BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF DICKERSON, ET AL., **Grievants,**	)	**DOCKET NO. 97-12-110**
v.	)	
DEPARTMENT OF CORRECTION, **Agency.**	)	**DECISION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers, Dallas Green, and John F. Schmutz, Esquire, Members, constituting the entire Merit Employee Relations Board and thus a quorum as required by 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievants:

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For the Agency:

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NATURE AND STAGE OF THE PROCEEDINGS

This matter originally came before the Merit Employee Relations Board in Docket No. 96-11-68 which was dismissed by Order of the Board mailed on September 9, 1996 for a fourth step grievance hearing. The fourth step grievance hearing was held, and the result was unsatisfactory to the Grievants, and an appeal was timely filed with the Board on December 12, 1996. The matter was heard by the Board on September 4, 1997; and for the reasons stated below, the Board finds that the Grievants have not by a preponderance of the evidence presented established that they were the recipients of intentional discriminatory treatment by the Department of Correction on the basis of race and that the Department has established that it had a valid non-racially based security reason for its actions which resulted in three Afro-American Correctional Officers not being able to attend the Million Man March.

Three of the grievances relate to the determination by officials of the Department of Correction to cancel all shift trades among all Correctional Officers at the Delaware Correctional Center on October 15, 1995 which was the day before the "Million Man March" conducted in Washington, D.C. on October 16, 1995. The fourth step grievance by Correctional Sergeant Stevenson, who was successful in obtaining approval for a shift trade and attended the Million Man March, pertained to his unresponded to application for leave to attend the march.

PRELIMINARY MATTERS

At the beginning of the hearing, the Department moved to dismiss the grievance of Correctional Sergeant Stevenson who attended the Million Man March after an approval of his proposed shift trade on October 15, 1995. Counsel for Sgt. Stevenson explained that his grievance

was not that he was denied a shift trade but that his request for leave to attend the Million Man March was unresponded to requiring him to enter into a shift trade in order to be able to attend the march. After hearing argument, the Board denied the motion.

In a second preliminary motion, the Department moved that the grievances be dismissed on the basis that there was no remedy sought and that there was no way for the Board to make whole the officers who had missed the event by virtue of the decision to terminate all shift trades. After hearing argument, the Board reserved decision on this motion which, in light of the final determination of the Board, is moot.

SUMMARY OF THE EVIDENCE

Gregory S. Powell, in sworn testimony, told the Board that on October 15, 1995 he was employed by the Department of Correction as a Correctional Sergeant working at the Delaware Correctional Center on the 8:00 A.M. to 4:00 P.M. shift. It was the practice to allow shift trades up to the time of the shift even though there was a policy that required seven (7) days advance written notice of such a shift trade. Sgt. Powell testified that he finally found someone willing to trade shifts with him, and on the morning of Sunday, October 15, 1995, he called Captain Cain, the Shift Supervisor, to ask for a shift trade. Capt. Cain told him that no shift trades were being allowed and did not give him any reason for the denial. Sgt. Powell testified that it was usually no problem to get shift trades approved and that such trades were routinely approved for predominantly "white" events such as hunting season and auto races at Dover Downs. He related that he felt disappointed that he would not be able to take his son to attend this significant black event in Washington, D.C. Sgt.

Powell testified that he felt like it was perceived as a "black event" by the administration which spelled trouble and that he did not like that perception.

On cross-examination, Sgt. Powell testified that he did not apply for a shift change sooner than the day before the event, because he did not have anyone to trade with before then. He stated that he had never before been denied permission to effect a shift trade.

Kendall Evans, a Correctional Officer who was represented by his counsel, recently released from the hospital, and recuperating at home, was called by his attorney, sworn and testified via a speaker telephone in the hearing room without objection from the Department. The Board determined to permit such testimony in this instance, reserving the possibility that the weight assigned thereto could be affected by the lack of opportunity to observe the witness' demeanor.

Correctional Officer Evans testified that he worked as a K-9 handler and had secured a shift trade for the 8:00 A.M. to 4:00 P.M. shift on October 16, 1995 in order to enable him to attend the Million Man March. He testified his request for a shift change was denied by Capt. Cain on Sunday, October 15, 1995, for the stated reason that Major Hawlk had ordered that there were to be no more shift trades approved. The witness testified that there had never been difficulty in securing shift trades before and that trades were allowed for "white" events such as hunting season and the auto races at Dover Downs. He felt deprived of an opportunity to attend a historic black event and to take his 19 year old son.

On cross-examination, Correctional Officer Evans testified that he was aware that some black men had gotten shift trades approved, and he stated that he had heard things such as discussion of work stoppage at the prison from the administration, but those things did not happen. He stated that there was talk that there could be some problems, but it was a peaceful march.

Jeffery Dickerson was sworn and testified that as a Correctional Officer he had applied for a shift trade on the 8:00 A.M. to 4:00 P.M. shift on October 15, 1995 so that he could attend the Million Man March the next day. He stated that the march was a black historic cultural event, and he wanted to attend and had arranged with a Correctional Sergeant to trade with him. The witness testified that he was told by Capt. Cain that Major Hawlk had given a directive that there would be no more shift changes approved. His request was disapproved, and he worked the 8:00 A.M. to 4:00 P.M. shift on October 16, 1995 and did not attend the event. He stated that people stereotype that when blacks get together, there will be violence.

On cross-examination, the witness testified that he was aware of George Robinson who was an inmate at the Delaware Correctional Center who put out a flyer suggesting that black inmates march around in the compound on the day of the Million Man March. Correctional Officer Dickerson also stated that he became aware of the march in late September and wanted to attend on October 16th.

Correctional Sergeant Darin Stevenson was sworn and testified that he put in for leave months in advance to attend the Million Man March and that his leave request was never answered. He got the run around and not a yes nor no answer, and so on Friday, he found someone willing to do a shift change with him. This was confirmed on Sunday which is when he asked Capt. Cain for approval of the shift change which approval was granted. Sgt. Stevenson testified that he was standing next to Capt. Cain when he received the call from Major Hawlk telling him that he was to approve no more shift changes. Sgt. Stevenson testified that the last shift change approved was his. He stated that he had money in a van to transport people to the Million Man March, and it was inconvenient for him to have to work a shift trade to be able to attend, rather than taking a vacation day for which he had

applied. He stated it was a great event and probably will not happen again in his life time. He stated that he felt that correctional officers get off for "white" events such as races at Dover Downs and for hunting season, and he felt discriminated against because it was thought to be a black event.

On cross-examination, Sgt. Stevenson testified that he generally did not do shift trades. He had sufficient vacation time accrued and usually used it so that he did not have to repay a shift trade. He stated that he had applied for the day off in June for the October event. He did not have a copy of the leave request and testified that it could not be found. He stated that normally you get such paperwork back in a week or so. According to Sgt. Stevenson, it seemed to have disappeared when he tried to get it back. He stated that he had written in the remarks section that it was to attend the Million Man March.

Ronald Hosterman, the Treatment Administrator at the Delaware Correctional Center and a member of the Executive Committee which reports to the Warden, was sworn. He testified that he had received a copy of a letter from an inmate and had seen newspaper articles about the Million Man March. He identified a memorandum he had written to the Warden's Executive Committee discussing this inmate letter attempting to create a work stoppage on the day of the Million Man March. He stated that he was alarmed by the letter. Mr. Hosterman testified that the inmate claims various roles, including President of the prison chapter of the National Association for the Advancement of Colored People (NAACP), and he claims to be the representative of the Nation of Islam. He has been active in federal court litigation against the prison. The witness testified that the Executive Committee met the week before the march and addressed issues such as rosters, time off for vacations, medical and court runs, and how to deal with such matters. He stated the process was to

plan for the worst and hope for the best. Mr. Hosterman stated that at the meeting of the Executive Committee the week before the march, they thought the roster was frozen.

Barry W. Hawlk was sworn and testified that he is the Security Superintendent at the Delaware Correctional Center with the rank of Major. There are approximately 1,700 inmates in the facility, and the average shift worked by guards is eight hours. He stated that different correctional officers have different skills and expertise and that there are differences in the requirements of the different shifts. For example, there is considerably more movement of prisoners outside the facility during the 8:00 A.M. to 4:00 P.M. shift for doctor's appointments and court appearances. Also, that is the time during which visitations are permitted.

Major Hawlk testified that shift trades among correctional officers were permitted with the written policy being that such trades had to be submitted for approval in writing seven (7) days in advance of the trade. That is the present policy also, but during the time before the Million Man March, the seven day rule was not enforced and trades were approved more informally and on less notice. Major Hawlk stated that his concern was that the trade was an equal trade since not all correctional officers have the same qualifications, and it may take two or three moves on persons to get a qualified person in a position as the result of the shift trade. The witness identified State's Exhibit No. 3 as a copy of an incident report for October 9, 1995 detailing intelligence collected relating to an aggressive gathering of inmates prior to the Million Man March. The group was part of George Robinson's group associated with the Nation of Islam. This was related with other intelligence collected on the Million Man March. State's Exhibit Nos. 1 and 2 were identified as other material collected concerning the march, including the confidential fax memorandum from the Association of State Correctional Administrators to all members regarding the Million Man March

updated noting, among other things, that any confrontation in Washington, D.C. might spark confrontations or disturbances in members' institutions.

According to Major Hawlk, the Executive Committee met on October 12, 1995 to finalize plans about preparations for the march. The Warden wanted to finalize readiness plans, and the Committee was concerned with the feeding of inmates in the event of a work stoppage by inmates and about the possibility of having to control fires and other disturbances. The planning, according to Major Hawlk, was for all possibilities not knowing what was going to happen. Several decisions were made at that Executive Committee meeting, including the decision not to permit further shift trades or vacations. He stated that he needed to know who he had on what shift so he could determine who was going to be assigned where. Quick Response Teams or "QRTs" had to be assembled. These are five man teams used to extract or control a single inmate. Also, Correctional Emergency Response Teams ("CERT" teams) had to be alerted. These are ten man teams used to clear a yard or area, and several teams may be used in a given incident. The witness identified State's Exhibit No. 4 as the roster for the 8:00 A.M. to 4:00 P.M. shift on the day of the march, October 16, 1995. He stated that he was reviewing the roster at home on Sunday, October 15th, and called Capt. Cain at approximately 10:00 A.M. to discuss the roster and get Capt. Cain's opinion on certain persons for the QRT teams. That is when he was told by Capt. Cain that he had just approved a shift trade for Sgt. Stevenson. The Major directed Capt. Cain to stop approving shift trades, but he did not rescind the approval of Sgt. Stevenson's trade. Major Hawlk testified that he needed an accurate roster of which individuals would be available and that he changed the roster assignments on the day prior to the march, including the individuals on the QRT by removing one correctional officer who was older and not in as good shape and replaced him with another individual who was younger and

better trained. He stated that all correctional officers are not interchangeable like apples and that different officers had different skills and qualifications.

Major Hawlk testified that on the day of the march there were small work stoppages by inmates and an inmate demonstration at the time they were supposed to conduct a head count. The inmates kept marching around, and the decision was made to allow it to go on and to delay the head count, rather than to try to force the matter. The count was moved back and eventually the inmates did comply. He described the October 16th operations as successful and related that it was the proper decision not to push it and to let the inmates violate the rule a little. There was no violence.

On cross-examination, Major Hawlk admitted that there was an apparent breakdown in communications since the word on the cancellation of all shift changes from the Executive Committee meeting on October 12th had not gotten through to Capt. Cain until the morning of October 15th. He reiterated that at that time he believed that the requirement for a seven day prior approval for a shift trade was in effect.

Concerning the vacation request by Sgt. Stevenson, Major Hawlk testified that it was proper and that he should have gotten a response to his request. The request first goes to the scheduling officer who can approve it if he has a relief person available. If he cannot approve it, then it goes to the Shift Commander who can approve it without a relief if he has sufficient other personnel and disapproves it if he cannot afford to approve.

Francis W. Cain was sworn and testified that he was the Shift Commander for the 8:00 A.M. to 4:00 P.M. shift with the rank of Captain. He stated that it was the practice to approve shift trades with less than seven days notice and that he had approved Sgt. Stevenson's trade on October 15, 1995 for the Million Man March on October 16, 1995. Major Hawlk called him and stated that no more

shift trades were to be allowed and thereafter he denied shift trades requested by Officers Powell, Evans, and Dickerson.

It was stipulated by the parties that on the 8:00 A.M. to 4:00 P.M. shift there were nine (9) trades which were approved for black officers consisting of eight (8) males and one (1) female prior to 10:00 A.M. on October 15, 1995.

THE LAW

29 *Del. C.* § 5931. Grievances.

> The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days.

MERIT RULE NO. 19.0100

> Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspeot of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

FINDINGS AND CONCLUSION

There are not significant or material disputes concerning the events giving rise to these four grievances which have been consolidated into this Docket.

Three black correctional officers who wished to attend the Million Man March in Washington, D.C. on October 16, 1995 and who sought shift trades on October 15, 1995 to enable such attendance had their requests for such shift trades denied. One black correctional sergeant whose shift trade was the last one approved on October 15th and who attended the march, grieves not being given approved leave for October 16th for which he had applied significantly prior to the event. The officers involved contend that the denial of their shift trades and lack of response on the vacation request were acts of racial discrimination on the part of the Department of Correction. They assert that the shift trade denials were improperly and intentionally discriminatory on the basis of race because this was a "black" event which they contrast with what they claim are "white" events such as hunting season and auto racing at Dover Downs where there was never any denial of shift trades to facilitate the attendance by white correctional officers. In the alternative, they assert that even without any intent to discriminate, the Department nevertheless discriminated because of the disparate impact of the termination of shift trades on October 15, 1995 on black officers.

The evidence presented does not support a contention that there was a discriminatory animus or state of mind which can be reasonably attributed to the Department in its decision to terminate shift trades, and the Board specifically so finds. There were a number of black officers granted shift trades to attend the march. There was no evidence presented that causes the Board to conclude that the Department either sought to limit the number of black officers who attended the march or to maintain a number of black officers at the facility. The termination of the shift trades which adversely affected the Grievants in these cases were premised on legitimate security concerns for the safety of the inmates, the institution, and the public, and the Board specifically so finds. The contention that there is no distinction between correctional officers is not well placed, and the testimony of Major Hawlk

supports the view that different officers have different skills, abilities, and qualifications and even with similar training different skills and attributes including size which distinguish one from another in ways that do not constitute improper discrimination.

The evidence presented does not establish an improper basis for the failure to grant Sgt. Stevenson's leave request. Any contention that it was based on a motivation to keep him from attending the march is belied by the approval of his shift trade to facilitate his actual attendance at the event. He has not met his burden to persuade the Board concerning his grievance.

Even if it were proper to view this entire matter as a situation involving disparate impact on black officers with no discriminatory state of mind required, there is no improper discrimination which has been established since the Board has specifically found the cancellation of the shift trades under the circumstances presented to have been based on legitimate security concerns. The Grievants have not shown that such a basis is a sham, or simply a pretext, or otherwise not necessary for the safe conduct of the operations of the institution. They simply made their requests for shift transfers in a non-timely manner under the circumstances.

As to the issue initially raised as to the ability of the Board to hear the matter in the absence of a requested remedy other than a a finding of discrimination, that matter is moot, and no finding or conclusion is made in regard thereto.

ORDER

Based upon the findings and conclusions stated above, by the unanimous vote of all members of the Merit Employee Relations Board, each of the consolidated grievances is denied, and Docket No. 97-12-110 is dismissed.

IT IS SO ORDERED:

Katy K. Woo, Chairperson

Robert Burns, Vice-Chairperson

Walter Bowers, Member

Dallas Green, Member

John F. Schmutz, Esquire, Member

APPEAL RIGHTS

29 *Del. C.* § 5949, the Appellant may appeal to the Superior Court. The burden of proof of any such appeal to the Superior Court is on the Appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of final action of the Board.

Mailing Date: October 30, 1997

Distribution:
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Agency's Representative
Merit Employee Relations Board
Katy K. Woo, Chairperson
Robert Burns, Vice Chairperson
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Dallas Green, Member
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