THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JIMMIE HAMMONS,
Grievant,

v. **DOCKET NO. 2011-0304-MAPS**

DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant, Jimmie Hammons, filed a grievance against his employer, the Division of Corrections, on September 9, 2010. The statement of grievance reads:

> I feel that I am being unfairly treated when as a Correctional Officer III I am being assigned to work on Correctional Officer I and II posts during my regularly scheduled shift, but I am not permitted to volunteer for overtime on these posts because I am a Correctional Officer III. (Pay Grade 11)

As relief Grievant sought:

> [f]or Anthony Correctional Center to be made to follow Policy Directive 129.02 "Voluntary Compensable Overtime for Correctional Officers". To be permitted to volunteer for overtime in the areas that I can be assigned to during my regular scheduled shift. To be paid overtime that I could have gotten had Anthony Correctional Center been in compliance with Policy Directive 129.02.

A hearing was held at level one on September 29, 2010,[1] and a level one decision denying the grievance was issued on October 6, 2010. Grievant appealed to level two on

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[1] The record does not contain a transcript of the level one hearing, although it is unclear why Respondent failed to provide a transcript of the hearing as it is required by statute to do. Should this decision be appealed, it would be Respondent's responsibility to have any recording of the hearing transcribed for submission to the circuit court.

October 15, 2010, and a mediation session was held on March 4, 2011. Grievant appealed to level three on March 16, 2011. A level three hearing was held before Administrative Law Judge Carrie H. LeFevre, on September 7, 2011, in Beckley, West Virginia. Grievant appeared *pro se* at the level three hearing, and Respondent was represented by John H. Boothroyd, Assistant Attorney General. At the level three hearing Grievant acknowledged that, effective May 5, 2011, the relief requested had been granted, and the relief requested was limited to back pay for any overtime he would have received had he been allowed to work overtime. This matter became mature for decision on October 3, 2011, on receipt of the last of the parties' proposed findings of fact and conclusions of law. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on January 5, 2012.

Synopsis

Grievant believes the Operational Procedure related to who could work overtime, put in place by the Warden at Anthony Correctional Center in July 2010, violated the Policy Directive applicable to all Correctional Institutions, because the Operational Procedure did not allow employees in Grievant's classification and pay grade to work overtime in classifications and pay grades below theirs, thus reducing his overtime hours and pay. Grievant believed he was entitled to payment for overtime he should have been allowed to work from July 2010 to May 5, 2011, when the new Warden at Anthony Correctional Center changed the overtime Operational Procedure, permitting him to work overtime hours again in classifications in lower pay grades. Grievant did not demonstrate that the Operational Procedure was in conflict with the Policy Directive, or that he was otherwise entitled to work any overtime.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the the Division of Corrections ("Corrections") as a Correctional Officer 3, Corporal, at Anthony Correctional Center ("ACC"). The Correctional Officer 3 classification is in a pay grade 11.

2. ACC houses youthful offenders up to age 23, serving sentences of six months to two years. ACC has eight dormitories for these offenders.

3. When there are not enough Correctional Officers reporting to work to properly man ACC, overtime is offered to other employees. ACC first asks for volunteers to work overtime, and if there are not enough volunteers, then a call-out list is used. If additional officers are needed to work overtime, then officers who are already at work are required to work overtime from a rotation list. Grievant has placed his name on the list maintained of those volunteering to work overtime, and has in the past received overtime.

4. Corrections has in place a Policy Directive, Number 129.02, dated January 1, 2004, outlining how overtime is to be handled throughout Corrections. Policy Directive 129.02 provides, in pertinent part, that:

> voluntary overtime be offered to employees who possess Pay Grade 12 or below 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.

5. Corrections' Policy Directives apply to all Correctional Institutions within the Division of Corrections. Each Institution has its own Operational Procedures specific to the needs of the Institution, which are issued by the Warden at the Institution.

6. In July, 2010, ACC's Warden put in place Operational Procedure 302.01, which established guidelines for overtime at the Institution, and which was revised in September 2010. Operational Procedure 302.01 stated, in pertinent part, that:

> All Correctional Officers will be eligible for overtime in posts that are appropriate and/or specific to his/her rank or higher (i.e. a COIV, or Sergeant, will not be eligible for overtime in a COI post, but may be eligible to work overtime in a COV, or Lieutenant post). Unless specified, all sections of this procedure apply to, and are to be applied to, **all** correctional officers regardless of their rank. However, anytime that two (2) ranking officers (Corporal or higher) are presently working on a particular shift, **overtime is not authorized** for any other ranking officer to cover for vacancies on that shift.

(Emphasis in original.)

7. Operational Procedure 302.01, as applied, saved ACC money on overtime, because the Institution was not paying Correctional Officer 3's, such as Grievant, at the higher hourly rate, for working overtime in a Correctional Officer 1 or 2 position, which were in lower pay grades.

8. On May 5, 2011, ACC's new Warden, Scott Patterson, revoked the provisions of Operational Procedure 302.01 which had precluded Officers such as Grievant from working voluntary overtime in classifications and pay grades below his own.

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 Public

Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant argued that Operational Procedure 302.01 was invalid, because it violated Policy Directive 129.02, and that he was entitled to be compensated for overtime he believed he would have earned, had he been eligible for overtime work in classifications in lower pay grades than his own. Grievant asserted that the amount of compensation awarded to him should be based on the amount of overtime he had worked on average after May 5, 2011.[2] Respondent argued that the Operational Procedure was not in conflict with the Policy Directive, inasmuch as the Policy Directive did not require that employees be allowed to work overtime in classifications in lower pay grades. Respondent also

[2] As has previously been noted by the Grievance Board when such a compensation proposal was suggested, "[w]hile Grievant has proposed an interesting approach to the question of relief, under any such circumstances it is speculative. 'When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied.' *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *MacCumbee v. Morgan County Bd.of Educ.*, Docket No. 05-32-190 (Nov. 18, 2005); *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)." *Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 05-30-412 (May 31, 2006).

argued that Grievant did not prove he would have received any overtime had he been allowed to work overtime in classifications in a lower pay grade.[3]

The undersigned cannot find any conflict between the Operational Procedure and the Policy Directive. While the Policy Directive envisions that employees may be working overtime in classifications other than their own, and addresses this situation, it does not require that employees be allowed to work out of their classification. To the contrary, the Policy Directive states: "[o]vertime will be offered **within the classification whenever practical**." (Emphasis added.) Grievant presented no law, rule, regulation, policy, or procedure which supports a finding that Grievant was entitled to work overtime hours in classifications in pay grades lower than his own classification, and the undersigned is not aware of any such entitlement.

The undersigned would also point out that the Grievance Board has no authority to require an agency to change its policies.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).

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[3] Respondent asserted at the beginning of the level three hearing that the grievance was not timely filed. Grievant responded that this fell within the continuing practice exception. No evidence was presented in support of Respondent's argument that the grievance was not timely filed, and this argument was not addressed in Respondent's post-hearing written proposal. Accordingly, this argument is deemed abandoned and will not be addressed. It appears, however, that this issue would fall within the continuing practice exception.

> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001).

The following Conclusions of Law support the Decision reached.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 did not demonstrate that Operational Procedure 302.01 violated Policy Directive 129.02, or that any law, rule, regulation, policy, or procedure required that he be allowed to work overtime in classifications in lower pay grades than his own.

3. It is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some

> law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).
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Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: January 27, 2012