THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA A. WITCHER,

Grievant,

v. **Docket No. 2010-0817-MAPS**

WEST VIRGINIA DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant Debra A. Witcher was dismissed from her position as a Correctional Officer 2 at the Mount Olive Correctional Complex where she was assigned by the Respondent Division of Corrections ("DOC"). The dismissal was related to Grievant by letter dated December 2, 2009, from Acting Warden Jason Collins. Debra Witcher filed a Grievance contesting her dismissal that was signed on December 17, 2009, and received by the West Virginia Public Employees Grievance Board on December 23, 2009. As relief, Grievant seeks to be reinstated to her position "with all due compensation past and present." Because this grievance involves a dismissal from employment, it was filed directly to level three. *See* W. VA. CODE § 6C-2-4 (a) (4).

A level three hearing was conducted on two separate days in Beckley, West Virginia. The first day was April 6, 2010 and the last day of the level three hearing was held on April 30, 2010. Grievant appeared on both days of the hearing and represented herself. Respondent DOC was represented by John H. Boothroyd, Assistant Attorney General. At the close of the evidence, the parties agreed to submit Proposed Findings of Fact and

Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on June 1, 2010. This grievance became mature for decision on that date.

Synopsis

In the December 2nd letter, the DOC gave three reasons for dismissing Grievant from her Correctional Officer 2 position. Respondent alleged Grievant violated DOC Policy Directive 129.00 through: 1) "instances of inadequate or unsatisfactory behavior;" 2) "sleeping during work hours;" and, 3) "breach of security or failure to report any breach or possible breach of facility security." The alleged misconduct involved Grievant falling asleep while stationed with a particularly dangerous prison population and failing to report an inmate count.

Grievant does not deny that she fell asleep, but avers that she was sick and that she was forced to work long hours which made it impossible for her to stay awake. She states that the DOC knew she was not well but browbeat her into working anyway because the facility was understaffed. Grievant does not believe that she should be dismissed under these circumstances.

DOC demonstrated that Grievant's actions were in violation of policy and presented a serious safety risk to the facility. Additionally, Grievant had been suspended twice previously, for falling asleep at work and another different, but serious, violation. The grievance is DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Debra A. Witcher has been employed by the DOC from January 1997 through December 2009, with the exception of a one year period between June 2004 and June 2005. During this entire time, Grievant Witcher has been classified as a Correctional Officer ("CO") and assigned to the Mount Olive Correctional Complex (hereinafter referred to as the "Complex"). During all times relevant to this grievance, Grievant was classified as a CO 2.

2. The Complex is a maximum security prison for the State of West Virginia.

3. Grievant received a five day suspension for sleeping while on duty on September 15, 2008. Grievant was assigned to the Complex Mental Health Unit at that time. A fellow officer, CO 2 Michael Summers, was forced to get the shift Lieutenant to let him into the Mental Health Unit because Grievant had fallen asleep and could not be awakened to let CO 2 Summers into his duty station.[1] Respondent Exhibit 2.

4. The Complex Mental Health Unit houses a particularly dangerous group of prisoners. Prisoners confined in the Mental Health Unit cannot be safely housed with the general prison population and most have been diagnosed as likely to cause serious harm to themselves or others.

5. On October 9, 2008, Grievant was given a written reprimand for making comments to CO 2 Summers after Grievant was caught sleeping while on duty on September 15, 2008. The day after she was caught sleeping, Grievant told CO 2

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[1] At her predetermination hearing, Grievant explained that she was suffering from a back injury and had taken pain medication that made her drowsy. She had not taken leave because she did not have enough time available.

Summers, "Thanks for getting me suspended, that's really fucked up." Additionally, as CO 2 Summers was leaving the Unit, Grievant called him a "Dick." Respondent Exhibit 9.

6. DOC Policy Directive 129.03 Section V (B) requires DOC employees to report to their immediate supervisor if they are arrested for a felony or a misdemeanor. The report must be made not later than the next work day.

7. On October 13, 2008, Grievant was involved in an automobile accident at a time when she was supposedly on her way to work. Grievant was driving the vehicle and was dressed in her Mount Olive Correctional Complex CO 2 uniform at the time of the accident. Grievant was given a sobriety test that indicated a blood alcohol concentration of .189. Grievant was arrested and charged with driving under the influence of alcohol.[2] Grievant did not report this arrest to her immediate supervisor until she was interviewed by a DOC investigator on January 12, 2009.

8. By letter dated February 18, 2009, Grievant was suspended for ten days without pay for discrediting herself and the Agency by being arrested in uniform and for failing to comply with the reporting requirements of Policy Directive 129.03.

9. Grievant has been experiencing medical problems and was making regular visits to the doctor in the summer of 2009. Grievant's condition left her tired and it was often difficult for her to stay awake. Because of these difficulties and the doctor visits, Grievant missed work more than usual which caused her supervisors to question her

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[2] There was a dispute in the testimony as to whether Grievant was on her way to work when the accident happened or if she had called off immediately before it took place. However, there is no dispute that Grievant was dressed in her uniform and the accident happened when she was due to begin her shift for the day. When asked if she had been drinking, Grievant told the arresting officer that she had a couple of shots while getting ready to go to work. Respondent Exhibit 3.

dependability for duty. Grievant had regularly been assigned to the night shift which ran from 1900 hours to 700 hours.[3]

10. In an effort to address Grievant's problems, the Unit Manager for Grievant's Unit discussed with Grievant the possibility that she could be moved from the night shift to the day shift which took place from 700 hours to 1900 hours. Grievant declined to make this shift change.

11. On October 15, 2009, Grievant was scheduled for a mandatory overtime shift on the 1900 hours to 700 hours shift. Grievant informed her supervisor, Lieutenant Margaret Clifford, that she was ill and Lieutenant Clifford released Grievant from overtime so she could go home.

12. The next day, October 16, 2009, was Grievant's regular day off but she volunteered to work overtime on the night shift.

13. The Mental Health Unit consists of two sides designated as Side One and Side Two. The two sides are adjacent and connected in the middle by a door. Each side is entered from the facility by a door at the opposite ends of the two sections. Inmate cells are along the outside walls of each side. Offices and break rooms are along the inside walls.

14. There is an officer's desk on each of the two sides, located next to the connecting door, and the control panel for the Mental Health Unit is located at the Side One officer desk. This control panel controls the mechanical functions for the unit, including the unlocking and opening of inmate cell doors. A key is necessary to activate the control

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[3]This time period can also be expressed as 7:00 pm to 7:00 am the next morning.

panel and the Officer on duty is required to keep that key on her person at all times. Also located at the officer's desk is a light and buzzer signal which alerts the Officer if an inmate needs assistance in one of the cells.

15. Directly behind the Side One officer's desk, there is a break room with a table, chairs, coffee pot and television. Grievant indicated that the telephone and buzzer at the officer's desk could be heard from the break room.

16. On October 16, 2009, Grievant was the only CO assigned to the Mental Health Unit and she was stationed at the Side One officer's desk. Because of the chronic shortage of staff at the Complex, it is not unusual for one officer to be assigned to this Unit.

17. The Complex Operational Procedures[4] require all officers to patrol through their assigned units at least once every thirty minutes to conduct security checks among other things. Respondent Exhibit 7.

18. Inmate counts are conducted on each unit at specified times during each shift and the unit counts are reported to the Central Control room for the Complex. The night shift counts are conducted at 2215 hours, 2400 hours, 0200 hours, 0400 hours and 0500 hours.[5] The inmate count taken at 2400 hours is the "Official Count" for the Complex and that count is reported to the DOC Central Office each day.[6] Respondent Exhibit 5.

19. COs are required to keep their assigned two-way radios on their persons at all times while they are on duty. At 2400 hours on October 16, 2009, the CO who was

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[4] *See* Mount Olive Correctional Complex Operating Procedure # 3.01.

[5] 10:15 pm, midnight, 2:00 am, 4:00 am and 5:00 am.

[6] *See* Mount Olive Correctional Complex Operating Procedure # 3.04.

working at the Central Control, CO 2 Michael Blagg, announced the 2400 "Official Count" for the Complex over the radio. The call was made over the two-way radios to all COs working in the Complex so that they would commence their unit inmate counts. The buzzer in each unit also sounds to announce the count. Once the count is announced, each of the COs call in the inmate count for their units to the CO in the Central Control, using the telephone located in their respective units. Because there are fewer inmates in the Mental Health Unit, that unit is usually one of the first to report their inmate count.

20. Within a short time period, CO 2 Blagg received inmate counts from all units except the Mental Health Unit. CO 2 Blagg called the Mental Health Unit by telephone and received no answer. At 0010 hours,[7] CO 2 Blagg reported to the shift commander, Lieutenant Clifford, that the Mental Health Unit had not reported the inmate count.

21. Lieutenant Clifford and Corporal Samuel Keenan obtained a set of emergency keys and proceeded to the Mental Health Unit.[8] Upon arriving at Side One of the Mental Health Unit, Clifford and Keenan looked through the door window and observed that no one was seated at the officer's desk. Officers Clifford and Keenan walked around the Unit and entered through the Side Two door. They walked through and entered Side One at the connecting door by the officer's desk.

22. Upon entering Side One of the Mental Health Unit, Lieutenant Clifford and Corporal Keenan observed that the key for the unit control panel was in the panel but no one was at the officer's desk. They also observed Grievant sitting in an officer's chair in

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[7] The time was ten minutes after midnight. The count was announced at midnight.

[8] At least two officers must respond to a failure to respond from a unit officer because it could mean that the officer has been overtaken by inmates.

the break room asleep. Grievant's radio and unit keys were on the table next to the chair where she was sleeping.

23. After observing Grievant sleep for ten to fifteen seconds, Lieutenant Clifford called Grievant's name and Grievant awoke and responded. Lieutenant Clifford asked Grievant if she was going to call in her inmate count and Grievant went to the telephone and reported her count to CO 2 Blagg. Officers Clifford and Kennan then left the Mental Health Unit.

24. Following the incident, Lieutenant Clifford drafted a memorandum to Major Robert Rhodes in which she described her observation of Grievant asleep in the Mental Health Unit and recommending that Grievant Witcher's employment be terminated. Respondent Exhibit 8.[9]

25. Lieutenant Clifford's memorandum was forwarded to the Unit Program Manager, John Bess. Manager Bess reviewed the two memoranda describing the incident of October 16, 2009, and Grievant's employment record. Thereafter, Manager Bess drafted a memorandum dated November 3, 2009, in which he recommended to Warden David Ballard that Grievant be dismissed. Respondent Exhibit 4.

26. By letter dated November 14, 2009, Warden Ballard notified Grievant that it had been brought to his attention that she had submitted documentation from a treating physician indicating that Grievant was taking medication that might cause her to fall asleep on duty. Based upon this information, Warden Ballard gave officer Witcher a copy of the

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[9] Corporal Keenan also prepared a memorandum detailing his observations of the incident involving Grievant being asleep in the Mental Health Unit. Officer Keenan's memorandum was dated October 17, 2009, and addressed to Lieutenant Clifford. *See* Respondent Exhibit 4.

classification specifications for the Correctional Officer 2 classification which specifies, in detail, the duties of that position. Warden Ballard directed Grievant to share this information with her treating physician and obtain a statement from that person indicating whether or not Grievant was able to function on full duty status. Respondent Exhibit 17.

27. Grievant was under the care of Elmer Nagye, a licensed Physician Assistant employed at the Ansted Medical Center. On December 1, 2009, Grievant Witcher gave Warden Ballard a "Physician's/Practioner's Statement" form signed by Elmer Nagye on November 17, 2009. On that form, Practioner Nagya noted that Grievant "may return to full duty." In answer to a question on the form which asks: "Will this disability prevent the employee from performing his/her duties?", Practioner Nagye marked the box "NO."[10] Grievant had been taking the same medication she was taking on October 16, 2009, since 2003.

28. On December 2, 2009, a predetermination meeting was held regarding the charges set out in the ultimate dismissal letter. Grievant was given an opportunity to explain the incident from her perspective.

29. Due to the shortage of Correctional Officers, employees at the Complex are often required to work overtime. Grievant has been criticized and counseled for missing work and was concerned that she would get in trouble if she asked to leave on October 16, 2009, because she had missed work earlier in the week.

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[10] Elmer Nagye testified that Grievant had been his patient for a number of months and he saw her on a fairly regular basis. He noted that he had worked at the Complex before and understood the danger and stress involved in the job. Nagye confirmed that Grievant's medication could make her drowsy but added that he would not release Grievant, or any other patient, to work at the Complex if he felt there was a chance that their medication would impair their ability to fully perform their duties.

30. Following the predetermination conference, Grievant was given a letter dismissing her from employment. The reasons stated for the dismissal were:

> "Violation of Policy Directive 129.00 -Progressive Discipline, Section V, subsection j;
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> Rule 5 - Instances of inadequate or unsatisfactory performance
>
> Rule 38 - Sleeping during work hours
>
> Rule 47- Breach of security or failure to report any breach or possible breach of facility security."

Discussion

This grievance involves discipline of an employee and the burden of proof in disciplinary matters rests with the employer. 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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Since Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means

misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

The Complex has a series of Operational Procedures that have been adopted to establish security and carry out the mission of the prison. Operational Procedure # 3.01 states in part the following:

> Staff will always stay alert and observe everything that takes place within sight or hearing.
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> - Sleeping (or "relaxing" with eyes closed) and reading of any item not issued by WVDOC or MOCC while on post is prohibited.
> - Staff will be particularly alert during hours of darkness or inclement weather, which restricts visibility.

Grievant clearly violated this operating procedure. She was not only asleep on duty but she fell asleep while in the unit that arguably houses the maximum security prison's most dangerous population. Additionally, Grievant was so sound asleep that she did not hear the count buzzer or radio announcement and she did not respond when CO 2 Blagg called her unit over the telephone to inquire about the inmate count. Grievant did not wake up when two officers entered her unit and were watching her sleep until Lieutenant Clifford called her name. This violation was exacerbated by the facts that Grievant left the key in the control panel at the officer's desk, making it possible for anyone to open the cells in the Mental Health Unit, and she laid her two-way radio and facility keys on the table beside her

while she slept. These actions violate Operating Procedure # 3.01 which requires all COs to ensure key security and keep their two-way radio on their person at all times. *See* Mount Olive Correctional Complex Operating Procedure # 3.0, page 6 of 8, Respondent Exhibit 7. By falling asleep, Grievant also missed a mandatory inmate count and caused two officers to be dispatched to her unit to ensure her safety. There can be little doubt that Grievant's misconduct was substantial and effected the interest of the public by placing herself and others in a position that could lead to significant harm.

Grievant argues that the punishment is too harsh. She states that she had been "browbeat" because of her "call-offs" and placed on leave restrictions. She felt that she could not call off work because she would get in trouble. Therefore, she came to work even though she was sick and could not keep from falling asleep. She feels that these circumstances were outside of her personal control and she should not be dismissed.

"The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for

rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

In this situation, it is very likely that Grievant would not have been dismissed had this been her first incident of misconduct. In fact, when Grievant fell asleep at the same post thirteen months earlier she was given a five day suspension. Additionally, when Grievant failed to report that she had been arrested for driving under the influence of alcohol, while wearing her uniform, at a time she was supposed to be on her way to work, Grievant was only given a ten day suspension. Given these prior incidents, both occurring less than thirteen months prior to the present misconduct, dismissal is clearly not a disproportionate penalty.

Grievant's situation was difficult. She worked long hours when she was not well. However, she had been taking the same medication since 2003, and her medical practitioner testified that it would not impair her ability to perform her job. When she was unable to stay awake, she had an obligation to herself and her fellow officers to inform her supervisors rather than risk the safety of the entire facility. Under these circumstances, mitigation would not be appropriate.

Respondent DOC has met its burden of proof and the grievance is DENIED.

Conclusions of Law

1. This grievance involves discipline of an employee and the burden of proof in disciplinary matters rests with the employer. 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. Since Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989).

3. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct that was in violation of DOC policy and procedures, that the misconduct was substantial and significantly effected the public interest by placing herself and others at the Mount Olive Correctional Complex in risk of receiving substantial harm. Under these circumstances dismissal was appropriate.

6. Grievant failed to prove that the penalty imposed upon Grievant was disproportionate to her misconduct because she had been suspended for the same offence and a different serious offence within the past fourteen months. Mitigation of the punishment is not appropriate.

Accordingly, the 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: August 3, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE