THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEDIDIAH E. ARBOGAST,
Grievant,

v. **Docket No. 2008-1758-CONS**

DIVISION OF CORRECTIONS/ HUTTONSVILLE CORRECTIONAL CENTER,
Respondent.

DECISION

Jedidiah Arbogast ("Grievant") instituted this proceeding on April 18, 2008, alleging he was improperly suspended for three days and denied the opportunity to work overtime during the pay period encompassed by his suspension. After a level one conference conducted on April 29, 2008, the grievance was denied in a decision dated April 30, 2008. A mediation session conducted on August 27, 2008, was unsuccessful. Grievant appealed to level three, and a hearing was held in Elkins, West Virginia, on December 5, 2008. Grievant represented himself, and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 16, 2009.

Synopsis

Grievant was suspended for three days without pay for refusing to work a mandatory extra shift. An insulin-dependent diabetic, Grievant refused because he did not have enough insulin to get him through another shift. However, Grievant knew of the procedure requiring mandatory overtime, which he had done on numerous occasions, and he had

been instructed to keep a sufficient supply of medication with him at all times. Grievant contended that another officer had been allowed to refuse overtime, due to not having sufficient medication, and was allowed to work the overtime the next day. However, this information came from an unsworn statement, and no details were provided or known by either party, making the document insufficient to support Grievant's claim of discriminatory treatment. Grievant's refusal constituted insubordination, and the three-day suspension comported with DOC policy.

Grievant also contended he should have been allowed to work overtime during the week of his suspension. Despite evidence indicating other shift commanders had allowed suspended employees to work overtime, this would obviously defeat the purpose of a suspension and was unauthorized by HCC officials. Therefore, other supervisors' mistakes did not entitle Grievant to relief. The grievance is denied.

Findings of Fact

1. Grievant is employed at the Huttonsville Correctional Center ("HCC") as a Correctional Officer II.

2. In order to provide adequate security at all times, HCC and the Division of Corrections ("DOC") require correctional officers to work mandatory overtime in the event of staffing shortages. This procedure is most often utilized when officers call off sick for an upcoming shift. If the absence(s) is going to cause security to be inadequate, the shift commander selects an officer from the current shift, on a rotating basis, who is "frozen over" for the next shift, essentially causing the officer to work a double shift.

3. Grievant has been frozen over many times and has worked double shifts on numerous occasions since being employed at HCC.

4. Grievant is an insulin-dependent diabetic, and he has been granted permission by HCC officials to bring insulin and related supplies into the facility when he is on duty. He has been instructed to keep a supply of extra medication with him at all times, sufficient to get through an additional shift, in case he is frozen over.

5. On February 10, 2008, Grievant was assigned to work the 6:00 a.m. to 2:00 p.m. shift. At approximately 1:40 p.m., Captain Stephen Balducci, the shift commander, called Grievant to inform him he was being frozen over for the 2:00 to 10:00 shift. Grievant advised Captain Balducci that he did not have enough insulin to get through another shift, and Captain Balducci advised him that a refusal to work would subject him to disciplinary action. Grievant again advised the captain that he could not work another shift, due to an insufficient supply of insulin and the severe fluctuations in his blood sugar at that time, which were causing him to use extra doses of medication. He left the facility at 2:00 p.m.

6. Grievant's prescription for insulin had run out, and he did not acquire more insulin until he got a new prescription and went to Wal-Mart to have it filled, at approximately 11:00 a.m. on February 11, 2008.[1]

7. In a memorandum to J.T. Murphy, Associate Warden of Security, dated February 13, 2008, Captain Balducci memorialized the events of February 10 regarding Grievant's refusal to work overtime, noting that Grievant's conduct violated HCC's internal personnel policies and DOC Policy Directive 129.00. The exact same information was forwarded by Associate Warden Murphy to Warden Teresa Waid on the same day.

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[1]Grievant provided no explanation as to how he was able to get through the entire evening, night and most of the following morning, after he had used almost all of his insulin by 2:00 p.m. the previous day.

8. On March 12, 2008, a predetermination meeting was held with Grievant, Warden Waid, Deputy Warden Grover Rosencrance and Human Resources Director Deborah Phillips present. Grievant was advised that, due to his refusal to work mandatory overtime, it was being proposed that he be suspended for three days. Grievant's response was that, while he understood the reason for the decision, it was impossible for him to stay at work that day without any insulin.

9. By letter dated March 19, 2008, Warden Waid advised Grievant that he was being suspended without pay for three working days, effective April 4, 2008, through April 6, 2008.

10. Because of his suspension, Grievant was not allowed to work overtime during the pay period encompassed by his suspension, March 12, 2008, through April 12, 2008.

11. Just prior to the events which are the subject of this grievance, Grievant had received approval from HCC to work a second job during the hours of 2:00 p.m. to 6:00 p.m. on days that he worked day shift at HCC.[2]

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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

[2]No specific details were provided regarding the nature of the job or how often Grievant worked in that position.

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.*

Respondent contends that a suspension was the appropriate penalty for Grievant's conduct, which violated both HCC and DOC policies. DOC Policy Directive 129.00 (Mar. 1, 2008) provides for suspension when continued infractions occur after an initial warning or "when a more serious singular incident occurs." The policy also includes a list of offenses for which employees may be disciplined, which includes "refusal to work required overtime." In addition HCC's IOP 1.29-1 (Nov. 1, 2006) contains a procedure for the implementation of mandatory overtime when a shortage of correctional staff occurs, providing for a rotation of officers, in alphabetical order, who may be required to work in excess of their regular shift to cover the shortage.

Although not specifically characterized as such, the conduct for which Grievant was suspended would constitute insubordination. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of*

Directors/So. W. Va.Community College, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

Grievant does not dispute the events that occurred on the day in question and does not deny that he refused to work overtime, for the reasons already discussed. He argues that he should not have been punished for his refusal, but should have been given the option of being frozen over on his next scheduled working day, which he alleges other employees on medication have been allowed to do. Grievant gave the example of an employee named Roger Hedrick, who provided an unsworn written statement to the effect that he had refused to work midnight shift because he "did not have medicine to carry me all night with the disease that I have." He further stated that he was excused from being frozen over and was allowed to work an extra shift the next night.

HCC officials who testified in this case, including Warden Waid, were unfamiliar with Mr. Hedrick's circumstances. In addition, his statement is unsworn and was not subject to cross examination. Accordingly, the undersigned cannot accept it as conclusive evidence of the matters it allegedly proves. Moreover, as testified to by Warden Waid and Deborah Phillips, Human Resources Director, a three-day suspension is a standard penalty

imposed for refusal to work mandatory overtime at HCC, a matter which Grievant has not refuted.

Grievant's allegations of differing treatment for similar conduct amount to claims of discrimination. Discrimination is defined by the current grievance statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007);[3] *See Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

The only employee to whom Grievant has compared himself is Mr. Hedrick, and as discussed above, an unsworn statement does not establish conclusively that Grievant and Mr. Hedrick were similarly situated. Accordingly, Grievant has failed to establish under the circumstances of this case that a 3-day suspension for his refusal was improper or discriminatory. While the undersigned, and certainly HCC officials, are sympathetic to

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[3]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

Grievant's medical condition, it is clear that Grievant's employer has taken all necessary measures to accommodate his condition by allowing him to bring whatever supplies are needed into the facility. Moreover, Grievant has worked overtime on numerous occasions before and is well aware of the requirement, and he knew that he was required to keep extra supplies on hand. It is puzzling that Grievant did not acquire insulin -- or even a prescription for it -- until 11:00 a.m. the following day, leading one to wonder why he allowed his medication to run so low with no prescription, let alone how he was able to do without insulin for nearly an entire day, when his blood sugar was allegedly "out of control."[4]

The remaining issue to be addressed is Grievant's allegation that he should have been allowed to work overtime during the pay period encompassed by his suspension. In support of this contention, Grievant produced shift schedules which indicated that, on occasion, shift commanders other than Captain Balducci have allowed officers to work overtime hours during the week they were suspended. As both Captain Balducci and Warden Waid stated, it is against HCC's practice to allow employees to do this, because it would obviously negate the purpose of a suspension. As the Grievance Board held in *Cox v. West Virginia Division of Corrections*, Docket No. 05-CORR-141 (July 21, 2005), there is no merit or support for the contention that an employee should be allowed to work overtime during a suspension period. As to Grievant's contention that other supervisors, contrary to institutional practice and/or policy, have allowed this to occur, it appears that these shift commanders did not do so with the approval of HCC administrators. A mistake

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[4]One must also wonder whether Grievant's second job may have been a factor in the events which are the subject of this grievance, although Respondent offered no evidence indicating that this was the case.

made by another employee constitutes an ultra vires act,[5] and does not entitle Grievant to relief; similarly, the Grievance Board recognizes that "two wrongs do not make a right." *See Guthrie v. W.Va. Dep't of Health and Human Res*. Docket No. 95-HHR-277 (Jan. 31, 1996); *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec 18, 1989). *See also Roberts v. W.Va. Dep't of Transp*., Docket No. 96-DOH-017 (May 2, 1996), *aff'd, Circuit Court of Kanawha County*, Civil Action No. 96-AA-72 (May 25, 1997)*; Gilliam v. W.Va. Dep't of Transp*., Docket No. 96-DOH-511 (Apr. 24, 1997).

The following conclusions of law are appropriate in this matter.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle*

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[5] Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313,406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 99-HHR- 228 (Nov. 30, 1998).

v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

4. A mistake made by another employee constitutes an ultra vires act, and does not entitle Grievant to relief; similarly, the Grievance Board recognizes that "two wrongs do not make a right." *See Guthrie v. W.Va. Dep't of Health and Human Res*. Docket No. 95-HHR-277 (Jan. 31, 1996); *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec 18, 1989). *See also Roberts v. W.Va. Dep't of Transp*., Docket No. 96-DOH-017 (May 2, 1996), *aff'd, Circuit Court of Kanawha County*, Civil Action No. 96-AA-72 (May 25, 1997)*; Gilliam v. W.Va. Dep't of Transp*., Docket No. 96-DOH-511 (Apr. 24, 1997).

5. Respondent has proven by a preponderance of the evidence that Grievant refused to work mandatory overtime, contrary to facility and Division of Corrections' policies and procedures, and also constituting insubordination.

6. Grievant has failed to establish that the imposition of a three-day suspension for his misconduct constituted discrimination.

7. Grievant failed to prove any right to work overtime during the period encompassed by his suspension.

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: January 30, 2009

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DENISE M. SPATAFORE
Administrative Law Judge