CALVIN COX, JR.

Grievant,

v. **DOCKET NO. 03-CORR-066**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Calvin Roger Cox, Jr. filed two grievances against his employer, Division of Corrections/Anthony Correctional Center (Respondent) on January 17, 2003. The grievances were consolidated at level two.

The first grievance stated: “On January 15, 2003 I requested to have my holiday time that I had accumulated paid to me. These holidays were over 90 days old and my supervisor has not scheduled them. I was informed on January 16, 2003 that I would be receiving a memo that they were no longer going to be paying holidays and that I would not be paid.” As relief, Grievant requested. “I want to be held to the same standards as fellow officers, not to be treated differently as in the past. I want my holidays paid to me as fellow officers had theirs paid to them. Receiving pay for the holidays in a timely fashion has been done in the past at the Commissioner's direction.”

The second grievance stated: “This grievance is due to the fact that the Anthony Correctional Center used my holidays to cover time that I had marked to be used as annual leave on my time sheet.” As relief, Grievant requested, “I want my holiday time returnedto me. It is my right to decide if I want to use annual leave instead of holiday not the facilities. To be treated like my fellow officers, not to be held to a different standard as in the past.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on August 15, 2003. Grievant was represented by coworker Dennis Brackman, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. This matter

became mature for decision on October 10, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Corporal Calvin Cox is employed by Respondent as a Correctional Officer at Anthony Correctional Center (ACC).

2. When an employee at ACC is required to work on a holiday, in addition to his regular pay he is credited with 8 hours of holiday time.

3. Prior to 2003, employees at ACC were expected to use their holiday time within 90 days of the holiday, or to advise the payroll office that they wished to be paid, or "cashed out" for the holiday.

4. On January 10, 2003, at an administrative staff meeting, Warden Scott Patterson announced a change in the past practice of "cashing out" holidays. Officers would no longer be paid for their unused holiday time, and would be required to use their holiday time within 60 days of the holiday. 5. The change was memorialized in the meeting minutes, which were approved by the Warden on January 15. Administrative meeting minutes are distributed to administrators and supervisors, who are to pass the information on to their subordinate staff at staff meetings.

7. Grievant had not received a copy of the meeting minutes by the time he turned in his request to cash out his holiday time. Grievant had met with the Warden on January 10 to discuss a pending disciplinary action, but no mention was made of the change in holiday time usage.

6. On January 15, 2003, Grievant requested that he be paid for holiday time that he had accumulated, by turning in his request at the business office, following past practice. At the time, Grievant had accumulated 21 holidays.

8. The following day, January 16, Payroll Officer Kim Wiley told him Respondent would no longer pay for holidays, and that he would have to schedule them as time off.

9. The change in practice was the result of a number of employees accumulating a large number of holidays over 90 days old, despite an operational procedure that required supervisors to ensure employees took holiday leave within 90 days.

10. Other officers had been paid for their accumulated holiday time prior to January, 2003; no

officers have been so compensated since that time.

11. In December, 2002, at the direction of Warden Patterson, Ms. Wiley revised the leave balances of several employees, including Grievant. For those employees who had accumulated holiday leave, she changed some annual leave used to holiday leave used, and recredited the employees with annual leave. 12. Division of Corrections Policy Directive (PD) 129.06, Wage and Hour Policy, became effective March 1, 2002. It states in pertinent part:

> E. Employees with the Division of Corrections will receive all state legal holidays, in accordance with WV Division of Personnel Administrative Rule.
>
> 1. All employees whose regularly scheduled workweek encompasses a holiday shall be compensated for the holiday in accordance with the Fair Labor Standards Act for actual hours worked, not to exceed eight (8) hours.
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> 2. If possible, these employees will be given an alternate day off within ninety (90) days. The scheduling of alternate days off shall be at the sole discretion of the Warden/Administrator of each institution/facility/center, Parole Officer Supervisor and Chief Supervisors in central Office or their designees.

Level Three Respondent's Exhibit No. 1.

13. The January 10, 2003, administrative meeting minutes state, in part:

> 1 * **HOLIDAYS**
>
> 1. Staff are behind on taking holidays; $22,000 needed to pay off these holidays.
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> 2. Warden Patterson said it is the Supervisor's responsibility to make sure that between now and **01 June 2002** [sic] any employee who has holidays accrued are to be taken. **No excuses, no exceptions**.

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> 3. An Operational Procedure will come out on 1 June 2003 which will give sixty (60) days from the date of the holiday for that holiday to be taken.
>
> 4. It is the responsibility of Deputy Warden Hoke after 01 July 2003 to make Administrative staff accountable for the new Operational Procedure regarding Holidays.

(Emphasis in original.) Level three Respondent's Exhibit No. 3.

14. Division of Personnel Administrative Rule § 14.1(b) states:

> When an agency must modify holiday schedules to accommodate around- the-clock shifts or other special needs, the agency should notify employees in advance of altered holiday work schedules and should schedule alteredholidays on days as close as possible to the normal holidays. The total payment of paid time off for holidays shall not exceed eight hours per full day holiday.

DISCUSSION

Since this grievance is not about a disciplinary action, 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. Grievant advances two separate claims: that he should be permitted to “cash out” his accumulated holiday leave, and that annual leave he had taken should not have been changed to holiday leave taken. Respondent avers Grievant had no right to either, and that it has not violated any rule or policy.

Grievant failed to show any entitlement to "cash out" his accrued holiday time. Neither the Administrative Rule nor PD 129.06 authorize Respondent to pay employees for unused Holiday time. Grievant has failed to demonstrate a violation of any of these policies. The past practice of ACC "cashing out" holiday leave did not create an entitlement, as under its written policies, treatment of holiday leave was at the discretion of the Warden. When the Warden issued his order changing the

practice, he did so within his authority.

Despite Respondent's argument to the contrary, Grievant's claim does amount to an assertion that denying payment to him amounts to a discriminatory practice, as other officers have been paid for unused holiday time. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by their 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant did establish a *prima facie* discrimination claim by showing that, in the past other, similarly-situated correctional officers had been paid for unused holiday leave time, but he was refused the same treatment. Once a grievant establishes a *prima facie* case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996).

Respondent successfully rebutted the assumption of discrimination created by Grievant's *prima facie* showing. Warden Patterson, due to an unacceptable accumulation of unpaid holiday leave created by a widespread failure of the employees to follow established policy, ordered a global change in the way holiday leave was treated. This change did not affect Grievant solely and was not targeted at Grievant due to his request. While Respondent admits employees received the treatment Grievant requested prior to the order, no employee has been paid for holiday time since the order, nor will they beentitled to a holiday time cash-out in the future. Although the effect is to create an

apparent difference in treatment, the order applies to everyone and is not discriminatory.

Grievant's claim that his annual leave and holiday leave balances should not have been tampered with is likewise without merit. "'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" Nottingham v. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 02- CORR-141 (Sep. 27, 2002). However, Grievant cited no authority for the proposition that extra time off for holidays is a similar earned benefit. As Respondent points out, "State employees may be required 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.;* Division of Personnel (DOP) Administrative Rule, Section 14.7." Knight, et al. v. Northern Regional Jail and Correctional Facility, Docket No. 02- CORR-301 (Apr. 2, 2002). As Knight pointed out, employees are only entitled to payment for time actually worked on holidays. Policy Directive 129.06 does not even require Respondent to grant additional time off for a missed holiday; it only provides this may be done if convenient at the discretion of the Warden. Therefore, Grievant was not harmed by the reallocation that allowed him to keep an earned benefit at the expense of a non-benefit. As Respondent points out, Warden Patterson could have simply "zeroed out" the unused holiday leave of his employees, especially those days that had been accumulated beyond the 90-day period mentioned in PD 129.06.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. 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 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. Grievant did not prove by a preponderance of the evidence that he was entitled to "cash-out" his accumulated holiday leave.

3. "'Discrimination' means 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(d).

4. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievant must show:

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

(b) that he has, to their detriment, been treated by their 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 Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 5. Grievant established a *prima facie* discrimination claim by showing other, similarly-situated employees had been permitted to cash-out their holiday leave according to past practice.

6. Once a grievant establishes a *prima facie* case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, 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. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Respondent successfully rebutted Grievant's discrimination argument by showing a legitimate, non-discriminatory reason for the difference.

8. "State employees may be required 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.*[;] Division of Personnel (DOP) Administrative Rule, Section 14.7." Knight, et al. v. Northern Regional Jail and Correctional Facility, Docket No. 02-CORR-301 (Apr. 2, 2002).

9. "'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." Nottingham v. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 02-CORR-141 (Sept. 27, 2002). Holiday leave is not a similar benefit.

10. Grievant is not entitled to extra pay or leave for holidays worked, above the pay earned for actually working on that day. *See* Knight, *supra.* For the foregoing reasons, this grievance is hereby **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 28, 2003

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant did not submit written argument.