THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL A. SNEDEGAR,
Grievant,

v. **Docket No. 2010-0831-MAPS**

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant Michael Snedegar is employed as a Correctional Officer ("CO") by the West Virginia Division of Corrections (DOC). Grievant is assigned to the Anthony Correctional Center located in White Sulphur Springs, West Virginia. By letter dated December 7, 2009, Grievant was demoted from the rank of CO 3 to CO 2 with a five percent cut in pay. CO Snedegar filed a grievance dated December 28, 2009, contesting this disciplinary action and alleging, among other things, that he was deprived of his "Due Process Rights" in relation to the demotion. As a remedy Grievant seeks, "to be given the rank of Correctional Officer III back with all back pay, benefits and interest, otherwise to be made whole." Pursuant to W. VA. CODE § 6C-2-4 (a) (4), Grievant waived levels one and two and proceeded directly to level three for a hearing.

A level three hearing was held in Beckley, West Virginia, on April 20, 2010. Grievant was present at the hearing and was represented by Tammy E. Brammer.[1] Respondent was represented by Charles P. Houdyschell, Jr., Senior Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings

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[1] Ms. Brammer is also a Correctional Officer employed by the Division of Corrections.

of Fact and Conclusions of Law. The fact/law proposals were to be mailed to the West Virginia Public Employees Grievance Board no later than June 4, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant was demoted from a CO 3 to a CO 2 for allegedly stealing a large amount of cheese sticks from the Anthony Correctional Center kitchen. The demotion included a five percent reduction in pay. Grievant alleges that he was treated unfairly in the investigation of the alleged theft and that his due process rights were violated. Respondent met its burden of proof related to the charges against Grievant and followed appropriate procedures in instituting the disciplinary action.

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 has been employed by the DOC as a CO for more than eight years. Grievant has been assigned to the Anthony Correctional Center ("Anthony") for this entire time.

2. Prior to December 2009, Grievant held the classification of CO 3 which is the rank of Corporal. By letter dated December 7, 2009, Teresa McCourt, the Warden at Anthony, demoted Grievant to a CO 2 with a reduction of pay of five percent. The reasons for the demotion were stated as follows:

WV Division of Corrections Policy Directive 129.00 "Progressive Discipline"

- **Section J, #1: Failure to comply with Policy directives, Operational procedures, or Post Orders;**

- **Section J, #5: Instances of inadequate or unsatisfactory performance;**
- **Section J, #18: Unauthorized possession or use of, loss of, or damage to records, state property, or other property of others;**
- **Section J, #32: Falsifying any records whether through misstatements, exaggerations, or concealment of facts;**
- **Section J, #47: Breach of facility security or failure to report any breach or possible breach.**

(Emphasis in original) Respondent Exhibit 15. More specifically, Grievant was accused of stealing a large quantity of cheese sticks from the Anthony kitchen area and giving a false statement to the investigator when questioned about the incident.

3. On August 3, 2009, the Anthony Center received a delivery of three boxes of individually wrapped mozzarella cheese sticks. The cheese sticks weigh one ounce each and each box contains 188 individual sticks. Respondent Exhibit 1.

4. Robin Wilson is the Anthony Food Service Supervisor. As such, she is responsible for keeping track of the food inventory for the Center. On August 17, 2009, she observed one box of cheese sticks remained in the inmate cooler. The box had been opened but appeared to be full.

5. Ms. Wilson was absent from work on August 18, 2009.

6. When Supervisor Wilson returned to work on August 19, 2009, she noticed that the box of cheese sticks was no longer in the inmate cooler.

7. Supervisor Wilson confirmed that the cheese sticks had not been served to the inmate population. Believing that an inmate may have taken them, Ms. Wilson asked inmates who were working in the kitchen about the cheese sticks for the next few days.

8. On August 27, 2009, an inmate told Supervisor Wilson that she had seen CO Snedegar enter the cooler with a large plastic bag and leave with what she believed to be the cheese sticks.[2]

9. Supervisor Wilson filled out a written incident report on August 27, 2009, detailing the disappearance of the cheese sticks and the information she received from inmate Demerise Smith regarding CO Snedegar. Respondent Exhibit 2.

10. After receiving the incident report from Supervisor Wilson, Warden McCourt directed CO 2 Shawn Carden to review the footage for August 18, 2009, from the security cameras located in the Anthony kitchen area. The video showed that grievant did the following:

- Entered the kitchen and then stopped at a work stand.
- Stopped at a work table and removed a large trash bag from a box on the lower shelf.
- Walked from the work table to the back of the kitchen area and into the walk-in cooler without stopping.
- Remained in the walk-in cooler for roughly one and one-half minutes.
- Came out of the cooler with the large garbage bag that had something in it that took up a space about as large as a basketball.
- Walked from the cooler to another work table, without stopping, where he tied the top of the bag and cut the excess plastic off with a knife.
- Walked out of the kitchen.

Respondent Exhibit 9.[3]

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[2] The inmate explained that she had not mentioned the incident earlier because she was afraid that she would be labeled a "snitch."

[3] Respondent Exhibit 9 is a compact disc that contains video files showing the recordings from two security cameras located in the Anthony kitchen.

11. Upon reviewing the video from the kitchen security cameras, Warden McCourt assigned Donnie Daniels to conduct an investigation into the disappearance of the cheese sticks. Mr. Daniels is employed by the DOC as an Investigator 2.

12. Inspector Daniels interviewed Supervisor Wilson, Grievant, and four inmates who were working in the kitchen area on August 18, 2009. He also reviewed the video surveillance recordings from the kitchen cameras and DOC documents. Respondent Exhibit 7.

13. Inmate Smith noted that the box of cheese sticks was nearly full on the morning of August 18, 2009, because she was planning on eating some with a salad later in the day. After Grievant left the kitchen, Inmate Smith checked the box of cheese sticks again and saw that the box was empty.[4]

14. Grievant Snedegar told Inspector Daniels that he was in the kitchen performing his "Rover"[5] duties on August 18, 2009. He indicated that he checked the temperature in the cooler[6] and looked inside to see if anyone was concealed and then left. He indicated that he was also looking for small trash bags for the visitation area and that is why he had the large trash bag. After viewing the surveillance video Grievant stated that he might have been moving things around in the cooler looking for something to eat. He

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[4] Inmate Smith told Investigator Daniels that she checked the box after CO 2 Snedegar left the kitchen because other inmates told her he had taken the cheese sticks. Respondent Exhibit 7.

[5] A Rover is a CO who goes throughout the center checking security in various areas.

[6] There is no internal temperature gauge inside the cooler. The gauge is outside the cooler.

also stated that he put a bunch of small trash bags in the large trash bag and that is what he carried out of the kitchen.

15. COs performing Rover duty make a record of when they check each area on a sign-in sheet to note that they have been to that area. Grievant Snedegar did not make a notation on the sign-in sheet when he was in the Anthony kitchen on August 18, 2009.

16. Small trash bags are not stored in the kitchen at Anthony and there were no small trash bags present in the kitchen on August 18, 2009.

17. There is a window in the door of the walk-in cooler in the Anthony kitchen. The cooler is small enough that an officer can look through the window and see if anyone is in the cooler. There is no need for a CO performing Rover duties to enter the walk-in cooler and they do not routinely do so.

18. Grievant Snedegar had previously been suspended for three days in June 2008. Respondent Exhibits 13 and 14.

19. A predetermination conference was held on the morning of December 7, 2009 with Grievant, Warden McCourt, Associate Warden Mark Wegman and Human Resource Manager Michael Reynolds in attendance. Grievant was advised of the reports made by Inspector Daniels and the charges that were being considered. He was given an opportunity to explain his actions.

20. On December 3, 2009, there were three CO 3 positions posted to be filled at Anthony, but there were only two CO 3 positions actually vacant. It is not uncommon for the DOC to have more than ten CO 3 positions posted at any given time. The CO 3 positions were posted in December 2009, because Warden McCourt intended to expand the number of CO 3 positions at Anthony.

Discussion

Grievant was demoted from a CO 3 position to a CO 2 position with a five percent cut in salary. This was a disciplinary action that was based upon violations of five specified provisions in DOC Policy Directive 129, "Progressive Discipline." All of these allegations relate the Grievant's alleged theft of a large quantity of cheese sticks and making false or misleading statements about the incident to Inspector Daniels. 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). "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).

The video evidence captured by the surveillance cameras in the Anthony kitchen on August 18, 2009 is very compelling. It shows Grievant entering the kitchen, getting a trash bag and walking directly to the walk-in cooler. After remaining in the cooler for a minute and a half Grievant comes out with the trash bag which had a large bulge consistent with a bag holding the cheese in question. Grievant went straight to a work station, tied the bag and cut the excess plastic off. He then left the kitchen area with the

bag. Testimony from an inmate revealed that the cheese sticks were in the walk-in cooler shortly before Grievant went into the cooler and they were gone shortly after Grievant left the cooler. The cheese sticks had not been served to the inmates. There is sufficient evidence to demonstrate that it is more likely than not that Grievant stole the cheese sticks from the walk-in cooler.

Grievant told Investigator Daniels that he was in the kitchen to perform his duties as a Rover. He initially stated that he signed in, retrieved some trash bags, and looked in the walk-in cooler to check the temperature. When he was confronted with the video evidence, Grievant stated that he only retrieved one large trash bag but stuffed it with a large number of small trash bags to use in the visitation area. He opined that the reason he spent time in the cooler was that he was moving things around to find something to eat.

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' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

Grievant did not testify at the level three hearing but a determination of the credibility of his statements to Inspector Daniels is necessary because giving false or misleading information is one of the reasons for the demotion. Grievant's version of the events of August 18, 2009, were inconsistent and implausible. At first Grievant indicated that he was in the kitchen on Rover duty, but he did not sign-in as is required of a Rover. Next Grievant initially stated that he went into the cooler to check the temperature, but the temperature gauge for the cooler is on the outside of the cooler. Grievant alleged that he stuffed the large trash bags with small trash bags and that is what was revealed on the video. However, small trash bags are not stored in the kitchen area and Grievant made no stops in the kitchen, except in the cooler to indicate that he was obtaining a large amount of trash bags. Grievant's statements are not credible. Respondent demonstrated by a preponderance of the evidence that Grievant gave false or misleading statements about the theft of the cheese sticks to Investigator Daniels.

Grievant avers that he was denied due process in the investigation and demotion. He notes that Respondent posted a CO 3 position without a specific vacancy on December 3, 2009. It is the Grievant's position that this posting indicates that Respondent had already decided that he was guilty and posted his position prior to his predetermination hearing on December 7, 2009. Respondent gave a plausible explanation for the posting. Warden McCourt noted that the Anthony administration had decided to expand the number of CO 3 positions and the posting was totally unrelated to Grievant's disciplinary action. This position was confirmed by Wayne Armstrong, DOC Director of Personnel, who stated that he prepared the postings and it is not unusual for the DOC to have ten or more CO 3 positions posted at any one time. Grievant was provided notice of the charges and

evidence against him and was given a meaningful opportunity to tell his version of the events, before any disciplinary action was taken against him. Grievant's due process rights were not violated. *See Bd. of Educ. of County of Mercer v. Wirt,* 192 W.Va. 568, 453 S.E.2d 402 (1994): citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The Grievance Board has upheld the dismissal of public employees for stealing public property because it is illegal and a betrayal of the public trust. *See Sigman v. W. Va. State Univ.*, Docket No. 2008-0730-WVSU (Apr. 11, 2008); *Massaro v. Dept. of Admin./Gen. Serv. Div.*, Docket No. 04-ADMIN-070 (May 4, 2004); *Hall v. Dept. of Admin.*, Docket no. 04-ADMIN- 046 (Apr. 21, 2004); *Dillard v. Dep't of Transp./Div. of Highways*, Docket No. 98-DOH-127 (Aug. 10, 1998). Additionally, Grievant had been suspended for misconduct roughly a year and a half prior to the incidents that led to this demotion. Under these circumstances, Warden McCourt was lenient in recognizing Grievant's tenure as a CO and demoting him rather than terminating his employment. Accordingly, the grievance is DENIED.

Conclusions of Law.

1. This is a disciplinary matter and the burden of proof 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).

2. Grievant's explanation of the events leading to his demotion were not credible. Respondent demonstrated by a preponderance of the evidence that Grievant gave false or misleading statements during an official investigation.

3. The Grievance Board has upheld the dismissal of public employees for stealing public property because it is illegal and a betrayal of the public trust. *See Sigman v. W. Va. State Univ*., Docket No. 2008-0730-WVSU (Apr. 11, 2008); *Massaro v. Dept. of Admin./Gen. Serv. Div*., Docket No. 04-ADMIN-070 (May 4, 2004); *Hall v. Dept. of Admin*., Docket no. 04-ADMIN- 046 (Apr. 21, 2004); *Dillard v. Dep't of Transp./Div. of Highways*, Docket No. 98-DOH-127 (Aug. 10, 1998).

4. Respondent proved by a preponderance of the evidence that Grievant stole state property from the Anthony Correctional Center kitchen.

5. Grievant was provided notice of the charges and evidence against him and was given a meaningful opportunity to tell his version of the events before any disciplinary action was taken against him. Grievant's due process rights were not violated. *See Bd. of Educ. of County of Mercer v. Wirt,* 192 W.Va. 568, 453 S.E.2d 402 (1994): citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

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: SEPTEMBER 27, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE