THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CLARENCE WEST,

Grievant,

v. **Docket No. 07-DJS-034**

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Clarence West, was employed by the Division of Juvenile Services ("DJS") as a Correctional Officer 2. He filed this grievance over his termination on January 26, 2005. His Statement of Grievance states, "Employment termination." The relief sought reads, "return to work with all back pay and all amenities."

This grievance was filed directly to Level IV, but Grievant's representative asked that the grievance be placed in abeyance until the resolution of other legal issues, and this request was granted. On December 14, 2006, Grievant's attorney, Michele Rusen, requested the case be set for hearing. After several continuances, a Level IV hearing was conducted in Parkersburg at the City Building on October 11, 2007, and in the Grievance Board's Charleston office on February 21, 2008. Respondent was represented by Steve Compton, Esq. This matter became mature on March 25, 2008, following the submission of a transcript provided by DJS. The parties elected not to submit proposed Findings of Facts and Conclusions of Law.

Synopsis

Respondent asserted it established Grievant was guilty of receiving and/or soliciting gifts, favors, or bribes in connection with his official duties and providing contraband to a resident.

Initially, Grievant asserted he was innocent of the charges, was being retaliated against for his complaints about DJS, and requested reinstatement. At the February hearing, Grievant stated he was no longer able to perform the duties of the Correctional Officer 2 position, and he had applied for disability. Grievant also admitted he did provide contraband to a resident of his facility, and he should have been terminated for this act. Further, Grievant stated he was not entitled to back pay because his termination for providing contraband was correct.

At that point, the undersigned Administrative Law Judge asked Grievant what relief he was now seeking, and Grievant responded he wanted his termination letter to state he was only dismissed for providing contraband to the resident. DJS would not agree to this change in Grievant's termination letter, and the hearing went forward. At this point in time, the only issue before the undersigned Administrative Law Judge is whether DJS established Grievant is guilty of receiving or soliciting gifts, favors, or bribes from resident KW (See footnote 1) in connection with his official duties.

For the reasons listed below, the undersigned Administrative Law Judge concludes Grievant did receive and/or solicit gifts, favors, or bribes in connection with his official duties. Grievance 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 was employed by DJS as a Correctional Officer 2 in July 2000. At the time of his termination, he was assigned to the North Central Regional Juvenile Detention Center. The residents at DJS facilities are minors.

2. In late November or early December of 2007, Grievant informed Director T. D. Melton that one of the residents, KW, was giving him information about his past criminal activities.

3. Contrary to Grievant's assertions, Director Melton did not tell Grievant to keep KW talking, and did not tell Grievant "repeatedly" that he would call Charleston and get a "wire" for Grievant to wear. Director Melton did tell Grievant if he heard anything to let him know, but never indicated Grievant should conduct an investigation and wear a wire.

4. If a Correctional Officer is offered a bribe, he is to complete an incident report.

Contrary to Grievant's assertion, Director Melton did not tell Grievant he should not complete an incident report about the bribe.

5. KW offered Grievant a bribe for favors while incarcerated, but Grievant never informed Director Melton of this fact.

6. Grievant admitted he gave the contraband substance, snuff, to KW in early December 2004. This act violates various DJS policies and can result in termination of the employee.

7. On December 5, 2004, when KW was questioned about the snuff by Sargent Harlan Lott, Chief Security Officer, he admitted Grievant had given it to him. KW alsoreported a friend of his was to give Grievant $1,500 on December 7, 2004, at the 7th Street Go Mart in Parkersburg. Thereafter, Grievant was to provide KW with additional favors such as snuff, food, and drugs.

8. Sgt. Lott called Director Melton, Director Melton called Central Office, the State Police were brought in, and the Parkersburg Violent Crime and Narcotics Task Force was contacted. After discussion and review of the allegations by various law enforcement officials, KW was wired for a conversation with Grievant on December 6, 2004.

9. In this December 6, 2004 conversation, Grievant and KW confirmed the meeting place and time for Grievant to receive the money, and the favors KW would expect in return. (See footnote 2)

10. On December 7, 2004, Grievant went to the Go Mart at the designated time. He did not tell Director Melton of this meeting, and he did not ask about wearing a wire. He was approached by an officer impersonating KW's friend. Grievant and the undercover officer discussed what would be expected in exchange for the money, and, after the money was counted out, Grievant was arrested.

11. Grievant agreed to go to the Police Department to give a statement, waived his Miranda rights, and gave a recorded statement. (See footnote 3) **In that statement, Grievant told the officers it was all a big misunderstanding, he was only expecting $10 to pay for his gas for going to the Go Mart, and he expected to receive a couple of magazines to give to a resident of the facility. 12. The taped conversation of December 6, 2004, between Grievant and KW contained no discussion of gas money and picking up a couple of magazines. The conversation did indicate Grievant would receive $1,500 and did point out the favors KW**

expected in exchange for this money.

13. While Grievant was at the Police Station, Director Melton verbally told Grievant he was suspended until an investigation could be conducted. This verbal suspension was followed by a letter dated December 8, 2004, stating the same information.

14. Grievant was terminated by letter dated January 19, 2005, for receiving and/or soliciting gifts, favors, or bribes in connection with his official duties and for providing contraband to a resident.

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 (See footnote 4) **; *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 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*.**

The administrative rules of the West Virginia Division of Personnel also provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal 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 Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

As previously stated, the only issue remaining before the undersigned Administrative Law Judge is whether DJS has met its burden of proof and demonstrated Grievant received and/or solicited gifts, favors, or bribes in connection with his official duties.

I. Credibility

An issue to address is credibility, as Grievant asserts he never intended to keep the money, he believed he was only going to receive $10 for gas money, and was so shocked when the $1,500 was counted out, he could not react. Additionally, Grievant asserts he was asked by Director Melton to conduct this "investigation," and was told by Director Melton not to report the bribe offer. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93- HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96- 29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 5) ***See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and mayconsciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990).**

The undersigned Administrative Law Judge finds Grievant's testimony to lack credibility. Grievant was unable to explain the discrepancies in his story. Many statements were just not plausible, and his statements were, at times, inconsistent and in direct contradiction to the recorded conversations. For example, Grievant stated he expected to get $10 dollars for gas

and collect some magazines, but the taped conversation with KW, recorded just the day before, does not support Grievant's theory. Grievant also could not explain why he made no attempt to obtain the wire he testified Director Melton promised. II. Merits

In this case, the evidence is overwhelming that Grievant did intend to accept a bribe from KW in exchange for favors. He attended the planned assignation, and made no attempt to make DJS aware of the meeting or to obtain the wire he says he was promised. Grievant's actions were of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Buskirk. supra*. Accordingly, DJS had good cause to terminate Grievant and has proven all the charges identified in the letter.

The above-discussion will be supplemented by the following Conclusions of Law.

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 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*.

2. The administrative rules of the West Virginia Division of Personnel also provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal 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 Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. Grievant's actions were of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Buskirk. supra*.

4. Respondent has met its burden of proof and established Grievant is guilty of the charges identified in his termination letter.

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. *See* W. Va. Code § 29-6A-7 (*See* Footnote 4*, supra; repealed by* Senate Bill No. 442, March 7, 2007*) (but see* Executive Order *No. 2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: April 1, 2008

Footnote: 1

In keeping with the Grievance Board's policy, the names of minors are not used, just the initials.

Footnote: 2

A recording of this conversation was played during the Level IV hearing.

Footnote: 3

A recording of this statement was played during the Level IV hearing.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W.

Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 5

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).