

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID A. AUSTIN,
Grievant,

v.

Docket No. 2016-0125-MAPS

DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

Grievant, David Austin, was employed by the Division of Corrections (“Respondent”) as a Correctional Officer 1 assigned to the Mount Olive Correctional Complex. (“Mount Olive”). Mr. Austin filed a grievance directly to level three¹ challenging the termination of his employment for, among other things, failure to follow the Progressive Discipline Policy, giving him more severe discipline than other employees who committed the same offence and unjust treatment.² Grievant seeks “reinstatement” and “compensation of wages.” A level three hearing was held in Beckley, West Virginia, on November 4, 2015. Grievant appeared, *pro se* and Respondent was represented by Cynthia Gardner, Assistant Attorney General. This matter became mature for decision on December 7, 2015, with receipt of the last of the parties’ Proposed Findings of Fact and Conclusions of Law.

¹ See W. VA. CODE § 6C-2-4-(a)(4).

² This is a brief summary of the allegations. The entire grievance statement is part of the record and incorporated herein by reference.

Synopsis

Grievant was a probationary Correctional Officer assigned to Mount Olive Correctional Complex, the State's maximum security facility which houses inmates who have been convicted of the most serious offences. During his short employment at Mount Olive, Grievant had been warned to stay alert while on duty and had been found sleeping on post twice. Respondent decided not to retain Grievant as a permanent employee. Grievant argues that he is a good employee and his dismissal constitutes discrimination since the typical penalty for a second "sleeping on post" offence for a permanent employee is a ten-day suspension. Grievant did not prove that his performance as a probationary employee was satisfactory. Respondent was justified in terminating Grievant's probationary employment.

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, David Austin, was employed by Respondent as a Correctional Officer 1 assigned to the Mount Olive Correctional Complex.
2. Mount Olive is the State's maximum security facility populated by inmates convicted of the most serious criminal offenses. Security is of paramount concern, at the complex to ensure public safety.
3. Grievant was initially employed as a temporary Correctional Officer 1 on February 25, 2015. He was employed as a full-time probationary Correctional Officer 1 on April 16, 2015. Grievant was assigned to work the night shift at Mount Olive.

4. A Correctional Officer 1 is required to serve a twelve-month probationary period. (Division of Personnel Classification Specifications). Grievant's probationary period would not end until April 17, 2016.

5. While a Correctional Officer is serving the probationary period, the officer is evaluated every two months, using Employee Performance Appraisal ("EPA") forms provided by the Division of Personnel ("DOP").

6. Grievant received an EPA-1 on April 27, 2015. In this document, Sergeant David Miller reviewed with Grievant his essential duties and responsibilities, as well as performance expectations. Attached to the EPA-1 were two documents: *MOCC Performance Standards and Expectations*, which sets out sixteen specific performance expectations; and the DOP Classification Specifications for the Correctional Officer 1 classification.

7. By letter dated June 9, 2015, Grievant was issued a five-day (forty hours) suspension without pay. On May 15, 2015, Grievant had fallen asleep, with his feet propped up, at the Infirmary Security Post. He did not wake up until another employee opened a door to the infirmary causing an alarm to sound. In the notice of suspension Grievant was reminded that such "actions violate safe and secure operating procedures with the potential to cause harm not only to yourself but to your fellow employees and members of the general public." (Respondent Exhibit 6).

8. The first two-month evaluation was conducted with Grievant by Lieutenant Daniel Hahn, on June 11, 2015. Grievant received an EPA-2 apprising him of his progress to date in meeting his performance expectations. Grievant received a rating of "DOES NOT MEET EXPECTATIONS." (Respondent Exhibit 3, Emphasis in original). The

document specifically noted Grievant's incident of sleeping on post as a reason for the poor rating and directed Grievant to "stay alert at all times and understand the consequences of sleeping on post could endanger his and other lives."³ Another evaluation was scheduled for August 14, 2015.

9. On July 6, 2015, Grievant and a Correctional Officer 2, were assigned to work a post at Charleston Area Medical Center – Memorial Division. The officers were required to provide security while an inmate received medical treatment at the hospital. The inmate held a class five security rating designating him as among the most dangerous housed at Mount Olive.

10. Both officers were discovered sleeping in the patient's room by a primary care nurse who reported what she had found to the charge nurse. The charge nurse entered the room and tried to wake the officers by clapping her hands. When that failed she kicked the boot of the Correctional Officer 2 who awoke and then roused Grievant. The charge nurse reported the incident to Mount Olive officials.

11. After meeting with Grievant and discussing the incident, Captain Derek McKinney prepared a memorandum dated July 9, 2015, recommending the termination of Grievant's probationary employment. (Respondent Exhibit 5).

12. On July 15, 2015, Captain Derek McKinney conducted an evaluation with Grievant and reviewed a completed EPA-3 with him. The EPA-3 is a detailed document which serves as the final performance review at the end of a review period. Grievant was rated as Needs Improvement on nineteen performance indicators and Meets Expectations

³ This phrase is written as it appeared on the EPA-2. (Respondent Exhibit 3).

on four indicators. Most of the failing indicators related to incidents of sleeping on post and reliability to perform assigned duties related thereto.

13. In the area for Summary Comments, Captain McKinney wrote:

Officer Austin fails to effectively model the core values of the Division to promote an environment that assists offenders in developing behaviors to prevent recidivism. In less than four (4) months, Officer Austin has been found sleeping on post two (2) times, one of which was so severe, a nurse entering the hospital room and clapping her hands did not wake him up. His first EPA-2 issued to him in his probationary period stated that he did not meet the expectations that were issued to him on his EPA-1 dated 27 April 2015.

(Respondent Exhibit 1). In the area for Improvement and/or Development Plan, Captain McKinney wrote:

Officer Austin failed to meet the expectations of his EPA-1 by being found asleep on post. Officer Austin was issued an EPA-2 pointing out the deficiencies in his performance and was again found asleep on post in public eye. Due to the aforementioned facts, I recommend immediate separation from the workplace for Officer Austin.

(Respondent Exhibit 1).

14. Grievant met with Deputy Warden Ralph Terry on July 29, 2015, for a predetermination conference. Deputy Warden Terry informed Grievant that dismissal from employment was being considered because the agency felt that his performance had been unsatisfactory. Specifically, his supervisors were concerned with his incidents of failing to stay alert on post. Grievant was given an opportunity to respond to the specific allocations.

15. Warden David Ballard gave written notice to Grievant that his employment would be terminated for unsatisfactory performance effective August 13, 2015. The date of the letter was July 29, 2015. Grievant would be paid through the effective date, but

separation from the workplace was to occur immediately. Warden Ballard recounted the incidents of sleeping on post and noted that they occurred within a four month time span. He concluded that this was an indication of unsatisfactory performance.

16. It can be very difficult for correctional officers to remain fully alert when working the night shift. While it is not a regular occurrence, correctional officers do doze off from time to time. Regular full-time correctional officers who are caught sleeping on post generally receive a five-day (forty hours) suspension without pay for the first incident. The discipline for a second incident is generally a ten-day (eighty hours) suspension without pay. Any incidents thereafter lead to dismissal. For probationary correctional officers the discipline for the first incident of sleeping on post is generally a five-day (forty hours) suspension without pay. A second incident of sleeping on post during the probationary period generally leads to dismissal.⁴

Discussion

When a probationary employee is dismissed for misconduct, the dismissal is disciplinary and the burden of proof rests with the employer. Respondent must meet that burden by proving the charges against the grievant by a preponderance of the evidence. *Mendenhall v. Dep't of Health & Human Res./Bureau for Children & Families*, Docket No. 2011-0997-CONS (Apr. 26, 2011); *Birchfield v. Div. of Highways*, Docket No. 2010-1498-DOT (Apr. 5, 2011); *Grueser v. Dep't of Health & Human Res.*, Docket No. 2010-1341-DHHR (Dec. 1, 2010); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

⁴ Level three hearing testimony of Deputy Warden Terry.

When, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health & Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009); *Birchfield v. Div. of Highways*, Docket No. 2010-1498-DOT (Apr. 5, 2011).

The Division of Personnel's Administrative Rule at Section 10, describes the probationary period of employment as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." It further states that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 C.S.R. 1 § 10.1(a).

Respondent argues that Grievant did not meet a basic required standard at the correctional complex of staying alert while on post to ensure the safety and security of the inmates, staff, and general public. The Mount Olive *General Security Orders* specifically require that:

Staff will always stay alert and observe everything that takes place within sight or hearing.

- Sleeping (or "relaxing" with eyes closed) and reading any item not issued by the WVDOC or MOCC while on post is prohibited.
- Staff will be particularly alert during hours of darkness or inclement weather which restricts visibility.

Id. Clearly, security is a paramount responsibility for correctional officers which cannot be met if the officers are not awake and alert. This concern is intensified when the officers

are responsible for a high security risk inmate in a unsecure facility such as a hospital. Repeated failure to meet this responsibility is unsatisfactory performance.

Grievant does not deny that he fell asleep on duty, but points out that his performance was satisfactory in all other respects. He willingly volunteered for additional duties and generally completed his tasks. Moreover, Grievant points out that other officers fall asleep on the night shift due, at least in part, to the need for officers to work additional shifts, because of staffing shortages. He notes that other officers are not always dismissed after the second sleeping on post violation and terminating his employment for the same offense constitutes discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);
Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Respondent differentiates between regular correctional officers and probationary correctional officers in discipline for sleeping on post violations. Regular employees generally receive a ten-day suspension for the second offense, but probationary officers

are generally dismissed. This difference in treatment of these classes of employees is related to their job responsibilities. As set out above, the agency may “use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.” 143 C.S.R. 1 § 10.1(a). Probationary officers who have a second offense of sleeping on post during their probationary period have those events in the course of one year or less. This indicates an inability to meet one of the essential standards of work for the correctional officer position, and may be the basis for dismissal of a probationary employee under the DOP Rule.

Conversely, the second offense for a regular employee might occur years after the first offense, and indicate two discrete incidents rather than a pattern of failing to meet the required work performance standard. Additionally, the agency has more time and training invested in the development of a regular correctional officer, which may justify additional efforts to correct performance before terminating the officer’s employment.

In the present case, Grievant violated the rule against sleeping on post twice within a four month period. He is not similarly situated to regular correctional officers who would receive a ten-day suspension for the second offense, and he did not prove that other probationary correctional officers had been treated differently than he was with regard to such second offense. Consequently, Grievant did not prove discrimination as that term is applied to the grievance procedure.

While Grievant was able to demonstrate that his performance was satisfactory in some regards, he was unable to prove that it met certain essential standards expected by Respondent, and set forth in his job responsibilities as discussed in his EPA-1. Since

Grievant was unable to prove by a preponderance of the evidence that his overall performance was satisfactory the grievance is DENIED.

Conclusions of Law

1. When, as in this case, a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health & Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009); *Birchfield v. Div. of Highways*, Docket No. 2010-1498-DOT (Apr. 5, 2011).

2. The Division of Personnel's Administrative Rule at Section 10, describes the probationary period of employment as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." It further states that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 C.S.R. 1 § 10.1(a).

3. Grievant did not prove by a preponderance of the evidence that his overall performance was satisfactory. His performance was deficient in a critical job performance standard.

4. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2 (d).

5. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) That the different treatment is not related to the actual job responsibilities of the employees; and,

(c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove discrimination as that term is defined in the grievance procedure. W. VA.CODE § 6C-2-2 (d).

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: February 17, 2016.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**