MICHAEL HUNDLEY,

Grievant,

v. Docket No. 97-CORR-197B

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Michael Hundley (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC), until his dismissal on April 17, 1997. (See footnote 1) He filed this action directly at Level IV on April 23, 1997, (See footnote 2) alleging that CORR, after dismissing him, improperly prevented him from working during the 15 day notice period provided by Administrative Rule 12.2 of the West Virginia Division of Personnel. A Level IV hearing was held on August 21, 1998, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by Elaine Harris, and CORR was represented by Assistant Attorney General Leslie K. Tyree. The final testimony in this grievance was taken telephonically, on March 3, 1999. The parties were given until April 27, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by CORR as a Correctional Officer until his dismissal on April 17, 1997.

2. At the beginning of his shift on April 17, 1997, Grievant met with Deputy Warden Howard Painter (Painter), who informed him that he was being dismissed, but could work during his 15 day

notice period. Grievant chose to work during the 15 day period.

3. After this meeting, Grievant reported to MOCC's Operations office to receive his assignment for the day. Captain William Vest (Vest) told Grievant that he would be assigned to the Observation Tower (Tower).

4. Grievant questioned Vest regarding his assignment to the Tower. Grievant told Vest that he was not trained for the Tower, and that all sorts of things could go wrong. Vest told Grievant that someone would be sent to train him, and that he should consult the Tower's post orders for instruction. 5. Grievant reported to the tower and worked a full shift there.

6. The Tower is reached by climbing stairs from MOCC's Central Control area. The Tower is staffed by one officer, for two shifts each day. It is approximately 100 feet tall, and is approximately 40 feet taller than the buildings below it.

7. The Tower's post orders provide that, in case of fire, the Tower Officer will descend the stairs to Central Control. The secondary escape route is out the window and down an emergency ladder.

8. After reading the Tower post orders, Grievant looked in vain for an emergency ladder, rope, and/or a fire extinguisher. Finding none, he contacted Vest, who came to the Tower and also failed to find these items.

9. By letter dated April 18, 1997, CORR dismissed Grievant immediately, instead of allowing him to work during his 15 day notice period, for insubordination constituting gross misconduct.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed.1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof.

Id.

A grievant no longer in the employ of a respondent generally has no right to file a grievance as the employment relationship has been terminated. However, a grievance may be filed when that termination is the subject of the grievance, as is the case in this grievance. Stroop v. W. Va. Dep't of Military Affairs and Public Safety, Adjutant General, Docket No. 97-ADJ-476 (Dec. 18, 1997); See Jackson v. W. Va. Div. of Corrections/Div. of Personnel, Docket No. 97-CORR-345 (Jan. 30, 1998).

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed “Fifteen (15) calendar days after notice in writing. . . ." However,

> Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of the dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

Under this Rule, State agencies are vested with the discretionary authority to dismiss an employee without a 15 day notice, if the cause for the dismissal is gross misconduct. An employer ordinarily cannot be found to have violated the fifteen-day notice requirement, unless the underlying conduct forming the basis for the dismissal plainly does not constitute gross misconduct. Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan.22, 1990). See Bennett v. W. Va. Dep't of Health and Human Resources, Huntington State Hospital, Docket No. 98-HHR-378 (Apr. 27, 1999). (See footnote 3)

CORR dismissed Grievant immediately, instead of allowing him to work during his 15 day notice period, for insubordination constituting gross misconduct.

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). An employer also has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). An employer can substantiate an allegation of insubordination by showing thatthe employee was given an order which did not entail unnecessary physical risk to himself or other employees, and that he failed to comply. See Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997). (See footnote 4)

Respondent failed to sustain its burden of proof in this matter. The uncontradicted testimony of Vest, Warden Painter, and Grievant, established that, when Vest ordered Grievant to the Tower, Grievant complied, and worked his full shift there. Grievant did question Vest about Grievant's lack of training for the tower position, and it is understandable that Vest did not appreciate Grievant doing so. (See footnote 5) However, because Grievant reported to the Tower as ordered, the undersigned administrative law judge cannot find that Grievant disobeyed the direct order of a superior entitled to give such an order. Riddle, supra.

Grievant's questioning of Vest was also sanctioned by CORR's policy. Policy Directive 400.00 (Policy Directive 400), entitled Employee Standards of Conduct andPerformance, provides that CORR “expects its employees to. . . . . [d]iscuss with their immediate supervisors any problems arising with matters within the scope of this policy[,] Policy Directive 400 § 2; and states that “[u]nclear instructions or procedures should be brought to the attention of supervision.” Policy Directive 400 § 2.03(C).

It is also noted that Grievant raised valid safety concerns regarding the Tower Officer's post. The Tower's post orders provide that, in case of fire, the Tower Officer will descend the stairs to Central Control. The secondary escape route is out the window and down an emergency ladder. MOCC OP #1.10, Attachment #16, Mar. 1, 1997.

An administrative body, such as CORR, must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); Powell v

Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); White v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-423 (Feb. 3, 1999).

After reading the Tower post orders, Grievant looked in vain for an emergency ladder, rope, and/or a fire extinguisher. Finding none, he contacted Vest, who came to the Tower and also failed to find these items. Grievant argued at Level IV that the approximately 40 foot drop from the Tower post to the nearest rooftop placed his life, and the life of any other Tower Officer, in jeopardy should a fire occur. This argument was well taken. Absent the emergency ladder mandated by CORR's policy, assignment to the Tower entailed unnecessary physical risk to Grievant and to other employees. See Hundley, supra. Finally, both Painter and Vest acknowledged that Grievant's questioning of Vest's order consisted of raising safety concerns.

Because Grievant's conduct did not constitute insubordination, his conduct, formingthe basis for his immediate dismissal, plainly does not constitute gross misconduct. Davis, supra. Accordingly, CORR erred in preventing Grievant from working during his 15 day notice period. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed “Fifteen (15) calendar days after notice in writing. . . ." However,

> Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of the dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

3. Under 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998), State agencies are vested with the discretionary authority to dismiss an employee without a fifteen-day notice, if the cause for the dismissal is gross misconduct. An employer ordinarily cannot be found to have violated the fifteen-day notice requirement, unless theunderlying conduct forming the basis for the dismissal plainly does not constitute gross misconduct. Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). See Bennett v. W. Va. Dep't of Health and Human Resources, Huntington State Hospital, Docket No. 98-HHR-378 (Apr. 27, 1999).

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

5. An employer can substantiate an allegation of insubordination by showing that the employee was given an order which did not entail unnecessary physical risk to himself or other employees, and that he failed to comply. See Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997).

6. Respondent CORR failed to meet its burden of proof and demonstrate, by a preponderance of the evidence, that Grievant was guilty of insubordination constituting gross misconduct.

Accordingly, this grievance is **GRANTED**, and Respondent CORR is **ORDERED** to pay Grievant the salary he would have earned had he worked the balance of his 15 day notice period, including interest.

Any party or the West Virginia Division of Personnel may appeal this decision to theCircuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W.Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 21, 1999

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Footnote: 1

Grievant's grievance of his dismissal was denied. Hundley v. W. Va. Div. of Corrections, Docket No. 97-CORR-197A (May 12, 1999).

Footnote: 2

This grievance was originally assigned to Administrative Law Judge (ALJ) Jerry Wright, who issued an Order Compelling Discovery to CORR on September 4, 1997. It was reassigned for administrative reasons to ALJ Mary Jo Swartz on November 5, 1997. This grievance was again reassigned for administrative reasons to the undersigned ALJ on March 18, 1998. A Level IV hearing was scheduled for July 10, 1998, but was continued on CORR's unopposed motion of July 8, 1998. After the Level IV hearing of August 21, 1998, a second day of the Level IV hearing was scheduled for December 22, 1998, but was continued on CORR's unopposed motion of December 11, 1998. A second day of the Level IV hearing was scheduled for February 10, 1999, but was continued by agreement of the parties.

Footnote: 3 *House Bill 2262, signed Mar. 31, 1999, provides that a dismissed employee may elect to receive severance pay for this 15 day period.*

Footnote: 4 *See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1997) (Grievant held insubordinate for stomping on her evaluation and threatening to blow her principal's head off with a shotgun); Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sep. 19, 1997)(Grievant held insubordinate for falsifying student records); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)(Grievant held insubordinate for grabbing, threatening, and cursing student); Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995)(Grievant held insubordinate for refusing to meet with his supervisor and refusing to acknowledge his refusal); Arbaugh v. Putnam County Bd. of Educ., Docket No. 90- 40-437 (May 22, 1991)(Grievant held insubordinate for refusing to work).*

Footnote: 5 *Grievant plausibly testified that his statement to Vest, that he was not trained for the Tower, and that all sorts of things could go wrong, meant only that he might accidentally "kick" or open a gate or sally port controlled from the Tower. Grievant testified without contradiction that training for a post such as the Tower typically took one week.*