KENNETH B. PINGLEY

v. Docket No. 94-CORR-1122

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

___Grievant, Kenneth B. Pingley, employed by the West Virginia Division of Corrections (Respondent) as a Correctional Officer II at the Huttonsville Correctional Center (HCC), complains that he was improperly reprimanded and suspended. The grievance was advanced to level four on December 16, 1994, after having been reviewed at levels one, two, and three. An evidentiary hearing was conducted on March 1, 1995, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by the parties on or before April 21, 1995.

The record establishes that Grievant was suspended without pay from his duties for a period of fifteen calendar days, from November 24 through December 8, 1994. Grievant was advised of the disciplinary action by letter dated November18, 1994 (See footnote 1) , in which Warden William C. Duncil stated in pertinent part:

The specific reason for your suspension is that on October 19, 1994, while on duty in the Education Department, you asked Inmate Bryson England, #12115 to do personal legal research for you. This is in violation of W.Va. Code, Section 28-5-24 and Section C19, of Policy Directive 400, 'receiving or soliciting gifts, favors or bribes in connection with official duty.'

Pursuant to the level three decision, the violation was reduced from a Class C to a Class B offense under Respondent's Policy Directive 400, and the suspension reduced from fifteen to five calendar days. (See footnote 2)

In support of the suspension, Respondent offered the testimony of Mark Williamson and Joseph Silvester. Mr. Williamson, employed as counselor and Adult Basic Education instructor, stated that while in the Education Department on October 19, 1994, he saw Grievant talking with Inmate England. Mr. Williamson recalled overhearing Grievant state to the inmate that thirteen correctional

officers at HCC had criminal records. He requested that Mr. England conduct legal research to identify the law which provides that individuals with criminal records may not be employed as correctional officers. Mr. Williamson reported that Mr. England responded that he could find it because he is a paralegal.

Mr. Silvester is Deputy Warden at HCC and was teaching an employability class on the evening of October 19, 1994. Mr. Silvester testified that Mr. Williamson advised him that evening of the conversation between Grievant and the inmate. Mr. Silvester further reported that Inmate England spoke with him the next morning, at which time he told the Deputy Warden of his conversation with Grievant. Both Mr. Williamson and Mr. Silvester filed incident reports regarding this matter.

Joe Smith, Assistant Director of the Division of Personnel, testified that he has had "several" contacts with Grievant regarding promotions and nepotism within the Division of Corrections. He recalled speaking with Grievant on November 2, 1994, in reference to correctional officers who had previously been convicted of felonies. Mr. Smith reported that his review of the matter indicated that only one correctional officer had been charged with a felony to which he had pled nolo contendre.

Former Inmate England stated that during his incarceration of eleven years, he had acted as an inmate (legal) representative at both the State Penitentiary at Moundsville and at HCC. Mr. England stated that while at HCC he had twice heard a rumor that some of the correctional officers had criminal records. For reasons left unstated, Mr. England began his own investigation of the matter; however, hedenied obtaining any information from Grievant. Mr. England also denied having any conversation with Grievant on October 19, or with Mr. Silvester on October 20.

John Dahlia, a reporter for WDTV, Weston/Clarksburg, stated that he had received ten to fifteeen anonymous telephone calls reporting that individuals with criminal records were employed at HCC. After speaking with the Warden two times, Mr. Dahlia "broke the story" on November 10, 1994. He recalled that during his meetings with the Warden, the administrator indicated a belief that certain employees, specifically Grievant and another correctional officer, were leaking the information.

Testifying on his own behalf, Grievant asserted that he had no need to go to inmates for legal advice because there are attorneys in Elkins he may consult. Grievant admitted to speaking with Mr. England sometime in early October regarding another matter; however, he denied having the opportunity to speak with the inmate on October 19. According to Grievant, he was supervising a cleaning crew on that date and was worried about "getting the job done right" since Lieutenant

Murphy was checking in from time to time. Grievant recollected that the cleaning consumed nearly his entire shift. (See footnote 3)

Grievant admits his concern for personnel matters have led him to contact Senators Rockefeller and Byrd, Congressman Wise, State Senators Ross, Manchin, and Helmick, Delegates Proudfoot and Martin, Commissioner Nicholas Hun, Personnel Director Stevens and Assistant Director Smith, and Governor Caperton. Grievant opines that he has spoken with Mr. Smith alone nearly one hundred times, and that he has contacted the Governor's office on numerous occasions. In addition to the issue of employees with criminal records, Grievant expressed his concern regarding the practice of nepotism at HCC. He claims that two brothers work the same shift and that one is assigned as supervisor. He states that this practice is all too common and that employees such as himself "who have to work for a paycheck," have no chance for advancement. Grievant argues that the suspension was in fact imposed in reprisal for his efforts to correct the problems at HCC. He asserts that reprisal is established by his showing that (a) he engaged in a protected activity, (b) the administration was aware of the activity, (c) thereafter, the suspension was imposed, and (d) the suspension was imposed promptly following media contact with the Warden at HCC. Grievant claims that the reason for the suspension provided by Respondent is neither legitimate nor non-retaliatory, inasmuch as the alleged action did not occur, and is merely pretextual.

Grievant vehemently asserts that he has job rights and that he will continue in his self-appointed duty to pursuechanges at the institution for the benefit of himself and others. Grievant claims that because he is "outspoken" he has been harassed five and one-half of the six years he has been employed at HCC; however, he advises that he will continue to express his rights under the Whistle Blower law.

In disciplinary matters, the burden is upon the employer to prove the charges against the employee by a preponderance of the evidence. Kinney and Toler v. W.Va. Div. of Corrections, Docket No. 93-CORR-195/213 (Dec. 30, 1993). Because the evidence presented in this case consists primarily of witness testimony, a determination as to whether the employer has met this burden must necessarily be decided on the basis of the credibility and reliability of the witnesses. Siler v. W.Va. Dept. of Health and Human Resources/W.Va. Children's Home, Docket No. 94-HHR-278 (Nov. 16, 1994).

Both Mr. Williamson, who reported overhearing the conversation between Grievant and the

inmate, and Deputy Warden Silvester, who stated that the inmate advised him the following day of the conversation with Grievant, presented direct, corroborative testimony establishing that the action upon which the suspension was based did in fact occur. Their testimony was consistent at both levels three and four. Grievant does not suggest any reason why either or both witnesses would offer knowingly incorrect or false testimony regarding this matter. There is no indication that Grievant has ever engaged in any dispute with either witness or thatany ill will has developed over the years.

In comparison, both Mr. England and Grievant proudly state that they challenge the system. Mr. England testified that he was "continuously" disciplined while incarcerated, acquiring nineteen offenses in a period of seven years. Grievant appeared pleased when reciting his past activities and pledged to continue his mission to eliminate corrruption at HCC.

Although it is possible that Grievant and Mr. England began independent investigations of HCC employees simultaneously, the probability of such an occurence is minimal. While it is also true that Grievant could have consulted with an attorney to obtain the legal information he sought, there is no evidence that he chose that course of action. Because Grievant was so intent upon disclosing what he believed to be an impropriety, and lacking any reason to believe the testimony of Mr. Williamson and Deputy Warden Silvester was perjured, it must be concluded that Grievant did ask Mr. England to perform legal research on his behalf. The action is consistent with Grievant's objective and was easily attainable by Mr. England's immediate accessibility. As an additional benefit, Grievant would have incurred no legal fees.

Soliciting legal research from an inmate is a violation of W.Va. Code §28-5-24 which provides: No officer or employee of the state, or contractor, or employee of a contractor,shall make any gift or present to a convict, or receive any from a convict, or having [have] any barter or dealings with a convict; and for every violation of this section the party engaged therein shall incur the same penalty as is prescribed in the preceding section. (See footnote 4)

Soliciting legal research from an inmate is also a violation of Respondent's Policy Directive 400, Section C19, which prohibits employees from "[r]eceiving or soliciting gifts, favors, or bribes in connection with official duties." The reduction of this charge to a violation of Section B23, "[o]ther actions of similar nature and gravity" does not appear improper.

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

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Division of Corrections as a Correctional Officer II at the Huttonsville Correctional Center.

2. On October 19, 1994, Grievant requested that an inmate perform legal research on Grievant's behalf.

3. Grievant presented a prima facie case of reprisal; however, Respondent successfully rebutted the case bypresenting a legitimate, non-retalitory reason for the action. Grievant failed to prove the reason was pretextual.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W.Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Reprisal is defined in the grievance procedure as retaliation toward a grievant either for an alleged injury itself or any lawful attempt to redress it. W.Va. Code §29-6A-2(p).

3. Respondent has proven the charges against Grievant thereby establishing cause for the suspension and rebutting any prima facie case of reprisal.

Accordingly, the grievance is DENIED.

DATED JUNE 30, 1995 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1An earlier letter incorrectly identified the date of the action as October 25, 1994. The error was subsequently corrected and has no further bearing on the disciplinary issue.

Footnote: 2Contrary to Grievant's complaint, no letter of reprimand was issued pursuant to this incident. The sole disciplinary action taken was the suspension.

Footnote: 3There is some contradictory testimony as to whether the entire educational wing was closed for the cleaning; however, it appears that Mr. Williamson and Mr. Silvester did conduct class that evening.

Footnote: 4W.Va. Code §28-5-27 prohibits officers and employees from receiving any other compensations other than that provided by law. Violations of this section requires that the employee "shall be dismissed from his office or service. . . ."