THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICIA VARNER,
Grievant,

Docket No. 2024-0390-DHS

DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF CORRECTIONS AND REHABILITATION,
Respondent.

DECISION

Grievant, Patricia Varner, is employed by the Respondent, West Virginia Division of Corrections and Rehabilitation ("WVDCR"), a division of Respondent West Virginia Department of Homeland Security, as a Corrections Counselor II, at the Respondent's Mount Olive Correctional Complex ("MOCC). On November 3, 2023, Grievant filed a direct to level three grievance against Respondent. Grievant is grieving her forty (40) hour suspension without pay for two alleged acts of insubordination for propping a door open without permission and allegedly allowing an inmate to participate in an inmate count. In Grievant's statement of grievance, she objected to and denied the findings in her suspension letter, alleged she was discriminated against, and claimed her suspension was illegal. The relief sought by Grievant is for her suspension to be overturned, for her employment record to be expunged of this incident, that she receives full pay and benefits that were a result of this suspension and for any other relief deemed appropriate.

A level three hearing was held before the undersigned Administrative Law Judge on February 6, 2024, in Charleston, WV. Grievant appeared in person and was represented by Elizabeth K. Campbell Esq. of Harrah and Campbell, PLLC. Respondent appeared by agency representative Donald Ames, Superintendent of Mt. Olive Correctional Complex, and by their counsel, Jonathan M. Calhoun, Assistant Attorney

General. This matter became mature for decision on March 8, 2024, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant challenges Respondent's decision to suspend her for 40-hours without pay for two alleged acts of insubordination for propping a door open without permission and allowing an inmate to participate in an inmate count. Grievant argued she did not allow an inmate to participate in an inmate count and claims her suspension for 40-hours is excessive for propping a door open. Respondent argues Grievant's actions established blatant and flagrant insubordination and warranted her suspension. Respondent failed to prove that Grievant failed to obey a lawful directive as Respondent admitted that Grievant did in fact check the inmate's cell as directed for purposes of conducting an inmate count. Respondent has also failed to prove by a preponderance of the evidence that the disciplinary action taken was justified as Superintendent Ames stated he would have only given Grievant a verbal reprimand for allowing a door to be propped open. 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, Patricia Varner is employed by the Respondent, West Virginia Division of Corrections and Rehabilitation ("WVDCR"), a division of Respondent West Virginia Department of Homeland Security, as a Corrections Counselor II, at the Respondent Mount Olive Correctional Complex prison ("MOCC) for five years.

2. As part of her duties at the prison, Grievant is regularly used as a security officer where her security duties involve keeping count of the inmates several times a day in the prison.

3. On September 7, 2023, Grievant was on security detail in the Pine Hall, side area II of the prison.

4. The air conditioning in the Pine Hall area II of the prison had a history of going out and the area would frequently become hot and stuffy. Because the air conditioning going out was such a common occurrence, it became a common practice to request permission to prop the door open to allow air to flow into the area.

5. The proper practice to prop a door open in the prison was an employee would get permission from their shift commander before propping the door open so that it would be logged by the shift commander in a logbook or binder.

6. The door propping due to the air conditioning being out became a written practice that was posted or referred to in employee briefings.

7. Lieutenant Michael Blagg is the Night Commander at the prison and is responsible for the security of the facilities. Lt. Blagg was working as Grievant's shift supervisor on September 7, 2023.

8. On September 7, 2023, Lt. Blagg was escorting a prison nurse to Pine Hall. Before Lt. Blagg arrived with the nurse, a "Covid cleaner "came through Pine Hall and propped the dayroom door open with a roll of garbage bags to get a cleaning cart through. Grievant was aware the Covid cleaner propped the door open and did not remove the roll of garbage bags from the dayroom door while the Covid cleaner was doing his cleaning duties because the air conditioning had gone out.

9. After Lt. Blagg escorted the nurse, he reported that he "removed the roll of garbage bags with his (sic) foot and secured the door," thereafter acknowledging the same with Grievant. *Respondent's Exhibit #3.*

10. Lt. Blagg clarified that Grievant had been given permission to prop the door open in the past but was not given permission on September 7, 2023, and having a door left propped open created a security risk.

11. Lt. Blagg did not reprimand Grievant for allowing the door to be propped open, but he did report it to his supervisor, Major Samuel Savilla, via a written memorandum dated September 7, 2023. *Respondent's Exhibit No. 3.*

12. Also, on September 7, 2023, Sargent Evans called the Grievant via prison telephone regarding a discrepancy in the inmate count.

13. Sargent Evans believed a discrepancy in the inmate count occurred due to believing a particular inmate was supposed to be teaching a class in the kitchen area and the inmate was not in the kitchen during the kitchen count.

14. Grievant reported to Sargent Evans over the phone that the inmate was not supposed to be in the kitchen but that the class the inmate was teaching was in the conference room. Grievant asserted she knew where her inmates were always located and informed Sargent Evans of the inmate's exact location. Despite informing Sargent Evans of the inmate's location, Sargent Evans ordered Grievant to check the inmate's cell number 213 and redo the count.

15. Video surveillance footage shows the relevant events on September 7, 2023. *Grievant Exhibit No. 11*. The video surveillance video does not contain any audio recording.

16. The video surveillance footage shows that as Grievant was walking over to check cell number 213 that she briefly spoke with the Covid cleaner who was in between Grievant and cell number 213. The video surveillance shows the Covid cleaner looking into the cell as Grievant is walking over to check the cell. The video surveillance footage shows what appears to be a brief communication between the Covid cleaner and Grievant and then the Covid cleaner walking away. The surveillance video then clearly shows Grievant looking into cell 213 for purposes of redoing the inmate count.

17. At the level three hearing, United Manager, Chris Wilson proclaimed that he was on the same end of the phone call with Sargent Evans and Grievant and claimed he overheard Grievant ask the Covid Cleaner to check whether the inmate was in his cell.

18. Grievant denied relying on the Covid cleaner for the inmate count.

19. On September 7, 2023, Unit Manager Wilson drafted a memorandum to Lt. Blagg of the events that occurred that day. The memo included language that Unit Manager Wilson heard Grievant ask the Covid cleaner to look in a cell to verify whether the inmate was inside the cell. *Respondent's Ex. No. 1.*

20. On September 7, 2023, Lt. Blagg wrote a memorandum to Major Samuel Savilla, concerning Grievant opening the cell of an inmate and allowing another inmate to look inside for purposes of participating in an inmate count. *See Respondent's Ex. 2.*

21. Unit Manager Richard Bess became aware of the events that occurred on September 7, 2023, and had a discussion with Grievant. After the discussion, Unit Manager Bess drafted a memorandum to Associate Superintendent of Programs John Bess. *See Memo Respondent's Ex. No. 4.* In the memo, Unit Manager Bess describes a conversation between himself and Grievant in which she acknowledged asking the Covid

cleaner inmate to check the cell in question while also stating that her count was correct and that she also checked the cell herself.

22. On September 28, 2023, Associate Superintendent Bess presented a "Request for Discipline" memorandum to Superintendent Donald Ames due to Grievant propping a door open without permission and allowing an inmate to participate in an inmate count. *Respondent's Exhibit No. 5.*

23. On October 16, 2023, Grievant received a letter from Superintendent Ames which informed her she was receiving forty (40) hour suspension. *Respondent's Ex. No. 7.*

24. In the October 16, 2023, letter, Superintendent Ames cites Policy Directive 129.00, "Code of Conduct and Progressive Discipline" Section II., Paragraphs A, B and C. (hereafter Policy Directive 129.00) as containing the Rules Grievant violated. *Respondent's Exhibit # 7*. The October 16, 2023, suspension letter cites the language of Policy Directive 129.00 and went on to specifically declare that Grievant's "actions and willful refusal to obey lawful directives is an act of insubordination." *Id.*

25. At the level three hearing, Superintendent Donald Ames described how the MOCC is a maximum-security prison and that allowing an inmate to have access to the cell of another inmate was a serious security violation and increased the possibility of an assault or escape.

26. Superintendent Ames proclaimed that he would have only given Grievant a verbal warning for the violation of propping a door open without permission. Superintendent Ames asserted Grievant's two incidents together, especially allowing an

inmate to have access to another inmate's cell, is why they chose to discipline Grievant by suspending her for forty (40) hours.

27. Video surveillance footage does not show the Covid cleaner entering cell 213 while Grievant was walking over to conduct the inmate count.

28. It is undisputed that Grievant did in fact check cell 213 herself as ordered. Grievant does not have any prior disciplinary actions against her.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant is grieving her forty (40) hour suspension without pay for two alleged policy violations where she was accused of insubordination. Grievant claims she was unfairly discriminated against due to her suspension being unwarranted and excessive. Grievant is requesting relief in the form of the suspension being removed from her record and reimbursement for the 40 hours pay and time accrued she lost. Grievant argues she admitted allowing an inmate Covid cleaner to prop open a door without first receiving permission and asserts she has learned from her mistake. Grievant denies Respondent's allegations that she was insubordinate by allowing an inmate Covid cleaner to participate in an inmate count. Respondent argues the two violations taken together created a

serious risk at the prison and the suspension without pay is warranted. Respondent also argues Grievant failed to establish she was discriminated against.

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 willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (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)." Graham v. Wetzel County Bd. of Educ., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

Respondent has failed to meet its burden of proof in this case to establish its claim that Grievant was insubordinate. In Respondent's disciplinary letter to Grievant,

Superintendent Ames used the word “insubordinate” seven (7) times but failed to pinpoint Grievant’s refusal to obey any specific order. *Respondent’s Exhibit # 7.* The suspension letter does not state with particularity what lawful directive Grievant refused to obey. Instead, the suspension letter merely gives a conclusory explanation that Grievant’s “actions and willful refusal to obey lawful directives is an act of insubordination.” *Respondent’s Exhibit # 7.*

Respondent claimed that Grievant permitted an inmate to carry out her job duty and created a serious safety risk by granting one inmate access to the cell of another. The video evidence clearly contradicts this claim. The video clearly shows the inmate Covid cleaner merely briefly peering into the cell as he was performing his cleaning duties and briefly speaking to Grievant. The Covid cleaner did not enter the inmate’s cell for purposes of accessing the cell.

The record revealed the creation of a Covid cleaner occurred due to the Covid pandemic, and no written procedures were ever produced. Nothing in the record was established showing the Covid cleaner was in a location where he was not allowed to be or that it was forbidden to speak with a Covid cleaner. It is undisputed that Grievant did in fact check the inmate’s cell and did not rely on the Covid cleaner to do the inmate recount. Respondent cannot establish any factual occurrence showing Grievant refused to do a recount. As such, Respondent failed the first prong of *Butts v. Higher Educ. Interim Governing Bd* by failing to establish that Grievant refused to obey an order to do a recount. Respondent also failed to establish Grievant’s actions of communicating with the Covid cleaner were against policy.

Additionally, the issue dealing with Grievant allowing a door to be propped open without permission does not rise to the level to establish blatant, willful insubordination worthy of a 40-hour suspension without pay. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency 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)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee

was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

The record reveals that Grievant has worked for Respondent for five years without any disciplinary issues. The record also reveals that on September 7, 2023, Lt. Blagg was working as Grievant's supervisor and did not reprimand Grievant for a policy violation when he discovered a door had been propped open. Moreover, at the level three hearing, Superintendent Ames proclaimed that he would have only given Grievant a verbal warning for the violation of propping a door open without permission.

The record failed to show any other employees similarly disciplined for propping a door open without permission. As such, the penalty of suspending Grievant for 40-hours without pay is clearly disproportionate to the offense proven. Superintendent Ames asserted it was only because of Grievant's two incidents together, especially allowing an inmate to have access to another inmate's cell, as the reasoning to choose to discipline Grievant by suspending her for 40 hours without pay. As stated above, Respondent failed to establish that Grievant failed to obey a lawful directive and Respondent admitted that Grievant did in fact check the inmate's cell as directed. Respondent has failed to establish proof by a preponderance of the evidence that the disciplinary action taken was justified.

Also, because Respondent failed to establish Grievant was insubordinate and Grievant's actions of allowing door to be propped open did not warrant her 40-hour suspension without pay, it is not necessary to address the argument that Grievant was discriminated against.

Accordingly, this grievance should be GRANTED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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 willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*).

3. The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

4. "'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).

5. 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)." Graham v. Wetzel County Bd. of Educ., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

6. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

7. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

8. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-

183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

9. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Respondent failed to establish that Grievant failed to obey a lawful directive as Respondent admitted that Grievant did in fact check the inmate's cell as directed. Respondent also failed to establish proof by a preponderance of the evidence that the disciplinary action taken was justified.

Accordingly, the grievance is **GRANTED.** Respondent is **ORDERED** to pay Grievant for the forty hours she was suspended, plus interest at the statutory rate; to restore all benefits affected by the suspension, including seniority; and to remove all references to the suspension from Grievant's personnel records maintained by Respondent.

The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed. W. Va. Code § 6C-2-5(a) (2024). An appeal of the decision of the

administrative law judge shall be to the Intermediate Court of Appeals in accordance with W. Va. Code §51-11-4(b)(4) and the Rules of Appellate Procedure. W. Va. Code § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. Va. Code § 29A-5-4(b) (2024).

DATE: April 22. 2024.

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Wes H. White
Administrative Law Judge