THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL CLIVER,
Grievant,

v. **Docket No. 2008-1069-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

Grievant Michael Cliver filed his grievance on January 17, 2008. The statement of grievance reads, "Have been unjustle [sic] charged with employee neglect."

For relief, Grievant seeks "Remove all disciplinary action from record and to be made whole."

A level three hearing was held on June 23, 2009 and August 14, 2009, at the Grievance Board's Charleston office. Grievant was represented by Barbara Harmon-Schamberger, Esquire, and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This case became mature for decision on September 30, 2009, upon receipt of the parties' findings of fact and conclusions of law.

Synopsis

Grievant was suspended for 5 days without pay for violating policies and procedures. Respondent asserts that on November 29, 2007, Grievant failed to update the Daily Log and the Mount Olive Work Camp Log Book upon relieving Correctional Officer ("CO") Jason Bragg. Respondent avers that on that day, Grievant also failed to follow policy and declare a condition yellow when an inmate was unaccounted for.

Grievant asserts he worked at the Mount Olive Work Camp, and because the Work Camp was quite different than Mount Olive Correctional Complex ("MOCC"), the General

Policies of MOCC are impractical for most purposes associated with the Work Camp's day to day operation. Grievant further argues that when it was brought to his attention that an inmate was unaccounted for, Grievant checked all possible locations to determine the inmate's whereabouts. Immediately upon concluding his search, without finding the inmate, Grievant spoke with Associate Warden Paul Parry. Grievant avers that he used his best judgement given the situation.

Respondent has met its burden and this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent and works at MOCC. He holds the position of Correctional Officer V and the rank of Lieutenant.

2. During the time of this incident, Grievant was assigned as the unit supervisor of the Mount Olive Work Camp, now called the Betty Slayton Work Camp.

3. The Work Camp is outside the Mount Olive Correctional Complex perimeter. It houses up to 48 inmates who are assigned to perform outside road crew work.

4. The Work Camp is run by MOCC, and the chain of command and supervisory structure goes through MOCC.

5. On November 29, 2007, at approximately 7:00 a.m., CO Jason Bragg began working the officer's desk. He did not do a spot count at this time.

6. CO Bragg was informed that inmate Robert Brady would not be working the road crew due to a hand injury. CO Bragg never recorded this information in the Log Book and the Daily Log.

7. At approximately 8:00 a.m., Grievant relieved CO Bragg. CO Bragg told Grievant he had filled out the Daily Log Sheet and had entered security checks until 10:30 a.m.

8. Grievant did not write in the log that he relieved CO Bragg. Grievant also did not perform the security checks that CO Bragg had previously logged.

9. Grievant was not informed that inmate Robert Brady was not working on the road crews.

10. At approximately 11:00 a.m. CO Bragg returned to the Work Camp and informed Grievant that he had completed a count and one inmate was unaccounted for.

11. Grievant instructed CO Bragg to perform another count and look in all areas around the Work Camp. Grievant began calling the work crews to verify what inmates they had on their crew.

12. By approximately 11:30 a.m., Grievant knew inmate Robert Brady was missing. Grievant left the Work Camp to inform Mr. Parry who was attending a meeting in the Mount Olive Correctional Complex. Before going to Mr. Parry, however, Grievant checked all the satellite areas.

13. At 12:05, Grievant entered the Quilliams Unit, where Mr. Parry was attending a meeting. Grievant did not interrupt the meeting but stood outside the door's window hoping Mr. Parry would notice him and stop the meeting.

14. Grievant eventually interrupted the meeting and explained to Mr. Parry that inmate Robert Brady was unaccounted for.

15. At approximately 12:25 p.m., Mr. Parry explained the situation to Warden Ballard, and Warden Ballard had Mr. Parry call and have the work crews return.

16. At approximately 12:45 p.m., Warden Ballard called a Condition Yellow for MOCC and a Condition Red for the Mount Olive Work Camp.

17. A Condition Yellow prevents vehicles from leaving the premise, the K-9 unit is called out to secure the perimeter, and all staff is alerted to a potential problem.

18. Any staff member can and is expected to call a Condition Yellow if count has not cleared.

19. It was later discovered that inmate Robert Brady had escaped with the assistance of CO Clarissa Johnson who allowed him to hide in the work van she was driving.[1]

20. It was recommended Grievant receive a ten day suspension, but that was reduced to five days after taking his service record and lack of previous disciplinary action into consideration.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. 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. West Virginia Department of Health & Human*

---

[1]Inmate Robert Brady was not found for approximately two to three months after the escape and was prosecuted for escaping. CO Clarissa Johnson was prosecuted for her role in the escape.

Resources, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent asserts Grievant was suspended for violating Operational Procedures and Policy Directives by not documenting in the Daily Log and the Log Book when he relieved CO Bragg. Also, Respondent argues Grievant failed to follow established procedure when it was discovered inmate Robert Brady was unaccounted for and Grievant did not initiate a condition yellow.

It is undisputed that Grievant did not document in the Daily Log and the Log Book when he relieved CO Bragg. MOCC Operational Procedure 3.02 requires that a Daily Log be maintained and that each shift log staff will log in full name, rank, and information about the staff members in the unit.

Grievant knew the policy and procedure of logging in upon relieving someone. He knew it should have been done. Grievant did violate Procedure 3.02.

Upon taking over for CO Bragg, Grievant was informed that Bragg had entered security checks until 10:30. Those checks were not performed by either CO Bragg or Grievant. This is troubling. Operational Procedure 3.01 requires staff to patrol their assigned posts once every thirty minutes. These patrols are to ensure that all is safe and operational. This security check is a required aspect of the job. Grievant violated this procedure as well.

Respondent also avers Grievant failed to follow procedure when he determined inmate Robert Brady was missing but did not call a Condition Yellow, as required by policy. Grievant asserts the policies and procedures for MOCC are not all applicable to the Work Camp, as the two deal with different types of inmates.

Mount Olive is a maximum security facility, and the Work Camp deals with nonviolent inmates who are not an escape risk. While some of the policies and procedures may not address issues at the Work Camp, some clearly are applicable to both.[2] The Operational Procedure 3.01 dealing with when staff should initiate a Condition Yellow is applicable to Mount Olive and the Work Camp. From the reading of the procedure, Condition Yellow should be called when a formal count has failed to clear, along with various other reasons. There are several differences between a routine count and a Condition Yellow count. During a Condition Yellow, no traffic is permitted to leave the Mount Olive, K-9 units are dispatched to the perimeter and all staff are alerted to a potential problem.

Grievant had been placed on an improvement plan for failing to call a Condition Yellow in March 2006. At that time, it was discussed with Grievant the importance of calling a Condition Yellow when appropriate, such as here. In March 2006, it was stressed to Grievant that time is of the essence in a situation where count has not cleared, as every 15 minutes an inmate is unaccounted for, expands the initial containment area by one mile.

Grievant knew the procedure for calling a Condition Yellow, and he was aware that the policy and procedure applied to the Work Camp, as well as Mount Olive. The undersigned believes the Grievant was concerned he would alert the facility only to have the inmate found somewhere on the premises. However, it is better to be safe than sorry. This in no way blames Grievant for the escape or the delay in finding Mr. Brady. Yet,

---

[2]On July 1, 2009, Operational Procedures were set in place for the Work Camp.

Mount Olive, the Work Camp, and all the employees need to make every effort to ensure they remain highly vigilant to obtain the goal of keeping the public safe and secure.

Grievant argues that he used his best judgement in not calling the Condition Yellow before checking every place the missing inmate might have been. While the undersigned can appreciate that Grievant continually sought inmate Robert Brady before calling a Condition Yellow, it still does not negate the fact that pursuant to policy and procedures the Condition Yellow must be called when count has failed to clear.

Lastly, little was said at the level three hearing concerning Respondent's mitigation of the time of suspension. Initially, it was recommended that Grievant be suspended for ten days. However, after his past service record, the suspension was mitigated down to a five day suspension. This resolution is appropriate.

Respondent has met its burden of proving Grievant violated policy and procedures. Therefore, this grievance is DENIED.

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 Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. 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. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. Respondent proved that Grievant failed to perform his duties in accordance with its policy and procedures.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

DATE: December 31, 2009

_____

Wendy A. Elswick
Administrative Law Judge