ROBERT KNIGHT, et al.,

Grievants,

v. Docket No. 02-CORR-301

NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievants, forty-one individuals employed as Correctional Officers at the Northern Regional Jail and Correctional Facility (Respondent), filed a level one grievance on September 3, 2002, in which they alleged, "[w]hen 3 day breaks occur on Friday, Saturday, and Sunday officers are working a 40 hour work week before and after the 3 day break occurs. When receiving 3 day breaks Monday through Friday officers work 32 hours. This also occurs on 3 day breaks of Saturday, Sunday & Monday." For relief, Grievants request compensated for the total days of lost pay, back pay for two years, and to be made whole. The grievance was denied at all lower levels, and was appealed to level four on September 19, 2002. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 11, 2003, at which time Grievants appeared *pro se*, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by the parties on or before March 12, 2003.

Findings of Fact

1. Grievants are employed by the Division of Corrections as correctional officers of differing ranks and titles, assigned to the Northern Regional Jail and Correctional Facility. 2. Due to the nature of Respondent's mission, employees are required to be on duty twenty-four hours a day, seven days a week, including weekends and holidays.

3. Grievants are paid an annual salary, and are paid twice per month.

4. If Grievants work more than 40 hours per week, they are compensated at time and a half for those hours beyond 40.

5. Respondent assigns Grievants to work under a rotating schedule which periodically

provides them 3 day breaks. When the scheduled days off occur Monday through Friday, Grievants work a 32 hour week, but are paid for 40 hours. If the 3 day break occurs during a weekend, Grievants work 40 hours the week prior to, and the week after, the break, and are paid for 40 hours.

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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

Grievants argue that the rotational schedule, which divides the employees into three groups, was designed to provide them with an extra day off each month to cover the holidays granted to other state employees, but actually requires them to work thirty-two hours more per year than a regular state employee. Respondent asserts that it is permitted to work correctional officers on holidays, and that they are compensated as required by the Fair Labor Standards Act (FLSA). Division of Personnel (DOP) Administrative Rule, Section 14.7, "Overtime Work and Holiday Work" provides that "[a]n appointing authority or his or her 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 and W. Va. Code §21-5C-1 et seq."

W. Va. Code §21-5C-3 provides that "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."

Grievants are correct that they do not receive as many paid holidays as state employees who work business hours, Monday through Friday. The ABC schedule provides nine "holidays" per year. However, because Respondent's work is necessary to the public interest, it may require Grievants' attendance. While Grievants' claim that they work forty hour weeks when the three days off falls on a weekend is also accurate, the FLSA does not require

overtime compensation until an employee exceeds forty hours of work in one week. The nature of Grievants' work is very different from other state employees, and Respondent is permitted to allocate its employees to meet the public needs.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. 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 and W. Va. Code §21-5C-1 et seq. Division of Personnel (DOP) Administrative Rule, Section 14.7.

3. No employee may be required to work longer than forty hours per week, unless such employee receives compensation for his employment in excess of forty at a rate of not less than one and one-half times the regular rate at which he is employed. W. Va. Code § 21-5C-3.

4. Grievants have failed to prove that Respondent has violated any rule, regulation, policy, or law regarding scheduled work hours or compensation.

Accordingly, the grievance is DENIED.

Any party or the Division of Personnel 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.

DATE: APRIL 2, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE