WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA H. SMITH,
Grievant,

v. **Docket No. 2011-0969-MAPS**

DIVISION OF CORRECTIONS/
LAKIN CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant, Debra Smith, was employed as a Correctional Officer 2 ("CO-2") at the Lakin Correctional Center ("Lakin"). The Center is located in Mason County and is operated under the Respondent, Division of Corrections ("DOC"). Debra Smith filed a level three[1] grievance form dated March 14, 2011, contesting a five-day suspension without pay. As relief, Grievant seeks, "Revocation of suspension, with compensation, secondary employment re-instated with compensation for all lost time, [and] no retribution or retaliation."

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on April 30, 2012. Grievant appeared in person and was represented by Jack Farrell, Communication Workers of America. Respondent was represented by John H. Boothroyd, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received on May 27, 2012. This matter became mature for decision on that date.

[1] W. VA. CODE § 6C-2-4(a)(4) authorizes an employee to file an expedited grievance at level three when contesting a suspension without pay.

Synopsis

Respondent suspended Grievant for five days without pay for attending, and receiving pay for, a meeting at her secondary job on a day she claimed sick leave from Respondent. Grievant also worked a full shift for her secondary employer during a period in which she submitted a medical form to Respondent stating that she was unavailable for work due to injury. Grievant argues that she was only attending the meeting to get advice from a co-worker regarding treatment for her injury and that the punishment imposed by Respondent was too severe for any infraction she may have committed.

Respondent proved that the discipline was justified and appropriate. The grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Debra Smith, was employed by the DOC in December 2005, as a Correctional Officer ("CO") at the Lakin Correctional Center. At the time of the incidents related to this grievance, she had reached the rank of CO-2.

2 Grievant also had a secondary part-time job with the Gallia County Sheriff's Department as a Correctional Officer at the Gallia County Work-Release Center.[2] This secondary employment was approved by the Warden at Lakin, Lori Nohe. To gain approval for the secondary employment, Grievant agreed that her secondary employment would not interfere with her work at Lakin.

[2] Gallia County is in Ohio, across the Ohio River from Mason County, West Virginia.

3. Grievant left employment with the Respondent on June 15, 2011, and has subsequently been employed full-time by the Gallia County Sheriff's Department as a Correctional Officer at the Gallia County Work-Release Center.

4. Grievant received a written reprimand from Corporal Scott Edwards[3] dated November 1, 2010, for use of obscene language and addressing co-workers in an insulting and rude manner. Respondent's Exhibit 4. Prior to receiving the written reprimand, Grievant had "received three verbal reprimands, one Memorandum regarding professionalism, and two significant occurrences[4] concerning the use of foul and abusive language and being disrespectful to the staff in the presence of the inmate population." Respondent's Exhibit 4. Grievant was also told that she would be required to take a class in conflict management, conducted by the West Virginia Division of Personnel, to help her with the issues set out in the written reprimand.

5. Grievant was given a written memorandum at 10:00 a.m. on November 8, 2010, requiring her to report to the WV State Training Center on November 9 and 10, 2010, for the conflict management class. The class would last from 9:00 a.m. until 4:00 p.m. each day. Respondent's Exhibit 5.

6. Grievant's normal shift at Lakin goes from 7:00 a.m. until 7:00 p.m. During work, at approximately 9:45 a.m. on November 8, Grievant pulled a muscle in her back while reaching for a clipboard. At approximately 11:00 a.m., Grievant told Corporal Edwards that her back was bothering her. She filed a written report of her injury with Corporal Edwards at 6:50 p.m. before leaving work.

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[3] Corporals are employed in the CO-3 classification.
[4] The term "significant occurrence" was not further defined.

7. Grievant called Lakin at approximately 11:30 p.m. on November 8, 2010, and reported that she would not be at work the next day.

8. Grievant went to the Gallia County Work-Release Center at 1:45 p.m. on November 9, hoping to see a co-worker. The co-worker had previously told her about a medical facility where county employees could be seen at no cost, and Grievant knew that the correctional officers at the facility were having a meeting at 2:00 p.m.

9. Grievant sat in the back of the room to wait for the co-worker, but he did not come in until the meeting had already started. Grievant sat through the meeting and spoke to the co-worker about the medical facility afterward. Grievant's commanding officer at the Gallia Center told her to put the meeting on her time sheet and she was paid for attending the meeting.

10. Grievant then visited the medical facility and received prescriptions for muscle relaxers and pain pills. She was instructed to stay off her feet and to use ice and heat on her back. She also received a medical excuse that said she could return to work on November 15, 2010.

11. Grievant's regular work schedule at Lakin required her to work on November 9, 2010, and then she would be off work until November 14, 2010. However, that schedule was modified when she was required to attend the conflict management training. She was supposed to attend that training on November 9 and 10, and since the 10th was normally her day off she would be paid one and a half times her normal rate for that day. Grievant was scheduled to work at the Gallia County Center on November 11, 12, and 13, 2010.

12. Grievant called off work and did not go to the conflict management training on November 10, due to the back pain she was experiencing.

13. On the morning of November 11, Grievant felt better and reported to work at the Gallia County Center. She began experiencing renewed pain after a couple of hours, but could not leave work because there was no one to take her shift.

14. Grievant called off work at the Gallia County Center on November 12 and 13. On November 13, Grievant aggravated her injury while cooking and called off work at Lakin on November 14.

15. On November 15, 2010, Grievant reported to work at Lakin. Grievant presented her medical excuse[5] that went from November 9, through 14.

16. Grievant submitted a sick leave form[6] for November 9, 2010, from 7:00 a.m. through 7:00 p.m. She did not report that she had been paid for nearly two hours of work at the Gallia County Center that day or that she had worked a full shift at the Gallia County Center on November 11.

17. Upon Grievant's return to employment, Sergeant Thomas Weiner confirmed that Grievant had been paid by the Gallia County Sheriff's Office for attending a meeting on November 9, 2010, and she had worked an eight-hour shift at the Gallia Work-Release Center on November 11, 2010. Both of these activities occurred during the period of time covered by the medical excuse she had received from Ohio

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[5] Respondent's Exhibit 3. The medical excuse was from Ohio Quickcare and was signed by John Hipes, a Certified Family Nurse Practitioner.

[6] Respondent's Exhibit 9. While the time period covers twelve hours, the leave slip has the number "10" written on the line next to the phrase "Hours Sick." There was no testimony offered to explain this by either party.

Quickcare. Sergeant Weiner informed Deputy Warden J.D. Sallaz of his findings in a memorandum dated November 15, 2010. Respondent's Exhibit 11.

18. On November 16, 2011, Deputy Warden Sallaz investigated the matters reported by Sergeant Weiner and conducted an interview with Grievant. He reported his findings to Warden Lori Nohe.

19. A predetermination hearing was conducted with Grievant on December 14, 2010. By letter dated December 15, 2010, Warden Nohe informed Grievant that she was suspended for forty working hours[7] and that Warden Nohe was revoking her prior permission for Grievant to have secondary employment.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "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); *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.*

[7] Forty working hours is the equivalent to five eight-hour shifts. Consequently, the suspension was termed a five-day suspension.

Respondent suspended Grievant because she attended, and was paid for, a meeting with her secondary employer on a day that she claimed sick leave from the DOC. Additionally, Grievant worked for her secondary employer during a period for which she had a medical excuse indicating she was unable to work. Respondent notes that Grievant's decision to work for her secondary employer during the period in which a medical professional excused her from work may have interfered with her ability to return to her primary job on November 14, 2010.

Grievant argues that the penalty is too harsh. She feels that the worst she should have received was to not be paid for November 9 and 10, the two days she called in sick, but she should not lose her opportunity to hold a second job.

Grievant has left employment with the Respondent and is now working elsewhere. No evidence was presented regarding any specific days of employment at the second job she would have worked before leaving employment at Lakin. Accordingly, the remedy of returning her secondary employment is no longer available. The Grievance Board has consistently held that "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Because Grievant would gain no concrete remedy from a ruling regarding her secondary employment, that issue is moot and will not be addressed herein.

Respondent proved that Grievant attended, and was paid for, a meeting at her secondary job during the same time she claimed sick leave from Respondent. Grievant also worked a shift at her secondary job during the period of time which was included in

the medical excuse she submitted to Respondent indicating that she was unavailable to work due to injury. These incidents violate Division of Corrections Policy Directive 129.00 Section J., which prohibits use of state time for personal business and abuse of sick leave under the general heading of “Abusing state work time.” Respondent’s Exhibit 12. Performing work for a secondary employer on the same day Grievant claimed sick leave from Respondent undoubtedly constitutes abuse of sick leave. Disciplinary action was justified.

Grievant argues that the five-day suspension was too harsh. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). 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).

Grievant had previously received verbal and written reprimands regarding her behavior at work. Indeed the training she was directed to attend on November 9 and 10, 2010, was an effort to remediate her behavior which led to the written reprimand

dated November 1, 2010. Given this disciplinary history, along with the remaining circumstances in the matter, the punishment imposed by Respondent was not an abuse of discretion and mitigation is not appropriate. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

2. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Because Grievant would gain no concrete remedy from a ruling regarding her secondary employment, that issue is moot.

3. Respondent proved the charges leading to the discipline given to Grievant by a preponderance of the evidence.

4. 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).

5. Given Grievant's recent disciplinary history, along with the remaining circumstances in this matter, the punishment imposed by Respondent was not an abuse of discretion and mitigation is not appropriate.

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 26, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE