STEVEN BERRYMAN, et al.,

Grievants,

v. Docket No. 03-CORR-317

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Steven Berryman, Laura Stone, John Steele, David VanCamp, Dale Munday, James Greathouse, and Dan Kimble ("Grievants"), employed by the Division of Corrections ("Respondent" or "DOC") as Correctional Officers at St. Marys Correctional Center (SMCC), filed individual level one grievances on August 14, 2003, in which they alleged that the voluntary Compensable Overtime Policy, implemented in August 2003, resulted in discrimination and favoritism, constituted reprisal for their prior grievance activity, and violates W. Va. Code § 25-1-11D. For relief, Grievants request: (1) to be allowed to work voluntary overtime as Correctional Officers in pay grade 12 and below; (2) back pay with interest; (3) for the reprisal to stop, with those who have participated in these actions to be dealt with accordingly by the appropriate authority/party; and, (4) any attorney fees or court costs.

The immediate supervisors either lacked authority to grant the requested relief, or denied the requests at level one. Deputy Warden Tony Lemasters denied each of the grievances at level two. The grievances were consolidated for hearing at level three; however, individual decisions denying their claims were issued. Appeals to level four were made on October 14, 2003. The grievances were consolidated, and a hearing to supplement the lower-level record was conducted in the Grievance Board's Wheeling office on February 26, 2004. Grievants were represented by Grievant Berryman, andRespondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 16, 2004.

The following facts are derived from a preponderance of the evidence.

Findings of Fact

1. Grievants are employed as Correctional Officers at SMCC, and hold the rank of Captain or Lieutenant. Grievants are compensated at pay grade 13, or higher.

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. SMCC Operational Procedure 1.29-6 "Staff Overtime," 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. Prior to February 2003,Grievants frequently worked overtime on posts which could be held by a Correctional Officer (CO) I or II. The cost for a Captain or Lieutenant to work overtime is considerably greater than that of a CO-I.

4. 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. The reason for this action was to reduce the cost of overtime expenses. 5. Effective April 1, 2003, DOC implemented Policy Directive 129.02, "Voluntary Compensable Overtime for Correctional Officers," which required that overtime be offered within the classification, whenever practical.

6. A level four decision, Greathouse v. Division of Corrections/St. Marys Correctional Center, Docket No. 03-CORR-115 (Sept. 26, 2003), held that the decision to limit voluntary overtime was in violation of SMCC Operational Procedure 1.29-6. 7. DOC implemented a revised version of Policy Directive 129.02, effective August 1, 2003, which provides that employees at pay grade 13 and higher are allowed to work voluntary overtime only at the discretion of the Appointing Authority (or his/her Designee).

8. SMCC revised Operational Procedure 1.29-6(O), effective August 4, 2003, to provide that employees at pay grade 13 or higher may participate in the Compensable Voluntary Overtime Program at the discretion of the appointing authority, on a case by case basis.

9. Grievants are currently allowed to work Voluntary Overtime, but are limited to vacancies of similar classification, title, and level of work to be performed, i.e., which require supervisory personnel.

10. Other DOC institutions allow employees to work in any position, if needed; however, Policy Directive 129.02 does not apply to those institutions working twelve hour shifts. SMCC employees work an eight hour shift.

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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Hundley v. Div. of Corrections, Docket No. 98-CORR-218 (Sept. 2, 1998).

Grievants argue that limiting their voluntary overtime, while employees in pay grades thirteen and fourteen are allowed to work below their classifications at other institutions, constitutes discrimination, and the fact that the revised DOC Policy was implemented one day after the level four hearing in Greathouse, supra, establishes that Respondent engaged in reprisal. Grievants additionally assert that Respondent's application of Policy Directive 129.06 is in violation of W. Va. Code § 25-1-11D, which requires that salaries, expenses and appropriations for employees of DOC be paid in the same manner as those of other state employees and agencies. Respondent argues that Grievants have failed to establish a prima facie case of discrimination, or that any reprisal has occurred.

Discrimination

W. Va. Code § 29-6A-2(d), defines discrimination 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." In order to establish a claim of discrimination, employees must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the grievants must show:

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

(b) that they have, 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 the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievants may show the offered reasons are pretextual.

Grievants have failed to establish a prima facie case of discrimination because they are not similarly situated to employees who work in another location. See Conner v. Dep't of Health & Human Resources/BCSE/BCF, Docket No. 03-HHR-142 (Dec. 12, 2003). Further, the testimony of officers assigned to other institutions is not supportive of Grievants' case. Shawn Straughn, a Unit Manager at the Northern Correctional Center, stated that he may work voluntary overtime, but is at the bottom of the list to be called. He characterized the available overtime as "few and far between" since implementation of the August Policy Directive. Major Guy Perry testified that Captains and Lieutenants may work voluntary overtime for positions other than their own at the Mount Olive Correctional Complex (MOCC), when no other employee is available. MOCC employees work twelve- hour shifts, and Policy Directive 129.02 does not apply to that institution. Finally, even ifit should be determined that a prima facie case of discrimination had been established, Respondent has stated a legitimate, nondiscriminatory reason for the action, i.e., fiscal restraint.

Reprisal

Grievants allege that the restriction of voluntary overtime was taken in reprisal for their prior grievance activity involving their right to overtime. W. Va. Code § 29-6A-2(p) defines

"reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal grievants must establish by a preponderance of the evidence the following elements:

> **1) that they engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that they were subsequently treated in an adverse manner by the employer or an agent;**
>
> **3) that the employer's official or agent had actual or constructive knowledge that the employees engaged in the protected activity;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**
>
> **5) the adverse action followed the employees' protected activity within such a period of time that retaliatory motivation can be inferred.**

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievants have established a prima facie case of reprisal by showing that the level four hearing in Greathouse, supra, was held the day before the revised DOC Policy Directive limiting their opportunity to work overtime became effective. While Grievants' earlier grievance undoubtedly brought the situation to Respondent's attention, and the revised Policy was implemented as a result, the need for institutions to manage fiscal restraint constitutes a

legitimate, non-retaliatory reason for the action.

W. Va. Code § 25-1-11D Violation

Section 25-1-11D states:

> **The commissioner of corrections shall approve the salaries of all employees of the division of corrections. Salaries shall be commensurate with their duties and responsibilities, but no meals or other emoluments of any kind shall be furnished, given or paid to the employee as all or part of their salary. The employees may be provided meals, household facilities and supplies as may be necessary for them to perform their duties, if the employees agree to pay the reasonable cost as established by the commissioner of corrections. In the event of an emergency, such as a riot or other disturbance, the commissioner may authorize meals be provided to employees at no cost. Additionally, the commissioner may establish a procedure to reimburse employees reasonable costs in the event the employee's personal property is stolen or damaged by an inmate. All persons employed under this article are entitled to be reimbursed for necessary traveling and other expenses. The salaries, expenses and appropriations provided for the employees under the commissioner's jurisdiction shall be paid in the same manner as are those of other stateemployees and agencies and on a payment schedule set forth by the state auditor.**

Grievants' interpretation of this statute to mean they are entitled to work voluntary overtime is unsupported by fact or law.

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 Rules of 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. W. Va. Code § 29-6A-2(d), defines discrimination 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. In order to establish a claim of discrimination, employees must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the grievants must show:

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

(b) that they have, 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 the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievants may show the offered reasons are pretextual.

4. Grievants failed to establish a prima facie case of discrimination; however, if it should be determined that a prima facie case of discrimination had been established, Respondent stated a legitimate, nondiscriminatory reason for the action, i.e., fiscal restraint.

___5. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

6. To demonstrate a prima facie case of reprisal grievants must establish by a preponderance of the evidence the following elements:

1) that they engaged in protected activity, e.g. filing or participating in a grievance;

2) that they were subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employees engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employees' protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If grievants establish a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employees may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

7. Grievants established a prima facie case of reprisal; however, Respondent offered a legitimate, non-discriminatory reason for the action.

8. Grievants failed to prove a violation of W. Va. Code § 25-1-11D.

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 andshould 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: JUNE 8, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE