The record does not reflect whether the tower and central control are normally staffed by Correctional Officers, but it

seems likely that they are.