MICHAEL HUNDLEY

v. Docket No. 96-CORR-399

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, Michael Hundley, a Correctional Officer I employed at the Mt. Olive Correctional Center, was suspended for twenty-eight days without pay effective October 4, 1996. (See footnote 1) He filed an appeal of that action to Level IV, on September 24, 1996. A hearing was held February 14, 1997, and the parties submitted proposed findings of fact and conclusions of law by August 19, 1997.

Background

Much of the background of the case is not in dispute. MOCC has experienced staff shortages since it opened in 1994. During the times pertinent herein, most correctional officers were required to work a considerable amount of overtime. While MOCC administrators have, at times, allowed employees on a particular shift to volunteer to work the next shift, they have generally chosen employees to work overtime according to their placement on an alphabetized list of all correctionalofficers. (See footnote 2)

On August 25, 1996, at or near the conclusion of his shift, Correctional Officer Othar Bills disobeyed an order to work an additional eight hours. He essentially informed his supervisor, Captain William Vest, that the order was not lawful. Officer Bills may have indicated that the grievant had advised him that he was not obligated to work the additional shift.

On or about August 28, 1996, while he, Officer Bills, and other MOCC employees were waiting to enter their work area, the grievant made several comments regarding the legality and/or propriety of CORR requiring employees to work overtime on their scheduled days off. The grievant's remarks were most likely directed at Officer Bills, but he was aware that other employees could hear. He may have suggested that his union would pursue grievances on behalf of members who were disciplined for refusing to work an additional shift when it fell on their first scheduled day off. The grievant was

vice-president the MOCC chapter of the State Employees Union (SEU) at the time.

On September 3, 1996, MOCC Warden George Trent directed MOCC Investigator Cheryl Chandler to inquire into Officer Bills' refusal to work overtime. It appears that he also directed her to inquire into the grievant's remarks on August 28.

At approximately 3:30 p.m. on September 3, Investigator Chandler advised the grievant that it was necessary for him to submit to tape recorded interviews on the two incidents. The grievant informed her that he would not make any statements unless he was furnished a copy of the interview tape. Ms. Chandler responded that it was MOCC policy not to provide witnesses and/or the target of an investigation copies of the tapes. She terminated the interview, and advised Warden Trent thatthe grievant was uncooperative.

The grievant's schedule in late August and September 1996, called for him to work the 3:00 p.m. to 11:00 p.m. shift from Saturday to Wednesday, and be off Thursday and Friday. On Saturday, August 31, 1996, he notified his supervisor, Lt. Robert Rhodes, that he would be available for additional shifts throughout the week. Lt. Rhodes permitted him to work additional shifts on Sunday and Monday, but advised him on Tuesday, that he was to return to his regular schedule.

On Wednesday, September 4, 1996, between 7:30 p.m. to 8:00 p.m., Lt. Rhodes informed the grievant that he would have to work an additional eight hours at the conclusion of his 3:00 p.m. to 11:00 p.m. shift. Prior to the end of the shift, the grievant notified Lt. Rhodes in writing that he would not work the additional hours. He did not provide a reason.

In a September 5, 1996 memorandum to MOCC Deputy Warden Howard Painter, Lt. Rhodes recommended that the grievant be disciplined for insubordination. The grievant was suspended for fifteen days without pay effective September 6, 1996, and advised that he might receive a more severe discipline once a more extensive investigation was completed. The only grounds cited at that time was his failure to comply with Lt. Rhodes' directive that he work an additional shift on September 4, and his refusal to cooperate with Investigator Chandler on September 3.

On September 12, 1996, the grievant was again asked to submit to an interview with Ms. Chandler. He was advised that he could have an attorney or other representative present. The grievant ultimately agreed to a September 16 interview without representation. At the direction of CORR's legal department, he was searched prior to entering the facility to determine whether he was concealing a tape recorder; none was found.

Investigator Chandler's report reflects that the grievant confirmed he had refused overtimeon September 4, but denied urging any correctional officer to disobey an order. He indicated that he was displeased with the process by which officers were assigned extra shifts, and believed that CORR could not legally require an employee to work on his or her day off, in any event.

In her September 16, 1996 final report to Warden Trent, Investigator Chandler essentially concluded that the grievant had refused a direct, lawful order, and had advised several correctional officers that CORR could not legally require them to work overtime on their days off. After reviewing the report, Deputy Warden Painter issued the an October 4, 1996 suspension letter charging the grievant with insubordination, refusal to cooperate in an official investigation, and “participating in [a] work slowdown, sit down, or similar concerted interference with state operations.” The letter cited a previous verbal reprimand for unsatisfactory use of sick leave, and a written reprimand for using disrespectful or abusive language toward a superior.

At the time of the suspension, the grievant had been employed by CORR for approximately two years. His June 29, 1995 evaluation noted several deficiencies in the “Interpersonal Skills” assessment area. The evaluator indicated that “self-control” should be his primary goal during the next rating period. The grievant did not file a protest, informal or otherwise, over the evaluation or the previous disciplinary actions.

Argument

The grievant apparently now concedes that it was not unlawful for CORR to require him to work overtime on the date in question. He makes no assertions regarding applicable state or federal law on the issue, but contends that MOCC's policy on the assignment of additional shifts was not followed in his case. The grievant also asserts that the suspension was motivated by anti-unionsentiments. CORR denies that any MOCC administrator harbored ill-will toward the grievant because of his affiliation with SEU. The agency contends that it has met its burden to show that the grievant engaged in prohibited conduct, and that the penalty was commensurate with the seriousness of his conduct and prior work history.

Findings and Conclusions

In a disciplinary action involving a tenured state employee, the employer must prove, by a

preponderance of the evidence, that the employee engaged in the conduct for which he was disciplined, and demonstrate that the conduct was of “a substantial nature directly affecting rights and interests of the public.” Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E. 2d 151 (W.Va. 1980). The employee has the burden on any affirmative defenses raised to the action. Rhodes v. W.Va. Division of Corrections, Docket No. 95-CORR-465 (Nov. 29, 1996).

The undersigned summarily finds that CORR has failed to show that the grievant ever participated in a work slowdown or otherwise engaged in a “concerted interference with state operations.” At best, the evidence establishes that one or more employees might have believed the grievant was encouraging them to refuse overtime on their days off by making statements about union support for correctional officers who were disciplined. The record as a whole supports that most employees viewed his remarks as a personal opinion on the legality of CORR's policies on overtime. There is no evidence that the grievant encouraged Officer Bills' or other officer to refuse a direct order. Discussions among employees about the legality of the employer's personnel practices may displease the employer, and may require a response, but they do not constitute aconspiracy to interfere with the agency's operations. See, Crist v. W.Va. Division of Corrections, Docket No. 97-CORR-067 (Oct. 27, 1997).

Insubordination is generally defined as the refusal to carry out the lawful order of a superior entitled to give such orders. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (April 30, 1991). Prior Level IV decisions have consistently held that there are few defenses against the charge. See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, the employer can substantiate the allegation by showing that the employee was given an order which did not entail unnecessary physical risk to himself or other employee, and that he failed to comply. Questions regarding the legality of the order must be litigated after compliance. Id.

There can be no doubt that the grievant refused an order given by a superior who had the authority to give it. Whether MOCC's policy on overtime assignments was followed, is irrelevant to the question of whether the grievant was insubordinate. He had a duty to comply, and then litigate any issues regarding the policy or its application. Moreover, it is clear that the grievant refused the order simply because he disagreed with and did not like MOCC policy which permitted overtime assignments on an employee's days off. His employment history supports that he was predisposed to

disagree with, and even challenge the authority of his superiors.

The same reasoning applies to the grievant's initial refusal to give tape recorded statements to Investigator Chandler. Although CORR characterizes this conduct as a “refusal to cooperate,” it was as insubordinate as his refusal to work overtime. The undersigned is not persuaded that MOCC had good cause to deny the grievant a copy of the tapes of the interview, but it is apparent that he understood that Investigator Chandler was acting on the authority of Warden Trent and/or DeputyWarden Painter when she advised him that the interview was necessary. Again, the grievant was obligated to comply and then pursue legal avenues for obtaining a copy of the tapes.

The grievant's evidence falls well short of establishing union animus on CORR's part. The only evidence of record which even tends to support that MOCC officials were not entirely unbiased is that the“work stoppage” charge appears contrived. This is insufficient to find that the suspension was motivated by the grievant's SEU affiliation. There is no evidence of record that MOCC officials have ever made anti-union statements or taken actions designed to thwart union activities. To the extent that the grievant's affiliation or position with SEU entitles him to an initial presumption that the suspension was motivated by anti-union sentiments, CORR has rebutted the presumption by showing that the grievant was insubordinate on at least three occasions during his relatively short tenure with CORR. See, 7Ferrell v. W.Va. Division of Corrections, Docket No. 96-CORR-194 (Jan. 31, 1997). The record will not support that the suspension was pretextual.

In summary, CORR has established by a preponderance of the evidence that the grievant disobeyed at least three orders given by persons with the authority to do so, and that the grievant has failed to advance or substantiate any defense against the charge of insubordination, and has failed to substantiate his claim that the disciplinary action was prompted by his union affiliation. Under applicable CORR personnel policy, the grievant could have been suspended for a longer period or even dismissed. CORR's failure to substantiate the charge of interference with agency operations does not require that the suspension be reduced, and there is otherwise no evidence to support that the punishment should be mitigated.

Any party may appeal this decision to the Circuit Court of Fayette County and such appealmust be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither with 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.

Accordingly, the grievance is **DENIED**

_____

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated:

October 31, 1997

Footnote: 1 *The grievant was dismissed on April 17, 1997. His appeal of that action is pending at Level IV. The parties agreed that a decision should be issued on the suspension before evidentiary proceedings were conducted in the case.*

Footnote: 2 *It is not entirely clear to the undersigned whether the process is rotational, i.e., the employee at the top of the list becomes second once he is chosen to work over. A resolution of the case does not require more precise findings on the procedure.*