PARIS DULANEY,

Grievant,

v.

DOCKET NO. 05-CORR-325

WEST VIRGINIA DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Paris Dulaney, filed this grievance against his employer, the West Virginia Division of Corrections/Mount Olive Correctional Center ("MOCC") on July 13, 2005. Grievant asserted the Mandatory Overtime Policy had created an unfair and unsafe work environment. The relief sought is "Stoppage of forcing overtime on days off."

This grievance was denied at all lower levels, and Grievant filed to Level IV on September 9, 2005. A Level IV hearing was held in the Grievance Board's office on October 18, 2005. Grievant represented himself, and Corrections was represented by Charles Houdyschell, Senior Assistant Attorney General. This case became mature for decision on that day as the parties elected to make closing arguments instead of submitting proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant asserted MOCC's use of mandatory overtime ("MOT") had created an unfair and unsafe work environment, the use of voluntary overtime did not work, the use of sick leave had increased since MOT was enacted, a prior, granted grievance on thesame issue filed by an MOCC employee has not been followed, and Correctional Officers are not able to plan for days off. (See footnote 1)

Corrections argues MOT is necessary because there are not enough volunteers for overtime, and MOCC must be staffed 24/7. Respondent also avers this grievance is actually about a disagreement

with a management decision, and Grievant has not met his burden of proof on the issue. Additionally, Respondent notes the prior overtime grievance was filed ten years ago under a different policy, it is unclear whether the issues and discussion were actually the same, and the Decision at Level II granting the grievance is not correctly interpreted by Grievant.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Correctional Officer at MOCC.

2. MOCC has had some type of mandatory overtime policy in effect since it opened in 1994, due to the need to cover all security posts.

3. On November 11, 1995, Michael Hundley filed a grievance stating, "Request that the mandatory overtime on employees day off be eliminated. . . ." The requested relief was to no longer require mandatory overtime. The Policy grieved was Operational Procedure 4.13. Several items were discussed during the Level II conference, including that a prior volunteer system worked well, and switching was no longer allowed. Confusingly, the Level II Decision stated Mr. Hundley had not met his burden of proof and demonstrated a violation of policy or statute, and that it was MOCC's prerogative to assign correctional officers, but then stated the grievance was granted, and a revised policy will be implemented as soon as it is approved. This Decision noted the current policy requiring overtime would be used until the new policy was in place.

4. At some point in time, Operational Procedure 1.22, Correctional Officer Required Overtime and Holiday Work, was adopted by MOCC. The one currently in place was adopted on September 1, 2005, and replaced Operational Procedure 1.22 adopted October 16, 2004. (See footnote 2)

5. MOCC has identified the positions that have to be filled in order to maintain the security of the prison, and it has a rotating MOT roster to use as needed. Each Monday, the Shift Commanders identify the number of vacant positions needing to be filled. This number can vary depending on the number of officers on sick leave, and the number of prisoners in the hospital. On Tuesday at staff meeting, the officer/security chief asks the heads of the non-uniformed staff who can be pulled to fill security/uniformed positions. If there are still vacancies, volunteers are requested to fill the remaining positions. If there are still positions that need to be filled, the MOT roster is used to complete the

necessary staffing.

6. An officer on the MOT list can volunteer to fill a needed, vacant position, and his name would then go to the bottom of the roster. For example, if Officer X is numberone of the MOT list, and there is a need for officers on Friday and Saturday, his regular days off ("RDO"), he can volunteer for Friday, and his name would then go to the bottom of the list for Saturday. Through this process, officers can be proactive in managing their schedules.

7. Officers are also allowed to switch days if they receive prior approval. Additionally, an officer may volunteer to fill a slot that is currently filled from the MOT list, and the MOT officer is then placed back on the MOT list.

8. MOCC is currently short 30 positions and has trouble filling and retaining employees, as do state prisons across the country. MOCC agrees the greater the number of unfilled vacancies, the greater the number of mandatory overtime days required, and the greater the amount of sick leave that is taken.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Basically, Grievant disagrees with the MOT Policy, and he has the burden of proof to establish this overtime policy violates some rule, regulation, or statute, or constitutes asubstantial detriment to or interference with his effective job performance or health and safety. W. Va. Code § 29-6A-2(i). As clearly explained by the Acting Chief Security Officer, Major Ron Williams, this Policy was put into place to ensure that all necessary posts are filled at all times, and MOCC has not found the use of voluntary overtime to be sufficient to meet its needs. Accordingly, it is necessary, at times, to require employees to work overtime in order to maintain a secure facility.

While it is understandable Grievant does not want to work on his RDO's and does not like the MOT Policy, he has not met his burden of proof and established the MOT Policy violates some rule, regulation, or statute, or constitutes a substantial detriment to or interference with his effective job performance or health and safety. In fact, the failure to staff MOCC properly could certainly be dangerous to the staff at MOCC and the public at large.

As for the failure of MOCC to follow a previously granted Level II Decision, Grievant has also not met his burden of proof on this issue. Mr. Hundley remained on staff at MOCC for at least several years after this Level II Decision was rendered, and there is no evidence he filed a subsequent grievance on the matter. (See footnote 3) Further, it appears some of the issues raised by the Hundley grievance were resolved on a long-term basis: a new policy was written, voluntary overtime was again used, and officers were allowed to switch with approval. No proof was offered by Grievant that the original grievance was not resolved to Mr. Hundley's satisfaction.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant has the burden of proving the MOT policy violates some rule, regulation, or statute, or constitutes a substantial detriment to or interference with his effective job performance or health and safety. See W. Va. Code § 29-6A-2(i).

3. Grievant did not demonstrated Respondent's decision to utilize MOT when required in order to maintain a safe environment violated any rule, regulation, or statute, or constituted a substantial detriment to or interference with his effective job performance or health and safety.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 21, 2005

Footnote: 1

Grievant's suggestion that the Warden could call a state of emergency if voluntary overtime did not meet the needs of the facility will not be addressed because of the outcome of this Decision.

Footnote: 2

At the Level IV hearing, Grievant initially stated he wanted the new version of the policy removed from the record, as he wanted to grieve the old policy. The undersigned Administrative Law Judge explained to Grievant that this change would make his grievance moot. He could not grieve a policy that was not longer in place, but could grieve MOT.

Footnote: 3

See the date of grievances filed by Mr. Hundley after this time in the Grievance Board's database.