JANICE HARRIS

v. Docket No. 94-RJA-021

REGIONAL JAIL AUTHORITY/

EASTERN REGIONAL JAIL

DECISION

Pursuant to the provisions of W.Va. Code §29-6A-4(e) Janice Harris filed a grievance directly at level four in which she alleged that her employer, the Regional Jail Authority (RJA or Respondent) had improperly terminated her employment. An evidentiary hearing was conducted on February 14, 1994, and the matter became mature on May 2, 1994 when Grievant filed proposed findings of fact and conclusions of law. (See footnote 1)

Grievant, employed by the RJA as a commissary clerk at the Eastern Regional Jail (ERJ) since 1989, was notified by letter dated January 7, 1994, that her employment wasterminated effective immediately. The reasons given for this action were the following acts of misconduct:

l. On Friday, 03 December 1993 while you were delivering commissary to inmates in Section VI of Pod A at the Eastern Regional Jail, you did gamble with inmates John Lemon ERJ-5781 and Ricky Yost ERJ-01516, by "cutting for high card" with [a] deck of playing cards. The items gambled for were candy bars from the commissary cart. This incident was witnessed by Officer Brian Strawderman.

2. On at least two occasions between August and October 1993 while you were delivering commissary items to inmates in Section IV of Pod B at the Eastern Regional Jail, you did gamble with inmate Charles Johnson ERJ-0907, by "cutting for high card" with a deck of playing cards. The items gambled for were candy bars from the commissary cart. Inmate Johnson verbally admitted to participating in the gambling activity. Additionally, one such incident was witnessed by inmate No. 1202.

These actions were determined to be unprofessional conduct in violation of Policy and Procedure

Statement No. 3010:

Section 1. No employee, or member of their immediate family shall, either directly or indirectly, solicit, accept, or agree to accept any gift, money, goods, loan or service for personal benefit which would influence or appear to influence the performance of the employee's work or decision making.

Section 12. Employees shall develop only those relations with inmates which are necessary for the professional conduct of business. The development of personal . . . relationships with inmates is prohibited. Any employee who attempts to use their position to develop an inappropriate relationship shall be subject to disciplinary action.

Section 15. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.

Section 18. All employees shall conduct themselves. . . in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority or public service.

Section 21. No employee shall willfully violate any federal, state or local law or ordinance.

Section 26. Improprieties or the appearance of improprieties, fraternization, or other nonprofessional association by and between employees and inmates are not allowed.

Section 28. Employees are not to extend or promise to an inmate special privileges or favors not available to all inmates except as provided for through official channels.

The letter of dismissal further stated that the alleged conduct "would appear to be addressed in Code 61-10-5, Betting on games or chance; furnishing money or thing of value therefor; penalty. (See footnote 2)

At the level four hearing Brian Strawderman, formerly employed at the ERJ as a Correctional Officer I, testified that on December 3, 1993, he was escorting Grievant on her commissary rounds when he observed her talking with inmates about cutting cards for commissary goods such as candy and potato chips. Grievant then shuffled the cards and she and the inmate drew for high card. Mr. Strawderman recalled that after they had left the area he warned Grievant not to engage in such activity again. When Grievant tried to initiate the card drawing again on December 10, he filed an

incident report.

First Sergeant E.T. Wensell conducted an investigation ordered upon the filing of the incident report. Sergeant Wensell stated that he spoke with three inmates. One had no comment, the second stated that he had cut cards withGrievant on two occasions and they had each won once. A third inmate stated that he had witnessed Grievant cutting cards with other inmates in August. Sergeant Wensell reported that efforts were made to interview Grievant but that she refused to cooperate.

Deputy Chief of Operations Jimmy Plear stated that during an unemployment compensation hearing, held one week prior to the level four hearing, Grievant admitted that she had been playing high card with inmates but that on the following day she returned any items won.

Chief of Operations Howard Painter testified that after a thorough review of the matter he determined Grievant's actions constituted the above-cited violations of Policy 3010 and were demonstrative of gross misconduct. Due to the severity of the charges he recommended, and the Executive Director concurred, that Grievant be dismissed.

Respondent argues that Grievant's acceptance of commissary items from inmates for her personal benefit as a reward for winning games of chance, serves to influence, or appears to influence, the performance of her work and decision making. Further, Grievant's gambling with inmates forms an inappropriate relationship of an unprofessional nature with the inmates. Respondent asserts that the severe level of discipline was imposed because the items to be won could have escalated to other than commissary goods and because the situation could have led to the blackmail of Grievant by the inmates. Finally, Respondent charges that Grievant's behavior as a State employee engaging in a game of chance and awarding inmates State property when they won represents an apparent violation of W.Va. Code §61-10-5 which makes it a misdemeanor for individuals to bet on games of chance or furnish money or things of value therefor.

Grievant elected not to testify at the level four hearing and called no witnesses on her behalf. (See footnote 3) Grievant argues that the RJA failed to follow its own policy 3036 when it did not reassign her to duties not having direct contact with inmates until the investigation was completed. She notes that Mr. Strawderman did not know whether the items allegedly won by her were returned to the inmates and she questions the reliability of statements given by the incarcerated individuals.

Grievant asserts that Respondent failed to follow Policy 3036 a second time when the investigation of her alleged behavior was instigated by ERJ Administrator Jerry Detrick while the

policy requires that the Chief of Operations shall conduct investigations. She asserts that no action was taken against those inmates who allegedly participated in the illegal conduct with her and that such action would establish that Respondent truly believed the action had taken place. Grievant contends that her communication skills with the inmates was encouraged and that she had received a commendation from Governor Gaston Caperton as part of the Inspire program acknowledging her valuable work. Finally, Grievant asserts that male employees who consumed alcoholic beverages on the jail premises and exposed themselves to female inmates were not terminated. Therefore, it would be illegal, a denial of civil rights, and against public policy to treat a female employee differently than said male employees. Grievant concludes that Respondent failed to prove the allegations upon which the termination of her employment was based; therefore, she is entitled to reinstatement, back pay, benefits, attorney fees and costs.

Because this matter apparently involves the termination of a classified employee, Respondent bears the burden of proving the charges upon which the action was taken by a preponderance of the evidence. W.Va. Code §29-6A-6. (See footnote 4) Respondent has established that Grievant engaged in an activity commonly known as drawing for high card and that commissary items were the winnings. It is irrelevant that the value of the items was minimal or that Grievant may have returned them to the inmates the following day. When Grievant engaged in a game of chance with the inmates for specified items she acted in violation of Respondent'sPolicy 3010 by accepting goods which would influence or appear to influence the performance of her work or decision making; by developing a relationship with inmates beyond that necessary to conduct business; and by failing to conduct herself in a manner which would reflect positively on the RJA. As a long-term employee of the RJA Grievant knew, or should have known, that such activity was contrary to the institutions rules and regulations. (See footnote 5) Her willful engagement in this activity after being warned to stopped establishes good cause for dismissal.

In reference to the procedural violations cited by Grievant, it is of no consequence that the ERJ Administrator, rather than the Chief of Operations, may have instigated the investigation of Grievant's activities. Certainly, had he reported the matter to Mr. Painter the same investigation would have been conducted. Grievant suffered no harm as a result of this technicality. Not every procedural irregularity will result in due process error. Thompson v. W.Va. Regional Jail and Correctional Facility Authority, Docket No. 94-RJA-139 (July 22, 1994). Particularly, an error which is not prejudicial to the

complaining party is harmless and does not require reversalof the final judgment. MMiller v. Bd. of Educ. of the County of Boone, 437 S.E.2d 591 (W.Va. 1993).

Second, Grievant's comparison of herself to two male employees who allegedly engaged in wrongdoing is not persuasive. Mr. Painter advised at hearing that those matters remained under investigation and administrative notice is taken that at least one male employee was subsequently terminated for allegedly exposing himself to female inmates. Thus, Grievant has failed to establish that male employees have escaped discipline or to otherwise prove discrimination under W.Va. Code §29-6A-2(d).

The third procedural violation, Respondent's failure to reassign Grievant pending the investigation, is meritorious. Respondent's Policy No. 3036, paragraph 8, provides:
Staff members accused of inappropriate or illegal conduct with regard to inmates will be reassigned to duties not having direct contact with inmates until a comprehensive investigation is completed and the findings of such investigation prove such allegations to be groundless.

Based upon the foregoing discussion it may be determined that Grievant is entitled to compensation for the duration of her suspension, from December 21, 1993, through January 7, 1994; however, the termination of her employment must be upheld for good cause shown.

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant has been employed by the West Virginia Regional Jail and Correctional Facility Authority as Commissary Clerk at the Eastern Regional Jail since 1989.

2. In December 1993 Grievant was observed drawing for high card with inmates. Candy and possibly other commissary items went to the winner.

3. Grievant was suspended December 21, 1993, pending the outcome of an investigation. Grievant was not reassigned to duties not having direct contact with inmates during the period of her suspension.

4. Grievant was terminated from her position effective January 7, 1994.

CONCLUSIONS OF LAW

1. The burden of proof shall rest with the employer in disciplinary matters. W.Va. Code §29-6A-6.

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in an activity which violated RJA Policy 3010 "Code of Conduct" and that said offense constituted misconduct warranting dismissal.

3. Respondent failed to comply with its Policy 3036 when Grievant was not reassigned during the investigation conducted regarding the allegations.

Accordingly, the Respondent is Ordered to compensate Grievant for the period of her suspension; however, thetermination is upheld and the remainder of the grievance is DENIED.

DATED August 30, 1994 Sue Keller

Senior Administrative

Law Judge

Footnote: 1

Respondent filed its proposals on April 15, 1994.

Footnote: 2

That section states in its entirety:

If any person at any place, public or private, bet or wage money or other thing of value on any game of chance, or shall knowingly furnish any money or other thing of value to any other person to bet or wage on any such game, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five nor more than three hundred dollars, and shall, if required by the court, give security for his good behavior for one year, and in default of the payment of such fine and the costs and the execution of such bond, if such bond be required, shall be imprisoned in the county jail not less than ten or more than thirty days.

Footnote: 3

W.Va. Code §29-6A-6 provides that "no employee shall be compelled to testify against himself or herself in a grievance involving disciplinary action."

Footnote: 4

In the particular circumstances of this case neither party raised the issue of whether Grievant is a classified or an at- will employee. Because the letter of dismissal stated that the action was "for cause," the undersigned determined to proceed

as if Grievant is in the classified service.

Footnote: 5

Grievant signed and dated a form on January 16, 1992, indicating that she had read an attached memorandum from ERJ Administrator Jerry Detrick. That document advised that while Policy No. 3010 "Code of Conduct" was a lengthy policy and not economical to provide each employee with a copy, its provisions were available on a daily basis. He directed all employees to review the Code within the next week and to pay particular attention to Procedures 25, 28, 29, 30, and 33. (Respondent's Exhibit 4).

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