MARK L. WILLIAMS

Grievant,

v.

DOCKET NO. 94-CORR-284

WEST VIRGINIA DIVISION OF CORRECTIONS

Respondent.

D E C I S I O N

This is a grievance by Mark L. Williams (hereinafter "Grievant") challenging his dismissal from employment by the West Virginia Division of Corrections ("Corrections" or "Respondent") (See footnote 1) . After carefully reviewing all matters of record and the arguments of the parties, the undersigned administrative law judge concludes Grievant's dismissal cannot be upheld based on the evidence presented.

Procedural History and Basic Facts

The procedural background of this protracted case will be briefly outlined. Grievant was initially suspended without pay for a period of at least fifteen days pending the outcome of aninternal investigation of allegations that he caused or permitted the removal or reproduction of official documents. The suspension was extended for another thirty calendar days pending the completion of an investigation of additional allegations made against him.

By letter dated July 13, 1994, Corrections notified Grievant of his dismissal for gross misconduct,

effective immediately. This letter alleged Grievant violated Policy Directive 400 and listed three specific grounds for the dismissal:

A. Class C19 - Receiving or soliciting gifts, favors, or bribes in connection with official duties;

B. Class C20 - Trafficking in contraband [documents];

C. Class C22 - Breach of facility security or failure to report a breach or possible breach of facility security.

The dismissal letter also alleged Grievant had violated W. Va. Code § 28-5-24, entitled "Gifts to or Dealings with Convicts," and that Grievant had "acted in concert with other correctional officers in supplying confidential information to inmates at the ... Penitentiary. You also obtained assistance from inmate or inmates ... in filing a law suit."

The grievance was received by the Grievance Board on July 15, 1994, two days after the date of the dismissal letter. An evidentiary hearing was set shortly thereafter, but by agreement of the parties the case was thereafter continued on at least six occasions. Subsequently, upon Grievant's motion, theadministrative law judge originally assigned the case recused herself to avoid any possible hint of partiality or any appearance of impropriety, and the case was transferred to the undersigned on February 22, 1995. An evidentiary hearing was conducted at the Board's branch office in Wheeling, West Virginia, on June 12 and 13, 1995. (See footnote 2)

As is often the case in disciplinary matters, the critical facts are in sharp dispute. The outcome of this case hinges entirely upon the relative credibility of the witnesses. Because of the factual determinations reached in this case, a complete recitation of the evidence of record is unnecessary.

At the time of his dismissal, Grievant had been employed by Corrections for almost ten years as a Correctional Officer I, a position in the classified service, at the West Virginia Penitentiary (Penitentiary) located at Moundsville, West Virginia.

Grievant was discharged for engaging in improper activity with two other correctional officers, Hindman and Ondeck, involving the removal of confidential documents from the administrative offices of the Penitentiary and the dissemination of such documents toinmate Paul Dorton. (See footnote 3) See e.g., Corr. Exh 4. Specifically, Grievant allegedly gave such documents to Ondeck, who then passed the documents on to Dorton. In addition, Grievant allegedly used his position to obtain legal services from Dorton in the form of legal research and the preparation of a legal document. These

alleged acts of misconduct provided the basis for the charged policy violations referred to earlier. The Warden testified that he did not review Grievant's personnel file or consider his employment history in making the decision to discharge him from employment.

Respondent's Evidence

Respondent's evidence to prove Grievant committed the alleged acts of misconduct consists of the testimony of two prison inmates, the only witnesses purporting to have any first-hand knowledge of the alleged acts of misconduct. The pertinent testimony of these two witnesses is summarized as follows. Inmate Paul Dorton met with Grievant, Correctional Officer Ondeck and another officer in the law library at the Penitentiary. During that meeting the officers promised to pay him seventy-five dollars and provide him with a bottle of whiskey for helping them draft a lawsuit to force Corrections to conduct psychological testing of all correctional officers. Officer Ondeck was the spokesman for the three officers and made the offer to pay him for this legal assistance. Dorton conducted this research and drafted the petition, but he was nevercompensated in any manner for his services.

Dorton also observed Grievant hand various documents to Officer Ondeck in the law library, who then passed them to him on several occasions over a two month period. Dorton always made copies of these documents and returned them to Officer Ondeck. Later, he made additional copies of the documents (See footnote 4) and shared them with Inmate Jeffrey Keplinger and three employees of Corrections. Corr. Exh. 13. (See footnote 5) Dorton heard Grievant express a desire to "take Warden Trent out," meaning to cause Warden George Trent to lose his position, because he, Grievant, did not believe the warden was "fit" to hold the position.

On cross-examination, Inmate Dorton revealed that he is a thirty-nine year old habitual offender serving fifteen to life. He has been incarcerated for about the last ten years and will be eligible for parole in the year 2000. He has served a total of about twenty years in confinement, beginning when he was about sixteen years of age, and has worked in the law library as an inmate representative for about nine years.

On both direct and cross-examination, Inmate Dorton said thatthe lawsuit against Corrections was filed in the Magistrate Court in Marshall County. On cross-examination, he reiterated that he had done the research for the lawsuit, drafted the pleading and gave it to one of the correctional officers. Dorton insisted that the seventy-five dollar amount was mutually agreed upon by all three officers

and him.

The relevant testimony of Inmate Jeffrey Todd Keplinger, who is serving a forty to one hundred year sentence for a sexual assault, corroborates Inmate Dorton's testimony in certain respects and is summarized briefly below. Keplinger saw Grievant enter the law library on more than one occasion and give documents to Officer Ondeck, who then provided the documents to Dorton. Keplinger said he "knew" one of the correctional officers wanted Dorton to file a lawsuit on his behalf, that Dorton had made copies of all documents given to him by Officer Ondeck, and that Dorton later gave the documents to him.

Grievant's Defense

Grievant testified in his own defense, denying every allegation made against him by inmates Dorton and Keplinger and stressing that he had not been given an opportunity to explain his side of the story before his dismissal. Grievant also stated that he typed the Petition for a writ of Mandamus, except for the last two paragraphs, on a word processor at his home, and he denied receiving any assistance from Dorton. Grievant introduced a document that he created in an effort to show the typeface of the Petition for a Writ of Prohibition he typed and the typeface of thesecond page of one of Dorton's affidavits were different. Gr. Exh. 1. Grievant answered all questions without equivocation, and the undersigned finds his testimony to be credible. For example, he acknowledged having discussed the psychological testing petition while in the law library with Officer Ondeck. He noted that Dorton was present and would have heard some of that discussion, but he denied discussing the lawsuit directly with Dorton.

Officer Ondeck, who was the President of the local chapter of the West Virginia State Employees Union at the time he was discharged by Corrections in 1994, testified at the Level Four hearing and denied engaging in any of the misconduct that provided the basis for the charges filed against Grievant.

Credibility of Respondent's Key Witnesses

After carefully considering all matters of record, the undersigned administrative law judge finds that the testimony of the inmates is not credible for the following reasons. Dorton gave at least two

affidavits against Grievant and other correctional officers. A three-page affidavit, signed on April 27, 1994, lists various charges against Grievant and other correctional officers. Corr. Exh. 12 & 14. In a subsequent affidavit dated May 6, 1994, Dorton lists all the documents allegedly given to him by Ondeck in Grievant's presence. Corr. Exh. 13. It is important that Dorton made no reference whatsoever in either affidavit to Inmate Keplinger, or any other inmate, having witnessed Grievant or Ondeck pass confidential documents to him. Furthermore, Dorton told at least three correctional employees that Grievant had been involvedin supplying him confidential documents; however, none of the hearsay statements given by these employee witnesses indicates that Dorton had told them his story could be corroborated by Keplinger or any other person. This circumstance also undermines the truthfulness and credibility of Dorton and Keplinger. (See footnote 6)

The undersigned also finds that Dorton did not, as he claimed, draft a Petition for a Writ of Mandamus/Prohibition to force Corrections to commence psychological testing of correctional officers. Corr. Exh. 13, a multiple document exhibit. (See footnote 7) Although Dorton, on both direct and cross-examination, testified that thepetition was filed in the Magistrate Court of Marshall County, it was actually filed in the Circuit Court of Marshall County and was styled as such. This major factual discrepancy strongly suggests to the undersigned that Dorton lied about drafting the lawsuit, rather than simply misstated where the petition had been filed. It seems that if he had typed the Petition he would have known that it was styled as "IN THE CIRCUIT COURT OF MARSHALL COUNTY." Dorton testimony on this charge was not convincing. Furthermore, Keplinger did not support Dorton's testimony on this point, and Corrections made no effort to establish that the Petition for a Writ of Mandamus filed in circuit court was, in fact, typed on an old typewriter in the law library to which Dorton had access.

Moreover, Grievant introduced evidence that Inmate Dorton had a history of fabricating blatant lies about staff members in order to try to negotiate a little better life for himself, i.e., to obtain a better job assignment or a cell change. Donald Bordenkircher, the Warden of the Penitentiary in the early 1980's, testified that based on his personal experience with Dorton he would not believe anything Dorton said about a staff member, and he would not even listen to him if he were the Warden today. In addition, Tracy Cutright, a correctional officer at the Penitentiary from August 1991 to January 1994, testified that Dorton had given him information about other inmates on more than one occasion, prompting shakedowns of their cells. However, theinformation Dorton provided never

proved accurate. (See footnote 8)

Testimony of prison inmates is certainly not inherently unreliable, but the testimony of Dorton and Keplinger in this case is found to lack any probative value. In terms of relative credibility, their testimony is completely outweighed by the testimony of Grievant and Officer Ondeck. (See footnote 9) In addition, their testimony against Grievant is not corroborated by any independent, non-hearsay evidence. (See footnote 10)

Applicable Legal Standard

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20,1990). State employees, such as Grievant, who are in the classified service (See footnote 11) can only be dismissed for "cause", meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

Conclusion of Law

Corrections failed to prove by a preponderance of the evidence that Grievant engaged in the acts of misconduct with which he was charged, and it therefore did not establish cause for his dismissal from employment.

Accordingly, this grievance is **GRANTED**, and Respondent is hereby ORDERED to promptly reinstate Grievant with back pay and all benefits to which he is entitled, minus any appropriate offsets, and to remove all reference to his suspension and dismissal from his personnel file.

Any party may appeal this decision to the "circuit court ofthe county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

RONALD WRIGHT

Administrative Law Judge

Dated: September 14, 1995

Footnote: 1 The grievance procedure statute for state employees provides an expedited process by which an employee can be file a grievance directly at Level Four in cases involving a dismissal, demotion or suspension exceeding twenty days. W. Va. Code § 29-6A-4(e).

Footnote: 2 In addition to the testimony adduced at the Level Four hearing, Corrections introduced fifteen exhibits, some of which included multiple documents, and Grievant introduced one exhibit. This case became mature for decision on July 10, 1995, upon receipt of Grievant's proposed findings of fact and conclusions of law. Corrections obtained a copy of the audio tapes of the evidentiary hearing, but it did not file any proposed findings or conclusions.

Footnote: 3 Corrections also dismissed Officers Ondeck and Hindman from employment, but the reasons for and the dates of their dismissals were not made a part of the record in this case.

Footnote: 4 Considerable testimony was introduced on the question of whether the documents Dorton was allegedly given by Officer Ondeck were widely available to inmates at the Penitentiary. If that were true, the documents would not necessarily be contraband. It is not necessary to address this issue, because of credibility determinations are dispositive of the case. It is clear, however, that a number of the documents were readily available to inmates and could have come from sources other than Ondeck and Grievant.

Footnote: 5 The hearsay testimony of these employees, based upon what Dorton (the declarant) told them, for the reasons discussed in this decision, is entitled to no weight.

Footnote: 6 During the investigation of this matter and related matters, Corrections arranged for inmate Dorton to wear a concealed recording device. At the Level Four hearing, Corrections sought, over objection, to introduce a copy of the original micro-cassette tape, that had been enhanced by the State Police and a partial transcript thereof, which had never been provided to Grievant's counsel. Counsel for Corrections offered the tape to show that Grievant had a motive for engaging in the alleged misconduct. The undersigned ruled the tape and the transcript inadmissible based upon the representation of Grievant's counsel that Corrections, by its former counsel, had promised several months earlier to provide him with all evidence it intended to introduce at the hearing and had stated that Grievant's voice was not on the tape. That exclusionary ruling is confirmed here. After listening carefully to the audio-tapes of the Level Four hearing, and

considering what counsel stated was on the proffered tape, the purpose for its introduction, and Grievant's testimony, the undersigned concludes the tape was only marginally relevant to the critical factual questions presented in this case. Other evidentiary rulings made at the Level Four hearing are also hereby affirmed.

Footnote: 7 The petition for a writ of mandamus was filed in the Circuit Court of Marshall County on a date not revealed by the record in this grievance. Although the circuit court noted that the petition was meritorious, it dismissed the petition for lack of venue by order filed on June 3, 1994. Corr. Exh. 7. The West Virginia Supreme Court of Appeals in Harrah v. Leverette, 165 W. Va. 665, 271 S.E.2d 322 (1980), ordered the Division of Corrections to administer "psychological testing of all Correctional Officers before they are employed .... Those found psychologically unsuited shall not continue to be employed ...."

Footnote: 8 Although Dorton and Keplinger both stated they had not been offered any reward in exchange for their testimony, and while Warden Trent said he did not recall any request or promise concerning where Dorton and Keplinger would be incarcerated in the future, neither inmate was transferred to Mount Olive Correctional Center in Fayette County when the Penitentiary was closed. Both of them remain in protective custody in the Northern Regional Jail and Correctional Facility located in Moundsville. According to the Warden, both inmates are incarcerated there for their own protection.

Footnote: 9 The undersigned did not find Officer Ondeck to be as credible a witness as was Grievant, based upon his demeanor and the manner in which he expressed himself at the hearing. At the same time, however, his testimony is entitled to more weight than the testimony of either Dorton or Keplinger.

Footnote: 10 It is simply noted that during the relevant time period, Warden Trent was aware that Grievant was an officer in the local chapter of the West Virginia State Employees Union, and that he was one of the petitioners in a mandamus proceeding seeking an order to force Corrections to comply with a legal requirement that all correctional officers be psychologically tested for their suitability for such employment.

Footnote: 11 "Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"