LURA E. GOARD, JR.

Grievant,

v. **Docket No. 95-CORR-068**

WEST VIRGINIA DIVISION OF CORRECTIONS

Respondent.

D E C I S I O N

Grievant, Lura E. Goard, Jr., was employed by the West Virginia Division of Corrections (hereinafter Corrections) as a probationary Correctional Officer I at the Mount Olive Correctional Complex (hereinafter MOCC) until his dismissal on February 15, 1995. (See footnote 1) The dismissal letter from Deputy Warden Howard Painter dated January 31, 1995, sets forth the sole ground for Grievant's dismissal:

> The reason for your dismissal is your failure to meet the standards established for successful completion of a psychological evaluation which was administered by the Charleston Psychiatric Group, Inc., on 12 October 1994. The West Virginia Supreme Court of Appeals, in the case of Harrah v. Leverette, [165 W. Va. 665], 271 S.E.2d 322 (1980), required 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 ... .' Accordingly, you were made aware during the hiring process that successful completion of a psychological evaluation was a prerequisite for continued employment as a uniformed staff member with the West Virginia Division of Corrections.

There is no dispute that all probationary correctional officers must successfully complete a psychological evaluation designed to ascertain whether they are psychologically suited for the work of a correctional officer in order to be retained and given permanent status.

In filing this claim, Grievant noted that he had worked at MOCC for three months without any problems and requested Corrections to explain how the Charleston Psychiatric Group, Inc., came to

the conclusion that he was not suited to be a correctional officer. He pointed out that one of the major tests he took stated that it was not a pass-fail test. He testified without contradiction that he had maintained an overall score of 94.5 out of a possible 100 during his six weeks of training at the Corrections Academy at West Liberty State College. Corrections also did not contradict Grievant's testimony that he had conducted himself in a professional manner when he was spit on by a prisoner during a brief work assignment at the Penitentiary in Moundsvillein January 1995. (See footnote 2) The evidence of record is not clear on this point, but it appears that Grievant was still well within his probationary period at the time of his dismissal. (See footnote 3)

Wyetta Fredericks, the Director of Programs for Corrections, testified briefly about the testing process and identified by name several of the psychological tests routinely given to probationary correctional officers by the psychiatric group. She explained that Grievant took a battery of psychological tests and was subsequently interviewed by a professional from the psychiatric group.

At the Level Four hearing, Grievant, although conceding that he was a probationary employee at the time of his dismissal, continued to question how the person conducting the evaluation could have reached the conclusion that he was not psychologically suited to be a correctional officer. Corrections did not disclose the actual test results or the psychological report it relied upon in dismissing Grievant. Corrections simply took the position that it had little or no choice under the law but to dismiss Grievant from employment based upon the unfavorable report submitted by the psychiatric group. Corrections did not offer into evidence any of its policies relating to the psychological testing of correctional officers and/or the hiring process.

The exclusive factual basis for Grievant's termination was the unfavorable report filed by the psychiatric group. Although Corrections took the position that it had little or no choice but to terminate Grievant's employment, the reason for this adverse action was not misconduct or unsatisfactory job performance. Corrections introduced no evidence relating to his actual job performance or to any alleged misconduct. Given the nature of the reason for Grievant's dismissal, it is concluded that he was not dismissed for disciplinary reasons within the meaning of W. Va. Code § 29-6A-6 ¶5, which provides, in pertinent part, that "[t]he burden of proof shall rest with the employer in disciplinary matters." Furthermore, as Grievant was a probationary employee at the time of his termination, it seems that, in this factual situation at least, he should bear the burden of proof. In any event, the evidence of record will not support a finding or conclusion that Corrections acted arbitrarily and

capriciously or lacked a rational basis for dismissing Grievant from his probationary employment.

Based upon all matters of record, the undersigned administrative law judge makes the following findings of fact and reaches the following conclusions of law:

Findings of Fact

1. Grievant was a probationary Correctional Officer I at the time of his dismissal.

2. Corrections contracts with the Charleston Psychiatric Group, Inc., to administer a battery of psychological tests to allprobationary correctional officers and to advise it whether these employees are suited to be correctional officers.

3. Corrections dismissed Grievant from his probationary employment based upon an unfavorable report from the Charleston Psychiatric Group, Inc.

Conclusions of Law

1. Because this is not a disciplinary matter within the meaning of W. Va. Code § 29-6A-6 ¶5, Grievant bears the burden of proving by a preponderance of the evidence that his dismissal from probationary employment was improper.

2. Grievant failed to either allege or prove that Corrections violated any statute, policy, rule or regulation in dismissing him from employment.

3. The evidence will not support a finding that Corrections acted arbitrarily and capriciously or lacked a rational basis for dismissing Grievant from his probationary employment.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the 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 partymust 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.

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RONALD WRIGHT

Administrative Law Judge

DATED: March 20, 1995

Footnote: 1 In accordance with the instructions contained in the termination letter, Grievant filed directly at Level Four of the grievance procedure under the expedited procedure for major disciplinary actions set forth in W. Va. Code § 29-6A-4(e). Grievant represented himself at the Level Four hearing conducted at the Board's principal office in Charleston on March 7, 1995, at which time the case became mature for decision. There was no objection by either party to proceeding at Level Four without a lower level hearing, even though Grievant was a probationary employee at the time of his dismissal and was not dismissed for disciplinary reasons. See Bonnell v. W. Va. Div. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

Footnote: 2 The dismissal letter was admitted in evidence as Gr. Exh. 1. The only other exhibit admitted in evidence was an Incident Report Grievant had prepared in January 1995, reporting that an inmate had spit in his hair and thrown what appeared to be juice on him.

Footnote: 3 In Major v. DeFrench, 169 W. Va. 241, 286 S.E.2d 688 (1982), the Supreme Court of Appeals ruled that due process protections may apply to a probationary employee if the employee is not terminated until the end of the probationary period.