HOPE MARTIN,

Grievant,

v. **Docket No. 99-CORR-009**

WEST VIRGINIA DIVISION OF CORRECTIONS/
DENMAR CORRECTIONAL CENTER,

Respondent.

DECISION

Hope Martin (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer (CO) II at the Denmar Correctional Center (Denmar), until her dismissal on December 17, 1998. She filed this action directly at Level IV on January 8, 1999, alleging that CORR lacked proper cause to dismiss her. Grievant does not allege that discrimination or retaliation motivated her dismissal. Grievant seeks reinstatement and such other relief as may be deemed proper.

A Level IV hearing was held on May 18, 1999, (See footnote 1) before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by William D. Turner, Esq., and CORR was represented by Assistant Attorney General Leslie K. Tyree. The parties were given until July 15, 1999, to submit proposed findings of fact and conclusions of law, and this grievance becamemature for decision on that date. 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 CO II, for a period of approximately four years, until her dismissal on December 17, 1998.

2. On or about August 12, 1998, Grievant was operating the alcohol interlock device on her

car, in order to start the car and leave work. CO Flack exposed his penis to her and mentioned oral sex (parking lot incident).

3. As a result of the parking lot incident, on August 19, 1998, Grievant met with Denmar's Chief CO, Major Dennis Mynuk. Grievant reported a pattern of sexual innuendo and horseplay that was making it difficult for her, and another female CO, to work at Denmar.

4. Other examples of the sexual innuendo and horseplay that Grievant reported included a male CO touching her breasts, two male officers pressing her against a wall, and inappropriate remarks of a sexual nature.

5. Until the parking lot incident, Grievant participated in the sexual innuendo and horseplay at Denmar, including touching a male CO on the crotch, pressing her breasts against the back of a male CO's head, touching the thighs of male COs, and looking at male COs and licking her lips.

6. Grievant did not want to make a formal complaint regarding this behavior, but rather hoped that Mynuk would speak to CO Flack privately about it. However, whenMynuk reported Grievant's information to then Denmar Warden Steven Yardley (Yardley), Yardley began a formal investigation.

7. As part of his investigation, Yardley interviewed the COs on Grievant's shift.

8. Before the investigation, the COs on Grievant's shift were a close-knit group.

9. Yardley's investigation focused at least as much on the behavior of Grievant as it did on the behavior of CO Flack.

10. As part of his investigation, on September 11, 1998, Yardley interviewed Grievant. At the conclusion of that interview, Yardley ordered Grievant not to discuss the interview with anyone.

11. Grievant discussed the interview with two other COs.

12. On September 17, 1998, at approximately 5:00 p.m., Grievant refused an order of the Shift Commander to work an overtime assignment beginning at 3:00 a.m., stating that she could not get a baby sitter and would take a reprimand.

13. On November 22, 1998, Grievant gave an inmate sixty-five cents to get a soft drink for her from a vending machine.

14. Money is prohibited contraband for inmates.

15. COs are trained to avoid becoming entrapped in a “favor system” with inmates. Such a system occurs when an inmate performs prohibited favors for a CO, and then threatens to report

such infractions to correctional authorities, unless the CO agrees to perform prohibited favors for the inmate.

16. Grievant's immediate supervisor verbally counseled her regarding the vending machine incident. 17. By letter dated December 17, 1998, CORR dismissed Grievant for discussing an internal investigation, refusing to work required overtime, and giving contraband to an inmate. CORR also relied upon two past disciplinary actions in dismissing Grievant.

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.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579(1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97- CORR-197A (May 12, 1999).

CORR based its decision to terminate Grievant upon provisions of its Policy Directive 400.00 (Policy Directive 400), entitled Employee Standards of Conduct and Performance. Policy Directive 400 provides three levels of disciplinary offenses. A Class A offense includes “types of behavior least

severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." A Class B offense includes "acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal." A Class C offense includes "acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal."

Specifically, CORR alleges that Grievant violated § 407-B-2 by discussing an internal investigation; § 407-B-10 by refusing to work required overtime; and § 407-B-15 by giving contraband to an inmate. CORR also relied, as part of its system of progressive discipline, on two past disciplinary actions in dismissing Grievant. Grievant does not allege that discrimination or retaliation motivated her dismissal, but contends that CORR lacked proper cause to dismiss her. Each of CORR's charges will be addressed in turn.

§ 407-B-2: "Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures." CORR alleges that Grievant violated this section by discussing an internal investigation after having been ordered not to do so. The evidence confirms that on September 11, 1998, at the conclusion of an interview with Yardley regarding the parking lot incident, Grievant was told "I'm going to caution you the same way that I've cautioned everybody else that I've talked to. What has been said in here, stays in here. It's not for public broadcast and it's not for public display. What was said in here stays in here. It is part of an official record now and is not for discussion. Any questions about that?" Grievant replied "No." She also later signed a copy of the transcript of this interview. However, at an interview with Denmar Warden Mark Williamson (Williamson) (See footnote 2) on December 2, 1998, Grievant confirmed that she had discussed her interview with CO Puffenbarger, and also with a CO from another institution. Grievant defends her discussion of the investigation by arguing that the COs with whom she discussed the investigation were not part of the investigation. However, Warden Yardley's order to her, stating that the interview was "not for discussion," clearly prohibited any such discussion. Accordingly, CORR has established that Grievant committed this Class B offense.

§ 407-B-10: "Refusal to work required overtime."

CORR alleges that Grievant violated this section, on September 17, 1998, by refusing an order of the Shift Commander to work an overtime assignment beginning at 3:00 a.m. Grievant responds that

no written policy exists requiring mandatory overtime; that she had recently worked overtime and was thus being called out of turn; and that she could notget a baby sitter for her infant.

However, CORR established that the job description for the position of Correctional Officer I states that "[a]pplicants are subject to mandatory overtime requirements[,]" and that 143 CSR § 15.7, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998) provides that "[a]n appointing authority. . . . may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered necessary to the public interest[.]" Denmar's Monthly Overtime Report for September, 1998, does not show that she had worked any overtime in September, and Grievant's time card for September, 1998, does not show that she had worked any overtime in September. Grievant's Shift Commander, Lieutenant Cox, credibly testified at Level IV that his subordinate, Lieutenant Galford, called COs scheduled to work the next day, who were unavailable for duty, until she reached Grievant's name; that Grievant was called at 5:00 p.m. for the 3:00 a.m. shift; that public safety required that Grievant's position be covered; that it was Grievant's turn to be selected for overtime; that he gave her a direct order, through Lieutenant Galford, to report to work; and that Grievant replied that she would take a reprimand. Grievant never reported for the overtime assignment. Accordingly, CORR has established that Grievant committed this Class B offense.

§ 407-B-15: "Giving or offering an unauthorized article or favor to any inmate, parolee, ex-inmate, their families or friends."

CORR alleges that Grievant violated this section by giving an inmate sixty-five cents to get a soft drink for her from a vending machine. CORR argues that money is contraband, and that asking an inmate to do such a favor is the first step in the dangerous "favorsystem" described in finding of fact seven.

Grievant responds that she needed the soft drink because she was choking on food. However, evidence presented at Level IV supported CORR's version of events. CORR presented credible testimony to show that Grievant was posted outside Denmar's medical unit when she allegedly began to choke; that the vending machine used by the inmate was two floors below her post; that a water fountain was located nearby; and that several other COs were available to relieve her so that she could seek medical help or purchase a soft drink. It is also noted that the incident report, describing this incident, completed by Grievant on the day of the incident, made no mention of her choking on food.

Accordingly, and because Grievant admits that she gave an inmate sixty-five cents to get a soft drink for her from a vending machine, CORR has established that Grievant committed this Class B offense.

Noting that, under Policy Directive 400, discipline is cumulative, CORR also relied on the following disciplinary actions in dismissing Grievant:

§ 407-A-5: "Inadequate or unsatisfactory job performance."

On August 13, 1997, Grievant received a written reprimand for asking an inmate to bring a live snake into Denmar, for the purpose of scaring a co-worker.

§ 407-B-12: "Arrest and conviction for public intoxication, driving under the influence, or associated offenses while on or off duty."

On March 5, 1998, Grievant received a five day suspension for her plea of No Contest to a charge of Driving Under the Influence and a charge of Obstructing a Police Officer. Under Policy Directive 400, a written notice of a Class A offense remains "active" (See footnote 3) for two years from its date of issuance. A first Class A offense warrants a reprimand to a five day suspension, with a second such offense warranting a suspension of from six to fifteen days, a third such offense warranting a suspension of 16 days through dismissal, and a fourth such offense normally warranting dismissal.

A written notice of a Class B offense remains "active" for three years from its date of issuance. A first Class B offense warrants a suspension of from five to fifteen days, with a second such offense warranting a suspension of from sixteen to thirty days, and a third such offense warranting a suspension of 31 days through dismissal.

The cumulative effect of CORR's disciplinary actions against Grievant is sufficient to support her dismissal. Under Policy Directive 400, all of CORR's previous disciplinary actions against Grievant are still "active," so that, when the charges proven by CORR in this grievance are added to them, Grievant has one Class A offense, and four Class B offenses. As noted above, a third Class B offense justifies dismissal. Accordingly, CORR has established, by a preponderance of the evidence, that its dismissal of Grievant was authorized by Policy Directive 400.

However, CORR's actions in dismissing Grievant are nonetheless disturbing. Wardens Yardley and Williamson, while allegedly investigating CO Flack's behavior in the parking lot incident, appeared to be at least as interested in building a case against Grievant. It was unclear how the investigation of alleged sexual harassment directedagainst Grievant came to focus instead on her

own behavior. What is clear is that an undesirable atmosphere of sexual innuendo and horseplay existed at Denmar. Grievant was, at first, a willing participant, but later sought to informally report the situation when the parking lot incident caused the situation to become unwelcome and offensive to her. CORR's subsequent formal investigation appeared to contribute to other COs on Grievant's shift turning against her, and it is hard to see how these events will not discourage other COs from reporting future instances of sexual harassment.

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. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999). 3. Respondent CORR proved, by a preponderance of the evidence, that Grievant committed a Class B offense by discussing an internal investigation after having been ordered not to do so, a Class B offense by refusing to work required overtime, and a Class B offense by giving an inmate sixty-five cents to get a soft drink for her from a vending machine.

4. Respondent CORR proved, by a preponderance of the evidence, that Grievant had previously committed one Class B offense and one Class A offense.

5. Under Respondent CORR's Policy Directive 400, Grievant's total of four Class B offenses and one Class A offense constitutes sufficient grounds for her dismissal.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit 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 August 24, 1999

Footnote: 1

A Level IV hearing in this grievance, scheduled for March 12, 1999, was continued by agreement of the parties. On February 22, 1999, this grievance was reassigned, for administrative purposes, to the undersigned administrative law judge.

Footnote: 2

During the course of these events, Williamson became Warden at Denmar.

Footnote: 3 *A past infraction's "active" status means that CORR may add that infraction to a current one when disciplining an employee.*