**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ANTHONY JOE ELKINS,**
**Grievant,**

**v.** **Docket No. 2013-0178-MAPS**

**REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/**
**SOUTHWESTERN REGIONAL JAIL,**
**Respondent.**

## DECISION

Grievant, Anthony Joe Elkins, was employed by Respondent, Regional Jail and Correctional Facility Authority at the Southwestern Regional Jail. On August 10, 2012, Grievant filed this grievance directly to level three[1] stating, "I was fired for no reason." For relief, grievant seeks to be reinstated with back pay, holidays, sick leave, and annual time.

A level three hearing was held on November 9, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Katherine L. Dooley, Respondent was represented by counsel, Travis E. Ellison III, General Counsel, West Virginia Regional Jail and Correctional Facility Authority. This matter became mature for decision on December 10, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

### Synopsis

Respondent terminated Grievant from his position as a Correctional Officer II. Respondent provided neither documentary evidence, testimony from the termination decision-maker, nor testimony from the investigator to justify the termination. As proof of the alleged wrongdoing, Respondent presented only the testimony of Grievant's

[1] Direct filing to level three is permitted pursuant to W. VA. CODE § 6C-2-4(a)(4).

accuser. Grievant denies all allegations. Neither the testimony of the accuser nor the Grievant's testimony can be found completely credible. Therefore, it being no more likely than not that the allegations are true, Respondent has failed to meet its burden of proof. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

**Findings of Fact**

1. Grievant was previously employed as a Correctional Officer II ("COII") by Respondent at the Southwestern Regional Jail and had been employed by Respondent for over eight years.

2. On June 18, 2012, Grievant was suspended without pay for fifteen days pending an investigation. The suspension was renewed for an additional fifteen days.

3. Grievant was then terminated. Respondent did not introduce the letter of termination into evidence, so the exact date, nature, and justification for the termination are unclear. Although both sides presented evidence and included in their proposed Findings of Fact and Conclusions of Law discussion of both Grievant's alleged sleeping while on duty and Grievant's alleged intimidation of witnesses, Respondent's counsel represented in the hearing that the only basis for termination being pursued was that of Grievant's alleged sleeping on the job.[2]

4. In the five to six months prior to the suspension, Grievant had been teamed with COII John Cooper "two or three" times, with those times being during the

[2] During argument on evidentiary objections in the direct examination of COII Whitt, Respondent's counsel represented that Grievant was only terminated for sleeping on duty and stated, "I'm here to litigate he was sleeping on the job and that's it."

midnight shift. COII Cooper was a new employee who had been on the job approximately six months. He was hired in as a COII rather than a Correctional Officer I due to either previous law enforcement training or experience.

5. The midnight shift includes a correctional officer to serve as a tower guard and a correctional officer to serve as a rover. The tower guard is in charge of monitoring the facility from the tower, opening doors, and monitoring communication. The rover walks the floor and handles the interaction with inmates.

6. In June 2011, COII Cooper accused another COII, Paul Smith, of wrongdoing, and during the investigation into that employee, COII Cooper then also made allegations against Grievant for sleeping on duty.

7. The tower door is to remain locked at all times. The door is locked from the inside using a key. There is a known weakness to the locking mechanism that allows the door to be broken into if the key is left in the interior lock. Leaving the key in the lock is a serious security breach.

8. COII Cooper did not complete an incident report of the alleged sleeping of Grievant, nor did COII Cooper keep any personal record of the alleged sleeping. COII Cooper did not complete an incident report until he was contacted about the investigation of another employee, months after he first supposedly witness Grievant sleeping.

9. Grievant admitted he had previously lied in an investigation against another employee, claiming he was forced to do so by his supervisor for fear of losing his job.

10. COII Carlos Turner and COII Berbin Townsend had both worked with Grievant for many years on midnight shifts and neither had ever witnessed Grievant sleeping or otherwise breaching security. COII Whitt had worked with Grievant for two years and had never witnessed him sleeping on duty.

11. Respondent states that it conducted an investigation before terminating Grievant, but Respondent provided no evidence of the investigation, its methods, or its findings.

12. Respondent provided the testimony of Administrator David Farmer, but Mr. Farmer neither had knowledge of the facts of the allegation, participated in the investigation, nor was the decision-maker for the termination.

**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. W. VA. CODE § 29-6A-6; *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 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.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful

intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

As proof in this case, the Respondent has offered only witness testimony. The testimony of Respondent's probative witness and Grievant are in complete disagreement on all key facts. COII Cooper testified that each time he worked with Grievant, which was two or three times, Grievant would sleep in the control tower. COII Cooper could not provide a specific number of times that this happened or provide specific dates on which this happened. COII Cooper was not certain of

his or Grievant's relative duty posts when the alleged sleeping occurred, stating, "He may have been my tower person. He may have been my rover. I can't remember specifically." COII Cooper stated that each time Grievant allegedly slept, Grievant would talk for an hour or two, then prop his feet up on the desk and go to sleep, sleeping three to four hours. COII Cooper claimed he reported this behavior to his supervisor, Sargent Chad Martin, who told him not to complete an incident report. Grievant denies ever sleeping while on duty. COII Cooper testified that he was able to observe Grievant sleeping in the tower because Grievant left the key in the door, so

COII Cooper was able to break into the tower and observe Grievant. COII Cooper testified that when he would exit the tower, he would lock the door back. When pressed, COII Cooper admitted that even if Grievant had not left the key in the lock, COII Cooper would put the key in the lock himself. Grievant testified he had never left the key in the lock since another employee had been terminated for that breach of security some years before. He and an inmate had viewed this incident, which made Grievant realize how dangerous it was to leave the key in the lock, which could allow inmates to break into the tower.

Therefore, a credibility determination must be made. In assessing the credibility of witnesses, some factors to be considered ... are the witness': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). As in *Leichliter,* there are very few of the above subjective factors available by which to judge credibility in this case, and proper weight of the evidence cannot be based merely on the number of witnesses testifying for one side or the other. *Leichliter v. W. Va. Dep't of Health &Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

COII Whitt, COII Turner, and COII Townsend all testified they had never witnessed Grievant sleeping on the job. There was no indication that any of the testimony on this issue was not credible. The demeanor of all on this issue was appropriate, calm, and forthright. COII Whitt's testimony in particular seems credible on this issue as he had testified negatively against Grievant on another issue found to be irrelevant. Even so, proof that others had never witnessed Grievant sleeping does not prove that Grievant never slept on the job, and this testimony could not be offered to refute alleged sleeping on any particular day as the accuser did not provide specific dates on which the alleged sleeping occurred.

CO II Cooper is the only witness to Grievant allegedly sleeping on the job. COII Cooper's demeanor during his testimony was poor. He was at times in his testimony hostile, defensive, sarcastic, and smug. Regarding the substance of his testimony, COII Cooper could provide no real details of the alleged sleeping. He testified that he and Grievant had worked together over the course of "five or six months" "two or three times," but that Grievant had slept in the tower every time they worked together. COII Cooper stated that Grievant would talk for an hour or two, then prop his feet up on the desk and go to sleep, sleeping three to four hours. Regarding their relative duty assignments, he testified, "He may have been my tower person. He may have been my rover. I can't remember specifically." The lack of specificity of whether Grievant was a tower guard or a rover at the time of the alleged sleeping is particularly disturbing given that it would be completely impossible for a rover to sit at a desk and sleep for three hours given the nature of that position's duties. Further, COII Cooper could not provide dates or times of the alleged sleeping, although he acknowledges it was months prior to

his report that lead to the investigation. Again, when pressed for details, COII Cooper said he was working midnights and had trouble remembering and keeping things straight, and he could not be expected to remember "who was doing what."

In testifying about how he could see Grievant sleeping when Grievant was in a locked tower, COII Cooper alleged that Grievant would leave the key in the lock on the inside of the door, which would allow COII Cooper to break into the tower. When pressed further, he testified that even when Grievant would not leave the key in the lock, that COII Cooper would place the key in the lock himself, even though he knew that was a serious security breach. He was never able to answer satisfactorily how he got into the tower in the first place to leave the key in the lock on those times, by his own testimony, when Grievant did not leave the key in the lock. All of the testimony regarding the key is internally inconsistent. If Grievant was the rover, he could not have been sleeping as COII Cooper described because the rover is not stationed in the tower. The whole story is implausible as COII Cooper could not testify to basic details. If he and Grievant had only worked together "two or three" times, the rest of COII Cooper's testimony about Grievant sometimes leaving the key in the tower door and sometimes not, does not make sense.

Regarding the allegation that Grievant threatened witnesses, that testimony is deemed irrelevant for factual purposes as Respondent's counsel asserted Respondent was only pursuing termination against Grievant for sleeping on the job. However, COII Cooper's testimony on this issue is useful in making a credibility determination. COII Cooper testified to supposed aggressive looks from the Grievant and that other people were telling him Grievant was calling him a rat. However, COII Cooper refused to

name any of the people who supposedly informed him of this. Also, COII Cooper clearly testified he was not intimidated by Grievant. He said, "While I'm on State property, I'm not intimidated by anyone." He stated further, "Being the person that I am I said, 'I'll take care of this myself.' I don't need to write a report. I don't need to go to Administrator. I don't need to go to First Sargent. I don't need to go to Corporal. I don't need to go to Sargent. I'll go to [Grievant] directly. I caught him out on the parking lot." At which time COII Cooper informs Grievant that he has made allegations against Grievant to the administration. Based on this testimony, it appears it was actually COII Cooper who was the aggressor and attempting to intimidate Grievant. Further, COII Cooper does have a motive to lie. Grievant testified that COII Cooper told him he, Cooper, was tired of being a rover every day while Grievant got to sit in the tower. This attitude is completely consistent with the demeanor COII Cooper displayed during the hearing, and would represent a motive to lie. As in *Leichliter*, both the lack of specificity of the testimony and the lapse of time in reporting the alleged wrongdoing reduces the credibility of the testimony offered by COII Cooper. Considering his demeanor, inconsistencies in his testimony, and motive to lie, COII Cooper's testimony cannot be deemed reliable or credible.

Grievant's demeanor was much better than that of COII Cooper. Grievant was calm and deliberate in his testimony. His description of events relayed was much more specific and consistent. He was not defensive on cross-examination. Grievant denied that he kept the key in the door after a previous employee had been fired for that breach. Grievant relayed that he saw this employee open the tower door with just a coin while the key was in the interior lock, and this employee did so in front of an

inmate. Grievant realized then how dangerous it was to leave the key in the tower door because inmates could break into the tower. Grievant's story seemed plausible and rational. He denied that he had slept at work or attempted to intimidate coworkers. He relayed a specific and convincing account of the conversation between he and COII Cooper in the parking lot. His testimony in general was consistent and appeared plausible. However, Grievant did admit he had previously lied in a disciplinary action about another employee at the direction of a superior officer. In addition, Grievant testified that he had been working sixteen hours of overtime a week, which would make it more likely that Grievant might fall asleep on the job. Grievant has an obvious interest and motive to lie in that he is trying to get his job back. His good demeanor in testifying cannot outweigh his previous lie and motive to lie in this case. Therefore, Grievant cannot be deemed completely credible either.

However, it is not Grievant's responsibility to disprove he slept on the job. It is Respondent's responsibility to prove that Grievant did, and Respondent has simply not met its burden in this case. Respondent failed to introduce any documentary evidence, providing neither the termination letter nor the facility policy upon which the termination was based. Respondent presented neither the testimony of the decision-maker for the termination, nor the investigator of the events. Although Respondent seemed to imply that Grievant had previously escaped discipline due to a corrupt supervisor, Respondent provided no evidence of this allegation. To prove its case, Respondent called only three witnesses: the administrator who had no direct knowledge of the allegations and did not make the termination decision, and two fact witnesses, one of which testified he had never actually witnessed Grievant sleeping on the job.

As no witness can be found to be completely credible, and there is no other corroborating evidence of the allegation, it is no more likely than not that Grievant slept on the job. There may have been facts or inferences that Respondent relied upon in making the determination to terminate Grievant, such as the allegations of corruption alluded to against Grievant's supervisor, Sargent Martin, but no evidence was presented to the undersigned if that was the case. 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 following Conclusions of Law support the decision reached.

**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. W. VA. CODE § 29-6A-6; *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 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.*

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384,

264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. In assessing the credibility of witnesses, some factors to be considered ... are the witness': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). As in *Leichliter,* there are very few of the above subjective factors available by which to judge credibility in this case, and proper weight of the evidence cannot be based merely on the number of witnesses testifying for one side or the other. *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

4. As no witness can be found to be completely credible, and there is no other corroborating evidence of the allegation, it is no more likely than not that Grievant slept on the job. Therefore, Respondent has failed to meet its burden of proof.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a Correctional Officer II at the Southwestern Regional Jail effective June 18, 2012, to pay him back pay to that date, with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which he would have otherwise been entitled, effective that date.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: February 8, 2013**

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**Billie Thacker Catlett**
**Administrative Law Judge**