THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CHRYSTAL BEVINS,

Grievant,

v. **Docket No. 06-DJS-209**

DIVISION OF JUVENILE SERVICES/
DONALD R. KUHN JUVENILE CENTER,

Respondent.

DECISION

Grievant, Chrystal Bevins, filed a grievance directly to Level IV against her employer on June 22, 2006, grieving her termination. For relief, she seeks reinstatement with back pay, and to have the allegations removed from her personnel file. A hearing was held at the Grievance Board's Charleston office on November 17, 2006. Grievant was represented by Jack Ferrell, Field Worker, Communication Workers of America, and Respondent was represented by Steven R. Compton, Assistant Attorney General. This case became mature following the hearing, the parties declining to file proposed findings of fact and conclusions of law.

Issues and Arguments

Respondent asserts Grievant was properly terminated after a transportation incident whereby Grievant allowed the juvenile resident to be served fast food for lunch, loosened her restraints, and allowed resident to smoke two cigarettes. Respondent argues it has followed progressive discipline with regard to Grievant's behavior in the past, and termination was the appropriate remedy. Grievant argues that a juvenile resident's version of what occurred should not be given greater weight than a Correctional Officer's version. Grievant also seems to assert she was not the

individual who actually purchased food for the juvenile, thereby diminishing her culpability.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as a Correctional Officer 2 ("CO") at the Donald R. Kuhn Juvenile Center ("Center"). (See footnote 1)

2. On May 15, 2006, Grievant transported a female juvenile resident to the Fayette County Courthouse to attend two hearings. Counselor Dawn Cavins, the juvenile's counselor, traveled in her personal vehicle to attend the hearings. On a transport, the CO is in charge at all times, as security is the priority.

3. Upon the conclusion of the first hearing, Grievant and Counselor Cavins were informed by the juvenile's attorney that the next hearing would not be for approximately another hour.

4. Grievant called the Center and spoke with Corporal Javis Brewster to inform him of the additional court hearing. Corporal Brewster then talked to Counselor Cavins and informed her that Grievant could stay with the juvenile resident while Counselor Cavins got lunch for herself and Grievant. Counselor Cavins inquired if she could get the juvenileresident something to eat for lunch, and was told the juvenile would have to eat the lunch that was packed for her.

5. Grievant, Counselor Cavins and the juvenile resident took the transport van to Burger King. They went through the drive-through, and Counselor Cavins paid for meals for all three of them.

6. Counselor Cavins was disciplined for buying the resident's lunch. This was her first rule violation.

7. Residents are to be restrained with handcuffs, belly chain/belt, and leg irons during secure transports. Once applied, they are to remain in place throughout all secure transports. The only exceptions are medical care, judicial order, return to the facility, or to effect transfer to another facility or agency. Respondent's Exhibit 6.

8. Residents restrained in this manner still have some movement with their arms and can eat and drink without having the restraints removed or loosened.

9. During transport the juvenile resident was restrained with handcuffs, belly chain, and leg irons. On a transport, security is in charge of the juvenile resident. Security takes priority.

10. After going through the fast food drive-through, Grievant went around to the back of the

van where the juvenile resident was and loosened her handcuffs, removed the lock box from around her handcuffs and gave her the food from Burger King.

11. When a resident is on transport, officers are not to stop and provide food for the resident. Meals are provided by the kitchen staff at the Center.

12. The policy of not providing additional food to residents during transport was placed in the pass down book on April 11, 2005. The pass down book is a notebook withhandwritten notes to provide information to staff. If staff members are off work for any reason, they are required to go back and review the pass down book from the past five days.

13. After eating the fast food, Counselor Cavins threw away the trash, but did not throw away any cups.

14. Grievant took cigarettes with her during the transport. While in the transportation vehicle, she laid them in the center dash area, placing them in view of the juvenile resident.

15. The Center is a smoke-free workplace. Policy prohibits employees, volunteers, education staff, or contracting personnel from carrying tobacco products on their person or concealing it in a bag or clothing while conducting business.

16. Tobacco products are not allowed in the transportation vehicle.

17. Traveling back to the facility, Grievant was to follow Counselor Cavins to a determined location. At that location, Grievant would then follow the route to take her back to the Center, and Counselor Cavins would travel the route to take her home.

18. Grievant followed Counselor Cavins for a period of time. Then at a toll booth, Counselor Cavins lost sight of the transportation van driven by Grievant.

19. Counselor Cavins pulled over and waited for Grievant and juvenile, but after approximately fifteen minutes, she continued on her way because the transportation vehicle was nowhere in sight.

20. When the transportation vehicle was returned to the Center, there were three pieces of cigarette in the fast food cup. 21. Grievant admitted to Tim Harper, Respondent's investigator, that she loosened the juvenile's hand cuffs, removed the lock box, and gave her fast food. Grievant admitted to having cigarettes with her during the transport.

22. Grievant was previously disciplined with a counseling checklist on May 11, 2004, for unsatisfactory job performance and inattention to duty. A counseling checklist was also completed on September 8, 2004, because Grievant left outside doors unsecured. On July 25, 2005, Grievant was

suspended for giving her home phone number to a former resident. The suspension also dealt with Grievant providing candy to residents.

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 is more 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); See also Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel.

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant blatantly disregarded the rules, causing a breach of security. The issue before the undersigned Administrative Law Judge is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant is guilty of this allegation. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

In this case Respondent has met its burden of proof. Grievant admitted to Tim Harper, Respondent's investigator, that she gave the fast food to the resident and loosened her restraints. These two admissions constitute gross misconduct.

Grievant seems to rely on the fact that Counselor Cavins actually purchased the fast food for the resident. However, this argument is of little merit. First, security is the main priority on a transport, and

the CO with the resident is the one ultimately responsible to ensure the safety of the resident and the public. To do that, the rules and policies established by Respondent must be followed, without exception. Second, Counselor Cavins was disciplined for the purchase as well.

What is most disconcerting is that Grievant took it upon herself, to remove the lock box from the handcuffs compromising security. This conduct is unacceptable. Grievantwas clearly aware of the protocol with respect to transporting juvenile residents. Not only did Grievant compromise her own safety, but also the safety of the juvenile and the public.

While Grievant did not admit to allowing the juvenile resident to smoke, testimony indicates that when Counselor Cavins lost sight of the transportation van, Grievant pulled over to allow the juvenile resident to smoke, once again ignoring the rules set forth by Respondent.

Grievant's employment history shows she has a pattern of disregarding the rules. Respondent has engaged in progressive discipline. However, Grievant has continued to have numerous problems.

Respondent has carried its burden of proof. The following conclusions of law support this discussion.

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). "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. 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.*

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); See also Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel.

3. The "term gross misconduct as used in the context of an employer-employee relationship

implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

4. Respondent has proven Grievant engaged in gross misconduct.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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 (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.

DATE: November 30, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

The undersigned was not provided with the date she obtained employment, but it appears as if she was employed there before July 2004.