BRANDON JONES,

Grievant,

v. Docket No. 04-CORR-315

DIVISION OF CORRECTIONS/
ST. MARYS CORRECTIONAL CENTER,

Respondent.

DECISION

This matter was filed directly at level four on August 13, 2004, by Brandon Jones ("Grievant"), challenging the termination of his employment as a Correctional Officer IV at St. Marys Correctional Center ("St. Marys"). After unsuccessful attempts at mediation and the scheduling of a level four hearing, the parties elected to submit this matter for a decision based upon documents assembled during the Division of Corrections' ("DOC") investigation into matters involving Grievant. (See footnote 1) On May 10, 2005, this grievance was reassigned to the undersigned administrative law judge in an effort to expedite the level four decision. After the parties provided additional information regarding identification of documents in the record, this matter became mature for consideration on June 10, 2005. Grievant was represented by Jack Ferrell of CWA, and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Prior to his termination, Grievant had been employed at St. Marys for approximately five years and was classified as a Correctional Officer IV (Sergeant). He had been an employee of the Division of Corrections since 1996.

2. Prior to his employment at St. Marys, Grievant had been employed at Pruntytown Correctional Center. His employment there was terminated on August 11, 1999, following his arrest for impersonating a police officer and stalking, both charges resulting from Grievant's behavior toward

a woman with whom he had previously had a romantic relationship. Another factor leading to his termination from that position was Grievant's history of domestic battery charges dating back several years at that time. Grievant was also previously employed at Mt. Olive Correctional Complex and the Eastern Regional Jail.

3. In September of 2003, Grievant entered into a romantic relationship with Heather Hashman, an employee of the medical services department at St. Marys.

4. In late 2003, Ms. Hashman sought a domestic violence petition against Grievant, due to constant conflict in their relationship. She later dropped the petition, because Grievant said he was going to seek counseling, and they were going to work out the problems in their relationship.

5. During their relationship, Grievant frequently came to the medical services department to talk with Ms. Hashman, and he also called her desk constantly. They often argued, and Ms. Hashman's supervisor had to remind them on several occasions that such conduct was not appropriate in the workplace.

6. Ms. Hashman permanently ended her relationship with Grievant in early May of 2004. 7. After the breakup, Grievant would yell to Ms. Hashman as she was entering or leaving St. Marys, following her at times, and saying things to the effect of “I love you-- why are you doing this to me?” Also, on a few occasions, Grievant sent letters to Ms. Hashman through her coworkers and sent flowers and balloons to her at work. Once he made a statement that he “would finish this.” These events occurred in early June of 2004.

8. After ending her relationship with Grievant, Ms. Hashman began dating Corporal Matthew Eichhorn, also an employee of St. Marys.

9. Throughout his employment at St. Marys, Grievant had assembled a “study guide” containing interview questions asked during promotion board interviews, along with information regarding specific knowledge areas addressed during the promotional process. Grievant had allowed Corporal Eichhorn and at least two other people to borrow the study guide prior to their promotion interviews.

10. Lt. Dale Munday was Grievant's supervisor prior to May of 2004, when Grievant worked day shift.

11. Ms. Hashman complained to St. Marys officials about Grievant's conduct toward her after their breakup, stating that she felt harassed. As a result, in early May, Grievant was transferred to

afternoon shift.

12. On June 1, 2004, Grievant greeted James Vaughn, a CO II, as he entered the facility. He made a statement to Officer Vaughn regarding how “they had taken [Vaughn's sergeant status] from you” and “I might be losing my position too, but I'm going to take a corporal and a lieutenant with me.” Several other officers witnessed this statement. 13. Grievant was referring to Lt. Munday and Corporal Eichhorn when he made the statement on June 1. Grievant told authorities that Lt. Munday was involved in developing the study guide and knew of its distribution to a select few employees who had been up for promotion. This allegation was never corroborated by any other witnesses or evidence. Associate Warden of Security Robert Hill was charged with the responsibility of developing interview questions for promotional purposes, and there was no evidence that Mr. Hill received or solicited any such information from Lt. Munday or Grievant.

14. Grievant received a written reprimand on June 8, 2004, as a result of the statement he made regarding Lt. Munday and Corporal Eichhorn. He was advised by Deputy Warden Tony Lemasters that the statement constituted a threat and violated provisions of DOC's Progressive Discipline Policy.

15. Grievant made statements to other St. Marys employees that he was going to “kick Eichhorn's ass.” He also made a statement to Eichhorn on at least one occasion about coming by his [Grievant's] house during the evening, “so I can do to you what I'm not going to do inside the fence.”

16. On a day in early June of 2004, Grievant went to the medical services department and entered the office of Vicki Gheen, Director of Nursing. Grievant was crying and saying that he couldn't stand “what was going on in his life” and “needed to get out of here.”

17. Grievant also broke down in tears in the presence of other officers and some inmates, which occurred on an unspecified date in June of 2004.

18. When Grievant was assigned to the afternoon shift after his breakup with Ms. Hashman occurred, his supervisor, Captain James Greathouse, would not allow Grievantto carry a firearm or do prisoner transports. He recommended that Grievant be placed on administrative leave and be allowed some time to “stabilize.” However, he described Grievant as a good employee who did good work, but who was suffering from the trauma of his personal problems and “couldn't let things go.”

19. On June 15, 2004, Warden William Fox issued a written memorandum to Grievant,

advising him to have no further workplace contact with Ms. Hashman, including telephone calls and passing notes through third parties.

20. On June 23, 2004, Grievant telephoned Ms. Hashman at her desk in the medical services department, stating “you really didn't kill our baby,” at which time Ms. Hashman hung up the phone. Grievant was referring to Ms. Hashman's abortion of a child allegedly conceived during their relationship, which had occurred sometime in May of 2004.

21. Throughout June of 2004, Grievant filed numerous incident reports regarding allegations of misconduct on the part of various St. Marys employees, including Ms. Hashman, Corporal Eichhorn, and Lt. Munday. These reports discussed matters such as off-premises phone calls, statements about the personal relationships of the parties involved, an allegedly pornographic birthday cake, and an incident during which an inmate was lying on a picnic table and admonished for it by Grievant, while Corporal Eichhorn was standing nearby. (See footnote 2) Grievant also filed a report alleging Ms. Hashman had stolen medications and a CD cleaning kit from the medical services department, but these allegations could not be corroborated. 22. Grievant made statements to Corporal Eichhorn on at least two occasions that he would “have his [Eichhorn's] job.”

23. On June 22, 2004, Captain Greathouse received a phone call from Miranda Jones, Grievant's ex-wife. She informed Captain Greathouse that Grievant had “started calling her again,” and that he had a long history of stalking, domestic violence, and mental illness. She inquired whom she could speak to regarding charges against him and having him “put away.”

24. On June 22, 2004, Ms. Hashman filed another domestic violence petition against Grievant, claiming he was calling her 20-30 times a day and driving by her house at 2:00 and 3:00 in the morning, and she alleged she was frightened of him. After a hearing before a magistrate, these charges were dismissed on June 29, 2004, because the conduct did not constitute domestic violence.

25. On June 23, 2004, Grievant was suspended from his duties at St. Marys, pending a full investigation into his threatening and unprofessional conduct, allegations against other employees, and his violation of the directive to have no contact with Ms. Hashman.

26. Pursuant to the terms of his suspension, Grievant was also referred to Dr. Ralph Smith for a psychiatric evaluation. In his report dated July 1, 2004, Dr. Smith diagnosed Grievant as suffering from major depression and personality disorder, and concluded that:

> It is my opinion that this explosive situation of his working at the same facility with the ex-girlfriend and with her new boyfriend (although he serves on another shift) makes the potential for future conflicts almost inevitable. Due to his personality style, he tends to act quickly in stressful situations without much forethought, is not very self-reflective and in spite of outpatientcounseling has not developed strategies to cope with the difficulties of interacting with the other officers or with his ex-girlfriend.

> However, the recent prescription for psychotropic medication has stabilized the previously described depression which now appears to be under adequate control. Whether the absence of the depression will be sufficient to prevent future problems is uncertain. In my opinion he is at moderate risk for future difficulties working as a correctional officer. If allowed to return to work, it is my opinion that he should not work at the same facility as the ex- girlfriend.

27. On August 11, 2004, Grievant was dismissed from his position with DOC, due to the domestic violence petitions against him, his threats to other officers, and his violation of the directive regarding contact with Ms. Hashman at work. He was charged with violating the Division of Personnel Workplace Security Policy and provisions of DOC's Policy Directive 129.00, including a provision whereby:

> The Division of Corrections has the right to expect its employees to conduct themselves in such a manner that activities both on and off duty will not discredit themselves, other employees or the Division. To conduct themselves in a manner that creates and maintains respect for the Division of Corrections and the State of West Virginia. To avoid any action that might result in, or create the appearance of, affecting adversely the confidence of the public in the integrity of the Division of the State.

[and portions of the policy which prohibit:]

> Instances of disrespectful conduct or use of insulting, abusive language to or about others, . . . disruptive behavior, . . . unprofessional treatment of persons contrary to Division Policy, operational procedure, court order or philosophy, and . . . . threatening or coercing other persons.

Grievant was also informed that the violation of the warden's directive regarding contact with Ms. Hashman violated a portion of the policy directive regarding “failure or delay in following a supervisor's instructions.” (See footnote 3)

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. Dep't 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 ismore likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v.Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. Jordanv. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999); Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

Grievant has been charged with various instances of threatening, abusive, unprofessional and disruptive conduct, along with insubordination and violating DOP's Workplace Security Policy, which prohibits threatening, hostile or abusive behavior, whether physical or verbal. As discussed in Burkhammer v. Department of Health & Human Resources, Docket No. 03- HHR-276 (Nov. 12, 2003), several factors must be evaluated in cases involving the Workplace Security Policy, including whether the threat seems real, and the nature, likelihood and imminence of the potential harm.

After a careful, meticulous review of the over 1,000 pages of documents submitted as evidence in this case, the undersigned cannot escape the conclusion that Respondent did not abuse its substantial discretion in determining that Grievant's dismissal from employment was appropriate under the circumstances. Grievant's conduct has included instances of making threats against his coworkers, which he could have attempted to carry out, along with many incidents involving unprofessional and disrespectful conduct. He has cried in front of coworkers and inmates, argued

with Ms. Hashman in front of other employees, contacted her after being directed not to, and has filed voluminous incident reports over many issues which were personal in nature. Moreover, his volatile relationships with both Ms. Hashman and Corporal Eichhorn have resulted in threats both on and off of work premises, which is rightfully of concern to DOC, especially in light of Grievant's past history. Grievant was in a fairly high-ranking supervisory position at St.Marys, and exhibited repeated instances of unprofessional and disruptive conduct at the facility, which is not acceptable from any employee, especially those in supervisory positions. Finally, Dr. Smith's conclusion that further conflicts could result if Grievant continued to work at the facility has rightfully led Respondent to the conclusion that his continued employment would be risky, both to Grievant and to his coworkers.

The following conclusions of law support this Decision.

Conclusions of Law

1. 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. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v.Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR- 183 (Oct. 3, 1996). 4. Respondent has proven by a preponderance of the evidence that Grievant engaged in repeated instances of threatening, disrespectful, disruptive, unprofessional and insubordinate conduct in the course of his employment as an officer at St. Marys Correctional Center, and his termination was appropriate.

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 recordcan be prepared and properly transmitted to the appropriate circuit court.

Date: July 11, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

These documents included witness interviews conducted by investigators, incident reports, handwritten letters, criminal case court documents, and other miscellaneous documents related to the alleged misconduct of Grievant and other St. Marys employees.

Footnote: 2

Grievant contended that Eichhorn was not doing his job, because he was standing there near the inmate, and did not tell the inmate his conduct was not permitted.

Footnote: 3

The termination letter also mentioned Grievant's alleged arrest and incarceration for domestic stalking in July of 2004 as a reason for his dismissal. However, after a carefulreview of the entire record, the undersigned can find no evidence, documentation, or discussion of this alleged incident, and it was not argued by Respondent in its level four brief. Therefore, it will not be considered in this Decision.