GREGORY ABBOTT

v. Docket No. 95-CORR-184

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, Gregory Abbott, was employed by the West Virginia Division of Corrections (CORR) as a Correctional Officer I (COI) assigned to the Mt. Olive Correctional Complex (MOCC) for approximately one year prior to his dismissal on April 26, 1995. The grievant made appeal of that action to Level IV per W.Va. Code §29-6A-4(e), May 10, 1995. A hearing was held July 14, 1995, and the parties submitted proposed findings of fact and conclusions of law by August 23, 1995.

There is little if any dispute over the facts of the case. The record supports and the grievant concedes that at approximately 12:00 p.m. on March 31, 1995, he approached inmate John Clinton, and asked him, in a joking manner, "You my punk?" The grievant was fully aware that the term "punk" was used by inmates to refer to the submissive partner in a nonconsensual homosexual relationship. The inmate did not immediately take offense and simply responded, "That ain't right Abbott." The prisoner was either smiling or laughing when he made the response. The grievant then indicatedthat he was only joking and may have even apologized for the remark.

Inmate Clinton had experienced sexual overtures from other inmates and perhaps even attempts to physically coerce him into homosexual activity during a prior incarceration at the Huttonsville Correctional Center (HCC). (See footnote 1) He also believed that, because of his small physical stature and his willingness to obey orders, he was perceived as weak among the general inmate population. For these reasons, and because reflection on the matter caused him to become angry, he decided to confront the grievant and demonstrate his displeasure with the remark.

Approximately twenty minutes after their initial contact, the inmate approached the grievant and advised him that he "did not appreciate the remark." The grievant apologized and again stated that he had been joking. Without warning, the inmate knocked the grievant to the floor. (See footnote 2) The grievant did not respond physically and the inmate fled. Other officers arrived shortly and isolated the grievant and the inmate in separate areas of the prison.

Word of the assault spread quickly throughout the complex. At least some inmates speculated that Clinton would be punished for an assault which had been provoked. Two long-term prisoners approached MOCC Administrative Assistant Mike Coleman, and informedhim that "things were tense" and that "somebody could be hurt." Mr. Coleman observed that prisoners were beginning to congregate in small groups in the "yard" area of the complex. He subsequently directed MOCC Investigator Tom McBride to begin an immediate inquiry into the incident. Mr. Coleman conducted a brief interrogation of the grievant and, after making further observations of the inmate population, concluded that the incident had caused a potentially volatile situation. He so advised Assistant Warden Howard Painter.

The grievant candidly admitted to Mr. McBride that he made the statement to the inmate. He attempted to downplay the seriousness of the incident but conceded that his actions had caused a difficult situation for MOCC administrators, i.e., they would be forced to either find the inmate blameless or punish him for an assault which was provoked. For reasons which are unclear, the grievant asked that his MOCC locker and private automobile be searched. (See footnote 3)

Prior to the search, the grievant advised Mr. McBride that there was a set of professional lock picks in the pocket of a jacket in the locker. The search was conducted and the picks were discovered. The grievant explained that he had purchased the picksfor his personal use because his young daughter was in the habit of locking herself in the bathroom of their home. He further explained that he had forgotten that they were in the jacket until after his arrival at the prison that morning. The inspection of the automobile apparently revealed nothing of significance.

After he was given a general report, but prior to his receipt of Mr. McBride's complete findings, Mr. Painter determined that, in order to insure the grievant's safety and to prevent inmate tensions from escalating, the grievant should be immediately removed from the complex. By letter dated March 31, he suspended the grievant without pay for a period "not to exceed sixteen days" pending the completion of Mr. McBride's investigation. (See footnote 4)

In addition to his taped interview with the grievant, Mr. McBride conducted such interviews with inmate Clinton and Correctional Officers Roger Morris and Jon Runyon. (See footnote 5) On or about April 12, 1995, Mr. McBride provided Mr. Painter a summary of his findings, transcripts of the interviews, and the lock picks. He concluded in his report that the grievant had violated several of CORR's regulations on officer conduct.

Mr. Painter ultimately concluded that while the grievant's comment to the inmate demonstrated extremely poor judgment, the offense did not warrant dismissal. He further concluded, however, that, at the very least, inmates could have stolen and converted the lock picks to weapons or used them to obtain access to confidential records. (See footnote 6) According to Mr. Painter, this second demonstration of poor judgment "tipped the balance" in favor of dismissal.

By letter dated April 26, 1995, Mr. Painter advised the grievant that he was dismissed for "gross misconduct." The letter contained an extensive account of Mr. McBride's findings and a lengthy explanation of how the grievant's actions constituted violations of various portions of the agency's standards.

The grievant was specifically advised that his comment to inmate Clinton was in contravention of that portion which provided, "Employees shall maintain a quiet but firm demeanor in dealing with inmates. Any use of indecent, abusive, or profane language is forbidden anywhere in the complex or its grounds." He was advised that his possession of lock picks was violative of the provision, "It is strictly prohibited to introduce into the complex any alcoholic beverage, narcotic, stimulant, depressant, hallucinogen, weapon, or other item which may be used to effect an escape and/orjeopardize the health, safety, and general welfare of the complex employees and the the inmate population." The grievant was given eight days to respond verbally or in writing but declined to do so.

The grievant first and primarily asserts that the punishment imposed upon him was too severe. The grievant specifically contends that his "misconduct was not of a substantial nature directly affecting the rights and interests of the public." He also takes issue with Mr. Painter's determination that the lock picks posed a threat to the security of the facility and appears to assert that they should have played no role in the decision to dismiss. (See footnote 7)

CORR maintains that the grievant's offenses were serious and warranted dismissal. The agency urges that deference be afforded Mr. Painter's conclusion that the grievant's actions posed a threat to inmates and prison personnel.

To the extent that the grievant contends the picks posed no security threat, the argument is not supported by the evidence. The record conclusively establishes that at least one inmate had access to the locker area where they were found. The undersigned'scursory examination of the picks, see, n. 6, revealed that even without modification, they could easily be used to inflict bodily injury. (See

footnote 8) The record also reflects that prisoners have succeeded, in MOCC's relatively short term of operation, in gaining entrance to items with small locks, such as the locker where they were discovered. In short, the evidence supports that Mr. Painter was not overreacting when he concluded that prisoners are "creative" and could have gained access to the picks and used them for a variety of purposes.

Moreover, in determining whether the grievant violated CORR policy on contraband, it appears irrelevant whether or not he placed the picks in an area accessible by inmates. The policy understandably proscribes the unauthorized introduction of prohibited items into the complex. It makes no distinction between items which are ultimately used for ulterior purposes and those which are not. Accordingly, the undersigned concludes that CORR has demonstrated that the grievant violated the cited provision of the policy by bringing the picks into the prison.

There is also no doubt that the grievant's comment to inmate Clinton was a violation of CORR's policy on the use of abusive or profane language. Moreover, the grievant's conduct was directly contrary to the demeanor normally expected of a Correctional Officer, regardless of the specific proscriptions of the agency's policies.

The Grievance Board may, in the absence of agency policy establishing a penalty for a particular offense, mitigate the punishment imposed in a disciplinary case. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). Considerable deference is afforded the discretion of agency administrators in such matters, and mitigation is imposed only when the punishment is so "clearly excessive or disproportionate to the offense" that it constitutes an abuse of discretion. Stewart v. W.Va. Alcohol Beverage Control Commission, Docket No. 91-ABCC-137 (Sept. 19, 1991).

While CORR personnel policy generally prescribes penalties for both of the grievant's offenses, (See footnote 9) it is clear that Mr. Painter, in determining the appropriate punishment, was proceeding under those portions of the policy which provide that CORR administrators have considerable discretion to increase or decrease the listed penalties when the offense "seriously undermines the [Agency's] effectiveness or the employee's performance." Thus, it is consistent with the above holdings to review the propriety of the discipline imposed.

As discussed, the record supports that inmate Clinton's assault on the grievant was not predicated entirely on the grievant's comment. To that extent, the grievant is correct in his assertion that the

inmate's reaction was "exaggerated." Itremains, however, that it was the grievant who gave the inmate the opportunity to act out at all.

Further, despite that he has candidly admitted making the statement, the record reflects an on-going reluctance on the grievant's part to concede the seriousness of using a defamatory term in reference to an inmate or that he had violated CORR policy. One of his final remark on the propriety of his comment, during his Level IV testimony, was "I probably shouldn't have said it." Accordingly, the undersigned finds no basis for mitigation of the punishment imposed in the grievant's willingness to cooperate in the investigation or the prisoner's overreaction to the comment.

There is ample evidence of record that the grievant was provided a considerable amount of training in the area of officer-inmate relations and that he was fully aware, at the time of the remark, that such interaction with inmates was directly contrary to CORR philosophy and policy on the conduct of officers. The record also fully supports that his training acquainted him with the ingenuity of prisoners and the perils of entering the complex with contraband. Thus, there can be no mitigation on the basis of a lack of clarity in the agency's expectations.

Finally, the grievant's tenure with CORR was short and he, therefore, has no "proven record" on which to rely in his bid for reduction of the punishment. Indeed, that he was only employed one year prior to two serious infractions of CORR policy, is a negative rather than positive consideration. In short, the undersigned finds that the dismissal was in keeping with the agency's personnelpolicies, the seriousness of the offense, and the grievant's prior work record and that there is otherwise no basis for reduction of the punishment.

In addition to the foregoing, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) On March 31, 1995, the grievant a one-year Correctional Officer, approached inmate John Clinton a the Mt. Olive Correctional Complex and stated, "J.C., you my punk." The grievant was aware that the term "punk" is used by inmates to refer to an unwilling participant in a homosexual relationship. The inmate did not immediately take offense and appeared to realize the grievant was making the statement in jest.

2) The inmate confronted and physically assaulted the grievant shortly thereafter. Tensions

among the inmate population rose as speculation circulated that the inmate would be punished for an assault which was provoked.

3) During the subsequent investigation of the incident, the grievant requested a search of his locker and personal automobile. He advised that his locker contained a set of professional lock picks which he had inadvertently brought to the complex that morning. The picks were discovered and turned over to Assistant Warden Howard Painter.

3) In order to relieve inmate tensions and protect the grievant, Mr. Painter suspended him without pay and directed that he be escorted from the complex.

4) Upon receipt of Investigator Tom McBride's full report on the matter, Mr. Painter concluded that the grievant had committed two serious violations of the agency's policies on officer conduct and the introduction of contraband into the complex. The grievant was advised by letter dated April 26, 1995, that he was dismissed from employment. The letter contained a lengthy discussion of Mr. McBride's findings and the pertinent policy provisions.

CONCLUSIONS OF LAW

1) In disciplinary cases involving a tenured state employee, the agency bears the burden of demonstrating, by a preponderance of the evidence, that the employee engaged in the conduct complained of and that the conduct was of a substantial nature directly affecting the public's interests. Oakes v. W.Va. Dept. of Fin. and Admin., 264 S.E.2d 216 (W.Va. 1989); Stonestreet v. W.Va. Dept. of Administration, Docket No. 93-ADMN-182 (November 30, 1993). The West Virginia Department of Corrections has fully met that burden.

2) The imposition of a particular disciplinary measure will not be disturbed unless the employee can demonstrate that the punishment was so disproportionate to the offense as to constitute an abuse of the employer's discretion. Parham v. Raleigh County Bd.of Educ., Docket No. 91-41-131 (Nov. 7, 1991). The grievant herein has failed to demonstrate that dismissal was excessive or disproportionate to the offenses committed.

Accordingly, the 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 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 21, 1995

Footnote: 1The evidence on this point is unclear, but it appears that the inmate may have reacted violently to these advances. He was transferred from HCC, a medium security facility, to MOCC because of infractions of HCC regulations on inmate conduct.

Footnote: 2It appears that the grievant was struck at least three times in the face, but was not seriously injured.

Footnote: 3During the questioning, Mr. McBride asked whether the grievant had a previous history of confrontations with prisoners and whether he had a criminal background. It appears that the grievant then became concerned that he might be "framed" for some greater offense. At Level IV, he asserted that other officers had advised him that contraband had been "planted" in their personal belongings. As hereinafter discussed, the grievant's request was unfortuitous.

Footnote: 4Mr. Painter or other administrators also filed a battery charge against the inmate and the matter was eventually presented to CORR's "in-house" magistrate. Despite that state law does not countenance physical reaction to verbal provocation, see, State v. Watson, 264 S.E.2d 628 (W.Va. 1980), the magistrate dismissed the charge against the inmate on the grounds that the grievant had incited the attack.

Footnote: 5Although Mr. Morris and Mr. Runyon may have witnessed all or part of the assault on the grievant, neither knew what precipitated it.

Footnote: 6The parties agree and the record supports that the picks could not have been used to effect escape from the complex in that they were the type used to open small locks such as those on desks or file cabinets. It is noted that the picks were presented at the Level IV hearing but were not admitted into evidence. Rather, the undersigned examined and verbally described them for the record.

Footnote: 7At the Level IV hearing, the grievant's representative asserted that there would be evidence presented to show that the grievant was the subject of discriminatory treatment in that other correctional officers had committed similar offenses but were not punished. COI Roger Morris testified that he had heard a Corporal Miller state that he and other

officers had once referred to an inmate as a "punk." There is no evidence of record to corroborate his assertion and the grievant presented no evidence whatsoever that CORR administrators were aware that Corporal Miller or other officers had ever made such a remark. Obviously, Mr. Morris' testimony alone cannot support a finding of disparate treatment. Accordingly, the issue is not further addressed herein.

Footnote: 8The handles and points of the four picks were made of what appeared to be tempered steel. All were extremely sharp.

Footnote: 9Under the policy, the grievant's comment to the inmate would be classified as a "B" offense punishable by a five to fifteen day suspension without pay. Possession of the lock picks would be a "C" class offense punishable by a sixteen to sixty day suspension without pay.