THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TIMOTHY COFFMAN,

Grievant,

v. Docket No. 2008-0120-MAPS

DIVISION OF CORRECTIONS/ANTHONY

CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Timothy Coffman, is currently employed by the Division of Corrections ("CORR") at the Anthony Correctional Center as a Correctional Officer 2. His Statement of Grievance reads:

> **I have been denied my Procedural Due Process Rights when by letter Dated 16 July 2007 I was informed that I was being suspended without Pay for Forty (40) hours. [sic] to begin on 22 July 2007 at 0700 hrs. This only affords me a two (2) working day notice[,] not the three (3) working day notice as provided by WV Division of Personnel Administration Rule Section 12.3.** (See footnote 1)

The Relief Sought is "[t]o have the suspension removed from all personnel files, to be paid all back pay to included all bennifits (sic) that I would have accured (sic) during this time[,] otherwise made whole."

This grievance was filed on July 7, 2007, a Level One hearing was held on August 1, 2007, and the grievance was denied by decision dated August 6, 2007. Grievant appealed to Level Two, and mediation was scheduled. The parties then waived mediation, and a Level Three hearing was scheduled. The parties then requested a continuance ofthis hearing, and it was

finally rescheduled for September 9, 2008, in Beckley, West Virginia. At this hearing, the parties repeated their arguments, and no testimony was taken. Grievant was represented by Correctional Officer John Robinson, and Charles Houdyschell, Esq., represented CORR. This matter became mature for decision on the hearing date, as the parties agreed there was no need to submit proposed Findings of Facts and Conclusions of Law.

Synopsis

Respondent avers the suspension was properly issued for cause, and all procedural requirements were followed. Grievant admits he was sleeping on the job, and the only assertion raised by this grievance is his contention that CORR failed to give him proper notice. For the reasons discussed below, this grievance must be DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by CORR as a Correctional Officer 2.
2. On June 26, 2007, Correctional Officer 4 Jeff Brown reported Grievant for sleeping while he was assigned to guard a prisoner at the Greenbrier Valley Medical Center on June 25, 2007.
3. A pre-disciplinary conference was held on July 16, 2007, and by letter dated Monday, July 16, 2007, Grievant was suspended for forty hours for sleeping on duty. The fact Grievant was armed at the time was also noted. The suspension was to begin Sunday, July 22, 2007.
4. Grievant received the suspension letter on Monday, July 16, 2007.
5. Grievant worked Monday through Wednesday, July 16 - 18, 2007, and his regular days off were Thursday through Saturday, July 19 - 21, 2007.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). *Leichliter v. W. Va. Dep't of Health and 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*.; *See Adkins v. Smith*, 142 W. Va. 772, 98 S.E.2d 712 (1957); *Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

In this instance, Grievant does not contest the fact he was sleeping on duty, he only contests that the suspension notice requirement was not met. His argument is based on Division of Personnel Rule 12.3 which states:

> 12.3. Suspension - An appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job. . . . Prior to the effective date of the suspension, the appointing authority or his or her designee shall: meet with the employee in a predetermination conference and advise the employee of the contemplated suspension; give the employee oral notice confirmed in writing, or written notice of the specific reason or reasons for the suspension; and, give the employee a minimum of three working days advance notice of the suspension to allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. . . .

(Emphasis added). Division of Personnel Rule 3.26 defines "Day" as "[u]nless otherwise specified, the use of 'day' means a calendar day," and Rule 3.96 defines " Workweek" as "[t]he time period of seven consecutive days, beginning and ending at specified days and times, during which work is performed and work hours reported for compliance with applicable federal and state labor laws." The Division of Personnel does not have a definition for the term "working days."

W. Va. Code § 6C-2-2(c) states, "Days" means "working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

The issue of how to define the term "working days" has already been determined by the Grievance Board in multiple cases. In *Sheppard v. Department of Health and Human Resources*, Docket No. 01-HHR-598DEF (May 9, 2002), the Department of Health and Human Resources did not count the days the grievant was on suspension in the time frame to respond to his grievance. The administrative law judge held

> "Working days" refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a

> work week comprising "regular working hours," defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday.

In *Roy v. Division of Highways*, Docket No. 05-DOH-150DEF (July 12, 2005), the Division of Highways did not count the grievant's regular day off, a Friday, in responding to his Level One grievance. The administrative law judge quoted *Sheppard* and found the agency was in default. In *Wilkinson v. Division of Corrections*, Docket No. 06-CORR-066D (June 6, 2006), the administrative law judge cited *Sheppard* and held the agency wasincorrect when it interpreted "working days" to mean only the days grievant actually worked.

As demonstrated by the above-cited cases, when counting working days, the employer is to utilize the normal work week for conducting business, and this is for "most West Virginia state government agencies, . . . Monday through Friday." *Sheppard, supra*. As stated in Division of Personnel Rules 12.3, the purpose of the notice period is to give an employee a reasonable time to reply, in writing or in person, to the charges. It only makes sense that working days are seen as Monday through Friday, as most Administrators tasked with receiving this response or meeting with the individual are not in the office on weekends, and most state employees do not routinely work on weekends.

Accordingly, the undersigned Administrative Law Judge finds Grievant did receive proper notice, and no error occurred when CORR gave Grievant notice on Monday, July 16, 2007, that his suspension would start four working days later on Sunday, July 21, 2007. (See footnote 2)

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). *Leichliter v. W. Va. Dep't of Health and Human Res.*, DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.; *See Adkins v. Smith*, 142 W. Va. 772, 98 S.E.2d 712 (1957); *Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

2. "'Working days' refers not to days when an employee is actually working, or

performing the duties and responsibilities of his or her job, but rather refers to a work week comprising 'regular working hours,' defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday." *Sheppard v. Dep't of Health and Human Res.*, Docket No. 01-HHR- 598DEF (May 9, 2002)*; Roy v. Div. of Highways*, Docket No. 05-DOH-150DEF (July 12, 2005). *See Wilkinson v. Div. of Corr.*, Docket No. 06-CORR-066D (June 6, 2006).

3. Grievant's procedural due process rights were not violated, and he received proper notice of his suspension.

Accordingly, this grievance is DENIED.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: October 31, 2008

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Janis I. Reynolds

Administrative Law Judge

Footnote: 1

Grievant capitalizes randomly.

Footnote: 2

The day Grievant received the suspension letter would not be counted.