SCOTT HATFIELD,

Grievant,

v. **DOCKET NO. 98-CORR-028**

DIVISION OF CORRECTIONS/

MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

This grievance was filed at Level IV on or about January 28, 1998, by Grievant Scott Hatfield against Respondent, Division of Corrections ("Corrections"), following his notification on January 14, 1998, of his dismissal from employment at Mount Olive Correctional Complex, effective January 29, 1998. He seeks as relief backpay and to be made whole. (See footnote 1)

Grievant was charged with violating Corrections' Policy Directive 400, Section B-2, "[f]ailure or delay in following a supervisor[']s instructions, performing assigned work or otherwise complying with applicable written policy," specifically that he failed on three occasions to call in to report off work at least two hours before his scheduled work time, and that he failed to follow an order given to him by Lieutenant Joseph Wood on each of these occasions, to report to a particular person upon his return to work. Mount Olive's Operational Procedure 4.32A requires employees to call in at least two hours preceding the time they are to report to work if they are going to be unable to report, even if the reason for their failure to report is their own illness. The stated purpose of Operational Procedure 4.32A "is to establish a written policy relating to the use of earned sick leave by MOCC employees." Regarding the procedure for notifying Mount Olive that the employee is sick, it provides:

> All Employees must notify the facility two (2) hours before scheduled work time giving their name and reason for requested absence.

Regarding discipline, it provides that "[a]ll disciplinary action will be administered in accordance with Policy Directive 400.00."

The following Findings of Fact are made based upon the evidence presented at the Level IV hearing.

Findings of Fact

1. Grievant was employed by Corrections as a Correctional Officer I at Mount Olive Correctional Complex ("Mount Olive"), and had been employed since June of 1995.

2. Mount Olive is a maximum security correctional facility. It is extremely important to security at the facility that employees report to work as scheduled. A staffing plan has been developed to show positions which need to be filled during each shift. It is mandatory that certain positions be filled at all times. When an employee filling one of these positions does not report to work, either an employee who was not scheduled to work must be called in, or an employee must stay and work another shift.

3. Mount Olive's Operational Procedure 4.32A requires that an employee who is ill and cannot come to work, call the facility at least two hours prior to the time he is to report to work. 4. On July 15, 1997, Deputy Warden Howard Painter advised Grievant he was being suspended for three days for reporting late for roll call on June 10 and July 11, 1997. The suspension letter stated, "following your return to duty after this suspension, I am directing the Associate Warden of Security to monitor your attendance for a period of six (6) months and the first time you fail to report to duty as scheduled will result in more stringent disciplinary action."

5. On September 26, 1997, Grievant called Mount Olive 15 minutes prior to the time he was to report to roll call, and stated he was sick and would not be in that day. The call was transferred to Lieutenant Joseph Wood. Lt. Wood instructed Grievant to report to his captain upon his return to work. The absence was unexcused.

6. Grievant then reported to work late on September 26, 1997, and worked 13 hours. He did not report to his captain upon returning to work as directed.

7. On November 22, 1997, Grievant called Mount Olive five minutes prior to roll call, and fifteen minutes before he was to be at his post, and stated he was sick and would not be in that day. The telephone call was transferred to Lt. Wood. Lt. Wood asked Grievant why he had waited so long to call in, and Grievant responded, "I guess that's the way it is today." Lt. Wood advised Grievant his absence would be unexcused, and asked him if he was familiar with Operational Procedure 4.32A, to which Grievant responded that he had been counseled on the procedure. Lt. Wood told Grievant to report to Captain Vest when he returned to work.

8. Grievant did not report to work on November 22, 1997. Grievant did not report to Captain Vest when he returned to work on November 23, 1997.

9. On December 13, 1997, Grievant called Mount Olive 30 minutes prior to the time he was to be at his post, and stated he was sick and would not be in that day. The call was transferredto Lt. Wood. Lt. Wood told Grievant to report to him the next scheduled work day, so he could counsel him.

10. Grievant then reported to work late on December 13, 1997, and worked 7.25 hours of his shift, and 8.25 hours of overtime.

11. Grievant did not report to Lt. Wood upon his return to work either on December 13 or 14.

12. Since he began his employment at Mount Olive, Grievant had been counseled four times for tardiness and abuse of sick leave. In August of 1996, Grievant was advised that his sick leave would be monitored as the days he took as sick leave almost always coincided with scheduled days off. In September 1996, he received a verbal warning for being late for roll call. Grievant was reprimanded on April 15, 1996, for his failure to answer roll call on nine occasions in early 1996, and was reprimanded again on May 23, 1996, for "unsatisfactory attendance or excessive tardiness." He was advised by the Payroll Department in September 1996, and January 1997, that he had used more sick leave than he had accumulated, and that if this continued, disciplinary action would be taken. Grievant was counseled once and reprimanded once for other types of infractions.

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Service Comm'n., 380 S.E.2d 226 (W. Va. 1989). "The judicial standard in West Virginia requires that `dismissal of a civil service employee be for good cause, which means

misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); 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)." Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant pointed out that he did report to work on September 26 and December 13, and in fact, worked a double shift on both days. Grievant did not deny that he had called in on the three days in question to report that he would not be in because he was sick, or that he had failed to call his employer at least two hours prior to his scheduled reporting time. Respondent proved Grievantviolated Operational Procedure 4.32A. The fact that Grievant later appeared and worked on September 26 and December 13 is irrelevant, as is Grievant's argument that Respondent could have charged him with tardiness on those two days. Grievant called in to report that he was ill and would not be at work, and he did so in violation of the written procedure. Respondent was under no obligation to change Grievant's request for sick leave to a designation that he was tardy, and Grievant presented no evidence to support a finding that Respondent acted in an arbitrary and capricious manner in failing to do so.

There was conflicting testimony regarding whether Lt. Wood told Grievant when he spoke with him on September 26 and November 22 to report to his captain upon his return to work, and whether he told Grievant on December 13 to report to him. Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses,

> some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant testified that Lt. Wood told him on December 13 to report to his captain when he returned to work, and that he did so. He testified he was not told to report to his captain on all three occasions. In a letter Grievant submitted to Deputy Warden Painter dated January 21, 1998 (Grievant's Exhibit

1), he wrote that he did not hear Lt. Wood tell him to report to his captain onSeptember 26 or November 22, or to him on December 13, and suggested he was perhaps too sick to comprehend what Lt. Wood said to him.

Lt. Wood testified he had told Grievant on September 26 and November 22 to report to his captain upon his return to work, and he told Grievant on December 13 to report to him upon his return to work. He also testified that Grievant had told him when he called Grievant to his office on December 14, 1997, that he did not report to his captain upon his return to work after he called off on September 26 or November 22, because he thought his captain would call him in. In his Letter of Documentation, dated December 14, 1997 (Respondent's Exhibit 4), and written after his interview with Grievant on that date, Lt. Wood noted that Grievant had acknowledged that he had told him to report to his captain upon his return to work on both September 26 and November 22.

At the time his testimony was given in this case, Lt. Wood was no longer employed by Corrections. Grievant offered no reason why Lt. Wood would lie about what had occurred. Lt. Wood's testimony was straightforward, and convincing, and the undersigned is aware of no reason he would risk perjuring himself to help his former employer. Lt. Wood had nothing to gain by doing so now.

Grievant's testimony was sparse. He did not address his illnesses in his testimony, but relied upon the letter he offered into evidence. The explanation in the letter of the sudden onset and subsidence of his illness was less than convincing. Likewise, he relied primarily upon the explanation in the letter in regard to whether Lt. Wood told him to report to his captain, and did not directly address whether he had told Lt. Wood he did not report to his captain upon his return to work because he thought he would call him in. Grievant's credibility was also called into question by his response when he was asked why he had never asked for any special accommodation due tothe severe illnesses of his daughter and wife. Grievant responded that he did not feel it was necessary, as he had not been told he was abusing sick leave or that there was a problem with it.

Accordingly, the undersigned finds the testimony of Lt. Wood more credible than that offered by Grievant. Respondent has proven that Grievant was told by Lt. Wood on September 26 and November 22 to report to his captain when he returned to work, and that he was told by Lt. Wood on December 13 to report directly to him upon his return to work, and he failed to follow these orders.

Grievant also argued that by not promptly punishing him for failing to report to his captain after the September 26 incident, Respondent's "prior acquiescence demonstrates an inconsistent and

confusing application of its policy." Grievant cannot be excused from the duty to follow orders simply because he got away with it once.

Respondent has proven the charges against Grievant. Respondent warned and counseled Grievant on numerous occasions about how important it was to the state's maximum security prison that he report to work on time and as scheduled. Finally, Grievant was suspended in an effort to correct his chronic tardiness. It should have been crystal clear to Grievant that Respondent was serious about its requirement that employees report to work as scheduled. Grievant's additional violations, after the numerous warnings, reprimands, and suspension, and the impact of Grievant's actions at the state's maximum security prison, amount to good cause for Grievant's dismissal, as is allowed by Policy Directive 400. See Respondent's Exhibit 8.

The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated,whether the employee was warned about the conduct, and mitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

In Grievant's letter to Deputy Warden Painter he described the sudden onset of flu-like symptoms on December 13 so severe that he could not reach the telephone, and the equally sudden subsidence of these symptoms after taking some medicine. He stated he had awakened with flu-like symptoms on November 22, but attempted to get ready for work; and that he overslept, and had awakened achy, nauseated, and with a headache on September 26, after working six straight days, but reported to work when his headache subsided. Respondent chose not to accept Grievant's excuses, and it was not required to do so. The procedure requires that absences be reported at least two hours prior to the scheduled shift, and Grievant was aware of the procedure. It is not up to the undersigned in this case to evaluate whether such a procedure is reasonable. Apparently, Respondent believes it is a necessary procedure because Mount Olive is a maximum security facility, and certain posts must be staffed, so that notice is needed that an employee will not be reporting as scheduled.

As to whether Grievant offered valid excuses for his actions which require the undersigned to mitigate the penalty imposed, first, Grievant did not testify under oath regarding his sudden illnesses, or its severity, nor did he offer a medical opinion. Quite frankly, the fact that Grievant was able to

work double shifts on two of the three days, calls into question whether Grievant was sick at all, as does his description in the letter of his illness on December 13, and his reliance on a headache as a part of his excuse on September 26. Grievant presented no evidence that he has been diagnosed as a migraine headache sufferer.

Grievant pointed to the fact that both his wife and daughter have serious illnesses which require him to take time away from work, and that his supervisors were aware of this. While it isunfortunate that Grievant has such a burden, this is of no relevance to this case. Grievant did not ask for any special accommodation for his family illnesses, and there is no indication that such accommodation would have been denied. Importantly, on the three dates in question, Grievant called in to report his own illness. Further, it is not his family which caused him to disobey the orders to report to his captain and to Lt. Wood. There is no evidence in the record that his previous tardiness, abuse of sick leave, and unsatisfactory attendance related to his wife's and daughter's illnesses. The penalty imposed was not clearly excessive.

The following Conclusions of Law support the Decision reached.

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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Respondent has proven Grievant violated Operational Procedure 4.32A when he failed to call his employer at least two hours before his scheduled shift to report that he would not be at work.

3. Respondent has proven Grievant failed to follow a direct order to report to his captain upon his return to work after his absence on September 26 and November 22, 1997, and to report to Lt. Wood after his absence on December 13, 1997. 4. Respondent demonstrated it had good cause to dismiss Grievant.

5. Grievant failed to demonstrate that the penalty imposed was clearly excessive given the fact

that he was employed at the state's maximum security prison where his failure to report to work as scheduled jeopardized security, and given the numerous disciplinary actions previously taken against him for tardiness and abuse of sick leave.

Accordingly, this grievance is **DENIED**.

Any party 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 30, 1998

Footnote: 1

Grievant was represented at the Level IV hearing held on March 9, 1998, by Jack Ferrell, and Respondent was represented by Leslie K. Kiser, Esquire. This matter became mature for decision on April 9, 1998, upon receipt of Grievant's written argument, filed on Grievant's behalf by George P. Surmaitis, Esquire. Respondent declined to submit written argument.