THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEVIN LILLY, et al.
Grievants,

v. **Docket No. 2018-0959-CONS**

DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

Grievants, Devin Lilly, Aaron Bowers and Dustin Bell, are employed by Respondent, Division of Corrections ("DOC") as Correctional Officers ("COs") assigned to Mount Olive Correctional Complex ("MOCC"). These three Correctional Officers filed an expedited grievance as allowed by W. VA. CODE § 6C-2-4(a)(4), dated February 9, 2018, that they were:

> [S]uspended from duty without pay, from Mount Olive Correctional Complex, for three traditional working days for unsatisfactory job performance. (improper cuffing and shackling, improper strip searching of inmates in the Quilliams Two Segregation Unit) . . . on December 24 and 25, 2017. All officers involved, have not been issued the same, if any progressive discipline. Furthermore, there are multiple discrepancies, within our letters of suspension. They are not accurate but seem to be cut and pasted to be made almost identical. Within the letters, our employment with the agency was threatened, for sleeping during working hours. There was no investigation conducted to warrant this alleged sleeping accusation. We ultimately feel we are being discriminated against and being disciplined for not only our alleged actions but the actions of fellow officers and supervisors alike.

As relief Grievants seek:

> Any disciplinary action transcribed against us for this, be rendered void and permanently removed from any and all files. Back pay for the dates of suspension, including the week before and after the dates, due to overtime lost. In fear of

> retaliation, and our employment being threatened, we request our choice of shift and post, every 6 months, for as long as we are employed at MOCC.

A Level Three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on May 11, 2018. Grievants appeared *pro se*,[1] and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on June 15, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Each Grievant received a three-day suspension without pay for failing to follow proper procedures in escorting inmates and failing to report improper conduct by fellow officers. Grievants argue that they were charged with misconduct they did not commit, and they were subjected to discrimination because not all officers involved in the incidents received the same discipline.

Respondent did not prove all the allegations of misconduct with which all Grievants were charged. However, Respondent proved that each Grievant was guilty of sufficient misconduct to support the penalty given. Not all officers received the same discipline, but Grievants did not prove they were similarly situated with the officers who received different penalties.

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.

[1] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258.

Findings of Fact

1. All three Grievants are employed by the DOC and assigned to the Mount Olive Correctional Complex in the Correctional Officer 2 classification. In December 2017, when the incidents giving rise to the discipline took place, Grievant Bowers was classified as a Correctional Officer 1. He became a Correctional Office 2 prior to implementation of the discipline.

2. Correctional Officers begin employment in the Correctional Officer 1 classification. They remain in that classification until they have completed their training at the DOC academy, after which they are reallocated to the CO 2 classification. CO 1s perform the same duties as CO 2s on a daily basis but are given closer supervision and instruction.[2]

3. Mount Olive Correctional Complex ("Mt. Olive") is a maximum-security prison housing male felons. Within Mt. Olive, there are two housing units, Quilliams I and Quilliams II, formally known as the Control Unit. These units house inmates assigned to administrative segregation because they are unable to be housed safely and securely in general inmate population. These inmates are considered the most dangerous inmates in the complex. It is not uncommon for the inmates to be found in possession of make-shift weapons or other contraband.

4. Due to the unique security risk posed by the population in the Quilliams units, Correctional Officers are required to follow stringent procedures when escorting

[2] Correctional Officers may be initially hired in the CO 2 classification if they have prior experience and training.

these inmates from one place to another.[3] MOCC Post Order 3A-66 requires the following procedures:

- Prior to each escort the inmate must go through a strip search wherein his clothing is hand-searched with a metal detector.
- At least two officers are required to escort each inmate.
- During escort the inmate must be restrained with hands cuffed behind his back and legs shackled.
- Officers are to maintain hand contact with the inmate at all times
- These inmates may not be escorted with any other inmate.

(Respondent Exhibit 2). Failure to follow the required protocol is a breach of security.

5. In addition to the officers on the floor of the unit, there must be at least one officer stationed in the control tower at all times. The officer in the control tower controls the cell doors and is responsible for opening inmate cell doors for the officers on the housing unit. He or she must observe the officers on the housing unit and take action if something goes wrong with one of the inmate escorts. As with all officers at the complex, the tower officer is required to report any security breach he or she observes.[4]

6. On December 26, 2017, an inmate in the Quilliams II unit managed to avoid escort back to his cell and hid in the unit's shower room. When another inmate was escorted into the shower room, he was assaulted by the hidden inmate.

7. The shower room assault prompted an investigation which included a review of the video of the unit activities during the prior days, including the dates of

[3] For example, when an inmate is escorted from his cell to the shower room.
[4] Respondent Exhibit 3, DOC Policy Directive 129 Article V. Section J. paragraph 47.

December 24th and 25th, 2017. The investigation was conducted by DOC Lead Investigator, Curtis Dixon. The video review revealed that escort procedures, including searching, cuffing and shackling of inmates were not being carried out on the Quilliams 2 unit.

8. The video review of December 24, 2017, showed officers D.H. and G.S.[5] escorting inmates without following the procedures required by MOCC Post Order 3A-66. Specifically, inmates were released from their cells for escort without a strip search. Additionally, inmates were escorted to and from the shower room without leg shackles; with their hands cuffed in front rather than behind their backs; and without officers maintaining physical control of the inmate.[6]

9. Grievant Bowers was stationed in the control tower on December 24, 2017. He observed the improper inmate escorts but did not report the ongoing security breaches.

10. Review of the videos from December 25, 2017, revealed Officers D.H., M.H. and Grievant Lilly, violating MOCC Post Order 3A-66, by escorting inmates from their cells, to the shower, and back to their cells, without a strip search and leg shackles, as well as improper hand cuffing and failing to maintain physical contact with the inmates.[7]

11. Grievant Bell was stationed in the control tower on December 25, 2017. He observed the improper inmate escorts but did not report the ongoing security breaches.

[5] The parties referred to the officers involved in the incidents who were not Grievants by their initials.
[6] Respondent Exhibit 14, Still shot copies taken from the video of the Quilliams 2 unit.
[7] Respondent Exhibit 15, Still shot copies taken from the video of the Quilliams 2 unit.

12. Investigator Dixon interviewed all the Correctional Officers who had been assigned to the Quilliams II unit and who were seen on the video to be violating security order in late December 2017. The officers interviewed were: CO 2 G.S.; CO 1 D.H.; Grievant, CO 2 Aaron Bowers; Grievant, CO 2 Devin Lilly; Grievant, CO 2 Dustin Bell; and Sergeant D. S. All the officers except Sergeant D.S. admitted that they knew the proper safety procedure, that they were not performing the procedures properly and that they were "cutting corners" so that they could complete their mandatory duties more quickly.[8]

13. Sergeant D.S. was the Nightshift Supervisor from June 2017 through December 2017. He was not seen on the videos violating security regulations. He gave a statement to Inspector Dixon alleging that all officers were properly trained regarding the escort security procedures and he did not encourage his subordinates to breach security or cut corners. (Respondent Exhibit 1).

14. All of the Correctional Officer 2s, including Grievant Bowers, were given a three-day suspension without pay by Warden Ralph Terry. Correctional Officer 1 D.H. received a written reprimand and Sergeant D. S. was not disciplined.

15. Warden Terry issued CO 1 D.H. a written reprimand because he had not been through the academy at the time the incidents took place. Warden Terry felt there was insufficient proof to support disciplinary action for Sergeant D.S.

16. Initially Grievants were issued identical letters of suspension dated January 23, 2018. The letters notified Grievants that they were suspended for three days for the following reasons:

[8] Respondent Exhibit 1, Memorandum from Inspector Dixon to Warden, Ralph Terry.

> The reason for this suspension is unsatisfactory job performance, specifically breaches of security by not properly cuffing, shackling, strip searching segregation inmates, and failing to report this breach of security.

The letters stated that these actions were in violation of the following provisions of DOC Policy Directive 129.00, Progressive Discipline, Section V (J):

- 1: "Failure to comply with Policy Directives, Operational Procedures, or Post Orders."
- 5: "Instances of inadequate or unsatisfactory job performance."
- 47: "Breach of facility security or failure to report any breach or possible breach of facility security."

Respondent Exhibits 19, 20, & 21.

17. The initial letters also stated, "[I]f you are interested in continuing employment with the agency, you must refrain from sleeping during working hours." Id. Grievant's were not investigated or charged with sleeping on the job.[9]

18. Grievants were issued identical "Corrected and Reissued" letters of suspension dated February 8, 2018 which removed any reference to sleeping at work. Respondent Exhibits 4, 5, & 6. No reference to sleeping on the job related to this action is in any file or on any record related to Grievants' employment as CO's.

19. Both Officer D.H. and Grievant Bowers were in the CO 1 classification at the time of the incidents leading to the discipline in this matter. CO 1 D.H. had not been through the Basic Academy class prior to these incidents, but CO 1 Bowers had been through the Basic Academy and was reallocated to CO 2 in February 2018.

[9] Warden Terry testified that he drafted these letters using a previous letter as a template. He failed to take the sentence related to sleeping from work from the template in the drafting process.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants received identical letters notifying each of them that they were being suspended for three days without pay. The letters all listed the reason for the discipline as "breaches of security by not properly cuffing, shackling, strip searching segregation inmates, and failing to report this breach of security." It in uncontested that MOCC Post Order 3A-66 requires all inmates on the Quilliams 2 unit to be strip searched, leg shackled, handcuffed behind their backs and the officers are required to maintain physical contact with these inmates during the entire escort. It is also uncontested that the

Correctional Officers who were working the Quilliams 2 unit on December 24 and 25, 2017, were not following those security orders. Testimony made it clear that these inmates were a dangerous population and extra security measures were necessary to ensure the safety of the Correctional Officers as well as the inmates in the unit. The incident on December 26, 2017 where an inmate was able to hide in the shower and attack another inmate when he came in highlights how lack of adherence to security standards can lead to extremely dangerous situations.

While Grievants do not generally dispute that they committed some misconduct they argue that they did not commit all the misconduct with which the were charged. Most notably, none of the officers were found to be sleeping on the job as was noted in the first suspension letter. Warden Terry realized his mistake in the initial suspension notice letters and issued corrected letters which removed all mention of sleeping. The original letters were removed from all files and destroyed. No record remains that Grievants were charged with that offense. Additionally, the initial letters did not actually list sleeping on the job as a reason for the suspension. That issue was only mentioned near the end of the letter noting that such conduct would not be condoned.

"The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex reI. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc*., 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial

compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure)." *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-0824-PutCH (May 4, 2010).

The mention of sleeping on the job was a clerical error which was corrected by Respondent and was not listed in the reasons for the discipline. This error did not invalidate the notice given to Grievants related to their discipline.

All Grievants were charged with "breaches of security by not properly cuffing, shackling, strip searching segregation inmates, and failing to report this breach of security." Respondent proved by a preponderance of the evidence that Grievant Lilly committed all these security violations. However, Grievants Bell and Bowers were assigned to the tower when the security violations occurred. Respondent did not produce any evidence that either participated in the improper escorting of inmates. Respondent only proved that Grievants Bell and Bower were in the tower, witnessed these serious security violations and failed to take any corrective action or report them in violation of Policy Directive 129.00, Progressive Discipline.

The issue becomes whether these Grievants should receive the same discipline for failing to report the violations as those who committed them. The tower officer is the

only person who can open the doors on the unit. He or she can view nearly all the unit at one time and is responsible for alerting the officers on the floor if anything unusual is occurring. The tower is expected to watch all the other officers and take corrective action or report any activity which constitutes a threat to security. Failure to take such action places all the floor offices who must depend on him or her at risk. Warden Terry testified that any one of the charges was a sufficient threat to security to warrant a suspension. Had the tower officers reported the security breaches they would not have continued for an extended time. Respondent proved by a preponderance of the evidence that Officers Bell and Bowers violated Policy Directive 129.00 by failing to report multiple serious breaches of facility security. This misconduct was sufficient to warrant the discipline given.

Finally, Grievants argue that they were subjected to discrimination because not all the officers who were involved in the security breaches receive the same discipline. Specifically, Officer D.H. received a written reprimand and Sergeant D.S. received no discipline. 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).

None of the Grievants were similarly situated to Sergeant D.S. Grievants had all been recorded on video breaching security protocols or had been working in the Tower when those breaches took place. There was no doubt that they had committed some misconduct. Conversely, Sergeant D.S. was not recorded participating in security breaches and steadfastly denied any wrongdoing. The evidence of misconduct was not similar. Respondent ultimately decided they did not have sufficient evidence to discipline Sergeant D.S. That was clearly not the case with Grievants.

None of the Grievants were similarly situated to CO 1 D.H. Officer D.H. had not been through the Basic Academy and Warden Terry felt that he was entitled to some leniency because he had not been fully trained. While Grievant Bowers was classified as a CO 1 at the time of the incidents he had been through the Basic Academy and was fully trained. The difference in training is a significant and valid reason for treating Officer D.H. differently than Grievants.

Grievants allegation that the disciple was the result of discrimination is an affirmative defense. The burden of proving any affirmative defense by a preponderance of the evidence is upon the party asserting the defense. Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 3 (2008). Grievants did not prove that by a preponderance of the evidence that they were subjected to discrimination as that term is defined in the grievance procedure statutes.

Accordingly, the consolidated grievances are DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved by a preponderance of the evidence that the Grievants committed at least one of the violations with which they were charged and that any one of the violations was a serious enough breach of security to justify a three-day suspension without pay.

3. 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);
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> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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).

4. Grievants allegation that the disciple was the result of discrimination is an affirmative defense. The burden of proving any affirmative defense by a preponderance

of the evidence is upon the party asserting the defense. Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 3 (2008).

5. Grievants did not prove that by a preponderance of the evidence that they were subjected to discrimination as that term is defined in the grievance procedure statutes.

Accordingly, the consolidated grievances are 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: July 11, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE