JAMES GREATHOUSE, et al.,

Grievants,

v. Docket No. 03-CORR-115

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

James Greathouse, Steven Berryman, Laura L. Stone, Dale Munday, David VanCamp, John Steele, and Misty Adams ("Grievants"), employed by the Division of Corrections ("DOC" or "Respondent") as Correctional Officers, filed a level one grievance on March 6, 2003, in which they alleged they were being denied voluntary overtime, in violation of Operational Procedure 1.29-6, and that the practice was discriminatory, and arbitrary and capricious. For relief, Grievants requested they be allowed to resume overtime work in any position and back pay. After the grievance was denied at all lower levels, the matter was advanced to level four on April 28, 2003. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on July 31, 2003, at which time Grievants Greathouse and Berryman represented Grievants, and Charles Houdyschell, Esq., appeared on behalf of DOC. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by the parties on or before September 2, 2003.

The facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievants are all employed by DOC as Correctional Officers (CO) assigned to St. Mary's Correctional Center (SMCC). Grievants Greathouse and Berryman hold therank of Captain (CO-VI). Grievants Stone, Munday, Steel, and VanCamp are Lieutenants (CO-V), and Grievant Adams is a Sergeant. Grievants are among the highest ranking, and highest paid, officers in the DOC.

2. SMCC maintains a list of employees who are interested in working overtime on a

voluntary basis. As SMCC is understaffed, with approximately 200 employees and more than 300 inmates, a great deal of overtime work is available.

3. Prior to February 26, 2003, employees who voluntarily worked overtime were allowed to select the post they wished to fill during that shift, a practice referred to as "bumping." Not surprisingly, the more desirable posts were chosen, and the employees who were regularly scheduled to work were bumped into the less desirable posts, such as those which are outdoors. Complaints were made regarding this practice.

4. Grievants frequently worked overtime on posts which could be held by a CO-I or II. The cost for a Captain or Lieutenant to work overtime is approximately twice that of a CO-I.

5. In February 2003, SMCC Deputy Warden Tony Lemasters no longer approved Correctional Officers holding the rank of Captain and Lieutenant to work voluntary overtime, except for a specific number of posts that were considered supervisory, or high profile in nature, and were consistent with a need for a Captain or Lieutenant. Further, employees working voluntary overtime were no longer allowed to select the post they would cover, but were to be assigned to the vacant post which created the need for a substitute employee. The reason for this action was to reduce the cost of overtimeexpenses, which had escalated at one point to approximately $34,000,00 for one pay period. (See footnote 1)

6. Effective April 1, 2003, DOC implemented Policy Directive 129.02, "Voluntary Compensable Overtime for Correctional Officers," which requires that overtime be offered within the classification, whenever practical. The adoption of this Policy Directive limits Grievants' claim to the period of February 26 through April 1, 2003. (See footnote 2)

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 theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

Grievants argue that SMCC's limitation of their ability to work voluntary overtime was in violation of SMCC Operational Procedure 1.29-6 "Staff Overtime," which provided that, "[o]vertime slots will be filled on a first come, first served basis affording the employees the

ability to choose the position they will fill provided the needs of the facility are met." DOC asserts there was no violation of the Operational Procedure which defines the voluntary overtime list as "correctional employees who are authorized by the Associate Warden of Security to work overtime . . . ." (Emphasis added.)

Accepting that Respondent had previously acted in compliance with Operational Proceure 1.29-6, the action taken by Deputy Warden LeMasters limiting the voluntary overtime Grievants could work was contrary to the Procedure, in that it did not allow the vacancies to be filled on a first come, first served basis. DOC's assertion that Grievants were simply no longer authorized to work outside their classification and only on limited posts, is contrary to the provision that the list of employees interested in voluntary overtime be kept in alphabetical order, and be given the opportunity to choose the position they would fill.

In support of their claim for relief, Grievants provided the Voluntary Overtime List for the period of March 1 through April 3, 2003. Grievants state that they would have worked each opportunity overtime was available, but for the restrictions placed on them by Deputy Warden LeMasters. A review of this list reveals that Grievants did not work on a number of occasions. Using the key on the document, many of the days are marked "R" or "U" toindicate the assignment was either refused, or the Grievant was unavailable. (See footnote 3) Grievants stated that notwithstanding the code used on the form, they would have worked, if the restrictions had not been in place. A significant number of days are marked as "No Vacancy" or "No Post."

Undoubtedly, some overtime was lost; however, it is simply impossible to determine how many additional shifts each Grievant would have worked under the prior policy. Even if, as Grievants represent, they would have worked at every opportunity, use of the rotational list and the decisions made by the remaining employees, would have affected the overtime available to Grievants. In instances such as this, a monetary award is impossible to calculate. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Tate v. Monongalia County Bd. of Educ., Docket No. 02-30-318D (Jan. 8, 2003); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v.Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Grievants have proven that SMCC administrators acted in violation of Operational Procedure 1.29-6 "Staff Overtime," which provided that, "[o]vertime slots will be filled on a first come, first served basis affording the employees the ability to choose the position they will fill provided the needs of the facility are met."

3. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Tate v. Monongalia County Bd. of Educ., Docket No. 02-30-318D (Jan. 8, 2003); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v.Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

4. Grievants have failed to prove they are entitled to any specific monetary relief.

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, 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: SEPTEMBER 26, 2003

SUE KELLER SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant Adams was not subject to the restriction on which posts she could fill, and was affected only to the extent that she could no longer "bump" an employee when working overtime.

Footnote: 2

²DOC Policy Directive 129.02, states:

It is the policy of the West Virginia Division of Corrections to establish and maintain a mechanism that ensures compensable voluntary overtime be offered to employees in a systematic fashion that affords equal opportunity to properly classified employees to perform essential duties consistent with the classification title and the level of work to be performed. Overtime will be offered within the classification whenever practical. However, when offering compensable voluntary overtime to employees with a higher classification title than necessary for the work to be performed, every effort will be made to offer the compensable voluntary overtime to the next higher level of classification only after working the entire voluntary overtime rotation listing within the original classification. . . .If three (3) or more vacancies exist, the senior most employee within the rotation established by this policy can choose which of the three (3) or more vacant posts he/she will work until the vacant posts are filled in sequence.

Footnote: 3 Grievants assert they refused or were unavailable because they were not allowed to select their post.