SAMUEL K. LEACH

v. DOCKET NO. 93-CORR-477

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

Grievant, Samuel K. Leach, employed by the West Virginia Division of Corrections (Division or Respondent), filed a grievance directly to level four on November 22, 1993, following his discharge from the position of Correctional Officer I at the Huttonsville Correctional Center (HCC). An evidentiary hearing was conducted on December 13, 1993; both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The facts of this matter are essentially undisputed.

1. Grievant was first employed by Respondent as a Correctional Officer I assigned to the HCC effective September 1, 1993.

2. William C. Duncil, Warden at HCC, notified Grievant by letter dated November 12, 1993, that his employment would be terminated effective November 27, 1993. 3. The reason given for the dismissal was fraud, specifically, that Grievant falsified an official document during an interview, as follows:

1. On August 3, 1993 while completing a form "Interview Information for Correctional Officer I", you answered 'No' to the question, Have you ever been arrested?

2. As a result of finger print check on prior criminal charges, the report states that on 10/08/90 you were arrested on four (4) charges for Employ/use minor and three (3) charges for child abuse - sexual acts.

4. Upon receipt of Grievant's arrest record on or about November 9, 1993, Warden Duncil advised Grievant that his employment with Respondent would be terminated effective November 27, 1993. Due to a delay in Grievant receiving this notice the effective date of dismissal was extended to

December 1, 1993.

It is Respondent's position that the decision to dismiss Grievant was based upon his failure to respond truthfully to a matter of utmost importance. At the level four hearing Warden Duncil explained that the charges against Grievant were still open at the time in question and that factor placed Grievant at risk of blackmail by the inmates, and could result in a compromise to the security of the institution.

Chief Correctional Officer Herman Cox also testified that inmates have a well-developed information-gathering network and would soon learn of Grievant's background. Chief Cox stressed that an applicant's honesty is crucial in this matter and corroborated Warden Duncil's testimony thata security hazard could be created if the information is not accurate.

Grievant did not deny that he replied "No" when asked if he had ever been arrested but asserts that he did not intentionally deceive anyone. He explained that the charges arose from malicious rumors circulated by the mother of a child who Grievant found to be stealing items from his apartment. When a complaint was filed accusing Grievant of molesting the child, police searched Grievant's apartment at which time they found pictures of Grievant's girl friend's son mooning Grievant and children exposing their tattoos. (See footnote 1) Grievant denies that he engaged in child abuse or "kiddie porn" and asserts that he honestly believed that the arrest was expunged from his record. (See footnote 2)

In support of this claim Grievant provided a letter from Greg D. Simon, the attorney who represented him at that time. Mr. Simon advised that

After discussion with the State's Attorney prosecuting the case, he decided to 'STET' allcharges. I advised Mr. Leach that a 'STET' means that the case against him would be placed on the inactive docket and no action would arise against him from this incident. Mr. Leach perceived this to mean that the case against him was dropped. I personally do not feel he should be held liable for fraudulently filing a job application in which he stated same.

Grievant claims that it was his understanding that the charges would remain on the inactive docket for one year and then they would be "dropped." Although he has since learned that he must now "go to court" to get his record expunged, he would not have signed the Release of Information authorizing Respondent to obtain such relevant information if he though the charges were still listed.

In a dismissal case, even where the employee is a probationer, if misconduct is alleged the

employer has the burden of proving those allegations by a preponderance of the evidence. See W.Va. Code §29-6A-6, providing in pertinent part, "[t]he burden of proof shall rest with the employer in disciplinary matters." Walker v. W.Va. Public Service Comm., Docket No. 91-PSC-422 (Mar. 11, 1992). The employee bears the burden of proving, also by a preponderance of the evidence, any defense he poses. Morris v. W.Va. Dept. of Health and Human Resources, Docket No. 91-DHS-112 (June 25, 1991); Bell v. Kanawha Co. Bd. of Educ., Docket No. 91-20-005 (April 9, 1991).

In the present matter, Respondent has proven that Grievant responded untruthfully to a question regarding his arrest record posed during an interview. Grievant could haveanswered the question truthfully with an explanation; however, he chose not to disclose the arrest based upon an erroneous belief that his record had been purged. Grievant's established lack of veracity constitutes misconduct in this situation and warrants his dismissal. Grievant's defense, that the arrest was erroneous, and his belief the arrest had been erased from his record, does not excuse his failure to respond truthfully during the interview.

In addition to the foregoing facts and narration, it is appropriate to make the following conclusions.

Conclusions of Law

1. Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer and the employer must prove the charges by a preponderance of the evidence. Stewart v. W.Va. Alcohol Beverage Comm., Docket NO. 91-ABCC-137 (Sept. 19, 1991); Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. Even where the employee is a probationer, if misconduct is alleged, the employer has the burden of proving those allegations by a preponderance of the evidence. Walker v. W.Va. Public Service Comm., Docket No. 91-PSC-422 (Mar. 11, 1992). 3. Respondent has proven by a preponderance of the evidence that Grievant engaged in unsatisfactory conduct and that his dismissal was for good cause.

4. Grievant failed to offer a viable defense for the action which led to his dismissal.

Accordingly, the grievance is **Denied**.

DATED 5/31/94 SUE KELLER

Footnote: 1

Grievant explained that each picture found resulted in a corresponding charge.

Footnote: 2

Grievant's testimony at level four was that as of December 1993 he understood that he had been arrested in October 1990; however, he claims that he was not certain that he was arrested at the time. This testimony is found to be incredible in light of Grievant's acknowledgment that he was handcuffed, fingerprinted and held in a cell until a bondsman posted bail. Grievant apparently did not accord the arrest any significance because the charges were "ridiculous to begin with." He also indicated that he determined the interview question relating to prior arrests was of no particular importance stating that he "did not think it mattered" since the charges were frivolous and because he believed his record had been cleared.