

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL JOHN-CURTIS TAYLOR,
Grievant,

v.

Docket No. 2018-0860-MAPS

**DIVISION OF CORRECTIONS/
BECKLEY CORRECTIONAL CENTER**
Respondent.

DECISION

Grievant, Michael John-Curtis Taylor, is employed as a Correctional Officer 2 (“CO2”) by Respondent, Division of Corrections. He is assigned to the Beckley Correctional Center. Officer Taylor filed an expedited grievance¹ dated January 8, 2018 contesting a fifteen-day suspension without pay he received on December 4, 2017. As relief, Grievant seeks, “Removal of disciplinary actions, payment for time off on suspension, \$500,000 punitive damages.”²

A Level Three hearing was conducted in Beckley, West Virginia on April 3, 2018. Grievant appeared *pro se*.³ Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on May 4, 2018, upon receipt of Respondent’s Proposed Findings of Fact and Conclusions of Law.⁴

¹ W. VA. CODE § 6C-2-4(a)(4) authorizes employees to file directly at Level Three when the grievance is contesting certain matters including a suspension without pay.

² “Tort-like” damages are not available under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 10, 2009).

³ “*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.

⁴ Grievant did not submit post-hearing proposals.

Synopsis

Grievant was given a fifteen-day suspension for refusing mandatory overtime, abandoning his post, making an improper inmate count, and breaching facility security. Grievant does not dispute most of the facts but argues that he did not technically abandon his post since another officer was present when he left and that requiring him to work over-time caused problems with his child care arrangements. Respondent proved the reasons for the suspension by a preponderance of the evidence.

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, Michael Taylor, is employed by the Division of Corrections as a Correctional Officer 2 and is assigned to the Beckley Correctional Center ("BCC"). Grievant started working at the BCC in October 2016. He had previously worked as a CO2 at the Mount Olive Correctional Complex.

2. For several years it has been very difficult for the state to recruit and retain correctional officers. This has led to a chronic shortage of correctional officers at all facilities requiring the correctional officers employed at the facilities to work mandatory overtime to maintain minimum safe staffing levels.

3. BCC is a correctional facility that houses convicted felons. It operates twenty-four hours, seven-days a week and must be minimally staffed at all times to insure the security of the facility as well the safety of the staff, inmates and public at large. To provide necessary coverage, correctional officers regularly perform overtime to cover all necessary security posts at BCC.

4. BCC has implemented a system to ensure fair distribution of overtime to its correctional officers. Whenever there is a vacant security post on the upcoming shift, which needs to be covered, the Shift Commander of the current shift will first attempt to find a correctional officer on the current shift, who is willing to volunteer to perform overtime and cover the post on the upcoming shift. If there is no volunteer, the Shift Commander will go through a rotating list for mandatory overtime and assign the correctional officer, who is next on the list, to the upcoming vacant security post. This assignment of mandatory overtime is known as a "freeze."

5. Once a correctional officer has been frozen for an overtime shift, his/her name goes to the bottom of the list and the officer is not frozen again until all others on the list have been frozen in turn.

6. The West Virginia Division of Personnel's Classification Specification for "Correctional Officer II" states that "Applicants are subject to mandatory overtime requirement and must be available for assignment to any location in the State of West Virginia."

7. BCC's Operational Procedure #1.21, *Attendance & Authorized Leave*, states at Section V, Subsection Q a.:

[i]f overtime is needed, refusal to work required overtime or holidays; or inability to perform essential duties of Correctional Officer or Staff Member will be grounds for disciplinary action, up to and including dismissal, in accordance with Policy Directive 129.00 "Progressive Discipline."

Id.

8. On August 28, 2017, CO3⁵ Cartwright was the shift commander for the 8:00 a.m. to 4:00 p.m. shift. During that shift, he received a call-off from an officer who would be unable to work the 4:00 p.m. to midnight shift. That left a security post that would not be covered on the next shift.

9. Pursuant to procedure, CO3 Cartwright went through the rotating mandatory overtime list. Since CO3 Cartwright had been the last officer “frozen”, the list started with CO3 Tabitha Coleman, followed by Officers David Leggett, Jonathan Cooley, and Grievant. Coleman and Cooley were both on assignments off-site from BCC and their return to BCC was not known or certain. Leggett was on his regularly scheduled day off, which exempted him from being frozen on that day. Grievant was the next person on the list and was ordered by CO3 Cartwright to perform mandatory overtime and cover a security post on the next shift.

10. On August 28, 2017, Grievant was working his regularly scheduled shift of 8:00 a.m. to 4:00 p.m., when he was ordered by CO3 Cartwright to perform mandatory overtime and cover a security post on the next shift, 4:00 p.m. to midnight. This occurred at approximately 10:50 a.m. Grievant did not initially object.

11. Shortly thereafter, Grievant asked CO3 Cartwright if there were any other officers to work the mandatory overtime. CO3 Cartwright informed Grievant that the next two officers on the list, Robert Hughes and Aaron Bennett, had personal business to take care of after their shifts and would not volunteer to take the overtime.

⁵ The Division of Corrections utilizes a military ranking system. A Correctional Officer 3 holds the rank of Corporal and is the first supervisory level.

12. At approximately 12:10 p.m., Grievant informed CO3 Cartwright that he could not stay over, and that he was refusing to accept the mandatory overtime. CO3 Cartwright informed Grievant that he would have to report Grievant for refusing mandatory overtime. Grievant told him "okay."

13. Around 12:55 p.m. another officer from the upcoming shift reported that he would not be in for work. This required an additional officer to perform overtime and cover a security post on the upcoming shift.

14. Grievant was working on the Residential Substance Abuse Treatment ("RSAT") unit during his regular shift. That unit is for inmates who are addicted to drugs and is located on the fourth floor the Jackie Withrow State Hospital. Based upon security needs, two officers were needed to serve on that unit during the 4:00 p.m. shift.

15. CO3 Cartwright determined at about 3:15 p.m. that he would have to work one of the two vacant security posts on the upcoming shift and that another officer was still needed to perform mandatory overtime. He called Grievant and informed him that no one was available to relieve Grievant and that Grievant would have to stay on his post in the RSAT unit for the 4:00 p.m. to midnight shift.

16. Grievant asked CO3 Cartwright to mandate either Officer Bennett or Officer Hughes to cover the mandatory overtime. CO3 Cartwright informed Grievant that it was not their turn to cover mandatory overtime and that he was ordered to stay on his post for the upcoming shift. Grievant stated that he was leaving his post at 4:00 p.m. even if no other officer relieved him at his post. CO3 Cartwright reasonably believed that Grievant would leave his assigned post after 4:00 p.m. Therefore, he told Officer Bennett to stay at the facility in case Grievant abandoned his post at 4:00 p.m.

17. Mandatory formal inmate counts must be performed at regular intervals in the BCC. The central command calls for the count and the officer on each unit conducts the count by taking a clipboard which holds a prepared sheet denoting the assigned place of each inmate on each date and checking off if the inmate is in his/her assigned location. Use of the clipboard is mandatory to avoid errors and maintain necessary records from shift to shift. BCC's Operational Procedure #2.07, *Inmate Counts*.

18. At 4:00 p.m. the inmate count was called by Central Control. At that time, Grievant was required to do an inmate count for the RSAT unit. Grievant was the only correctional officer on the day shift. A non-uniformed correctional employee was assigned to the second security post during this shift.⁶

19. As shown on the security video for the RSAT unit, Grievant conducted the inmate count without the clipboard or prepared count sheet. The video revealed that Grievant had conducted his earlier count properly and Grievant acknowledged that the 4:00 p.m. count did not comply with required operational procedures.

20. Once an officer has completed his/her inmate count, it is expected for the officer to call-in the count totals to Central Control. Grievant did not call-in his count totals. Central Control attempted to contact Grievant by both radio and by telephone. Grievant did not respond. Grievant's wife called Central Control at BBC and said she was concerned because Grievant was not answering his cell phone.

21. Because Grievant had not responded, there were concerns about his safety on the unit. Officer James Miller, who was being assigned to the RSAT unit for the 4:00

⁶ Non-uniformed correctional employees hold such positions as Correctional Counselors or Corrections Coordinators. They have received basic security training, and many have been correctional officers before taking non-uniform positions.

p.m. to midnight shift, was sent up to the unit via elevator to check on Grievant. Officer Miller was then supposed to cover the RSAT unit along with Grievant.

22. Grievant intentionally refused to respond so that Central Control would have to send someone to check on his safety.

23. Grievant observed Officer Miller getting on the elevator on his video monitor. When Officer Miller got out of the elevator, Grievant was waiting outside the elevator. Grievant told Officer Miller that the count was "fifty-six in, one at the hospital" and that he was leaving. Grievant then boarded the same elevator and left the unit. At that point Grievant did not know that Officer Miller was assigned to the RSAT. Had he been assigned to a different security post he would have been stuck on the RSAT unit as the only officer and the other security post would be vacant.

24. Grievant went directly to his vehicle and left the Center.

25. BCC Operational Procedure #2.00 (General Security Orders), Section V, Subsection D 7 requires that, "Staff will receive, obey and pass on to their relief all orders received, incidents/unusual events and will stand their assigned post until properly relieved." Proper relief takes place in the control room of the unit and involves the relieving officer reviewing the logs and events with the departing officer. The relieving officer should feel confident that he/she understands what issues may exist on the unit before taking over the post.

26. Office Bennett was subsequently frozen for overtime to cover Grievant's post. Officer Bennett had not volunteered for overtime because he had an appointment with a realtor that evening which he had to cancel after he was frozen.

27. Grievant did not work any overtime during the month of August. Prior to August 28, 2017, Officer Bennett had already worked overtime on the fourth, the fifteenth and the sixteenth of August. Every officer on the 8:00 a.m. to 4:00 p.m. shift performed overtime, at least once during the month, except for Grievant and Officer Christopher Houchins, who was at training for the entire month and unavailable.

28. In his September 4, 2017, written statement, Grievant admitted that CO3 Cartwright had ordered him to perform mandatory overtime and stay on his post in the RSAT unit for the 4:00 p.m. to midnight shift. His statement noted he had to leave because his sister/babysitter would stop watching his children if he did not pick them up. Grievant also admitted that he heard the call for him over the radio to give his count, and heard the telephone ring, but did not respond to either call.

29. On November 2, 2017, Grievant was assigned to the RSAT unit. During the shift Correctional Counselor Richard Pauley had to enter the control room. Pauley had to side step an inmate, who was in the control room and leaning over the officer's desk, while Grievant showed the inmate information on the facility's computer. Pauley contacted the unit manager reporting this security breach.

30. The RSAT unit's control room is off limits to inmates because it contains many items, including files and security tools, which need to be kept from inmates. The door on the control room has a clear posting that the inmates may not enter the room.

31. The control room computer, as well as staff computers, is also off limits to inmates. The *Performance Standards and Expectations for a Correctional Officer II*, states, "Responsible for safeguarding Inmate information found on the computers, and not allowing Inmates to view the computer screens."

32. A review of video of the RSAT unit's control room on November 2, 2017, shows Grievant conversing with an inmate, entering the control room to get on the computer on behalf of the inmate, allowing the inmate to enter the control room, and showing the inmate information on the computer.

33. Prior to the August 28, 2017 incident, Grievant was suspended for three days by BCC. on July 27, 2017, for his refusal to work mandatory overtime, on April 11, 2017; May 4, 2017; May 5, 2017; and May 12, 2017. All these refusals of mandatory overtime were based upon Grievant not having child care.

33. Grievant had been placed on a thirty-day improvement plan on April 6,

34. Grievant also received written reprimands for unauthorized leave on April 12, 2017; May 16, 2017; May 30, 2017.

35. Grievant participated in a predetermination conference on December 4, 2017. He was issued a fifteen-working days suspension without pay later that day by a memorandum signed by BCC Deputy Warden Paul E. Perry. The reasons cited for the disciplinary action were refusing mandatory overtime and abandoning his post, as well as an improper inmate count on August 28, 2017, and a Breach of Facility Security on November 2, 2017, by allowing an inmate to enter the unit control room and view the facility computer.

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).

Respondent suspended Grievant for refusing mandatory overtime and abandoning his post, as well as an improper inmate count on August 28, 2017, and a Breach of Facility Security on November 2, 2017, by allowing an inmate to enter the unit control room and view the facility computer. BCC's Operational Procedure #1.21, *Attendance & Authorized Leave*, states at Section V, Subsection Q a.

[i]f overtime is needed, refusal to work required overtime or holidays; or inability to perform essential duties of Correctional Officer or Staff Member will be grounds for disciplinary action, up to and including dismissal, in accordance with Policy Directive 129.00 "Progressive Discipline."

Id.

Grievant did not deny that he refused overtime. In fact, he told CO3 Cartwright that he knew that he would be reported for doing so and would receive some form of discipline. He argued that he did not abandon his post because Officer Miller was on the unit when

he left. That argument fails because two security officers were required on the RSAT unit during the late shift and one security post was left empty upon Grievant's departure. Another officer had to be frozen to fill the position.

Grievant's main defense was that he could not work mandatory overtime because it interfered with his ability to provide child care for his children. The problem is that the other officers whom are frozen on overtime when Grievant is not also have children and also must make arrangements for coverage. Grievant's situation is not special in that regard. Obviously, mandatory overtime creates hardships for all the officers. The facility managers have tried to ease the problem somewhat by creating a rotating schedule which spreads the overtime evenly across the staff. When Grievant avoids his turn as he did throughout the entire month of August 2017, the burden is unfairly borne by the remaining officers.

Grievant asserted that it was not his turn for mandatory overtime on August 28, 2017, but produced no evidence to contradict the record keeping of his shift commander. Respondent proved by a preponderance of the evidence that Grievant refused mandatory overtime and abandoned his post on August 28, 2017.

BCC's Operational Procedure #2.07, *Inmate Counts* requires that Formal Counts, on a regular basis in each correctional facility. The operational procedure requires the officer to count inmates using a clipboard with a pre-prepared sheet listing the inmates on the unit and checking each inmate off the list as the inmate is counted. Grievant did conduct the 4:00 p.m. count in compliance with the requirements of this operational procedure. He admitted to failing to conduct a proper count but argued that the numbers he verbally passed on to Officer Miller were accurate. Proper record keeping of formal

counts is essential to security at correctional facilities because it provides early detection if a prisoner is not where he/she should be. Respondent proved by a preponderance of the evidence that Grievant violated BCC Operational Procedure #2.07, *Inmate Counts* by failing to properly document a count on August 28, 2017.

The control room on the RSAT unit is surrounded by a wide red line. This line gives notice to the inmates that they are not allowed to cross the line and enter the control room. The control room holds confidential information regarding other inmates and defense weapons such a pepper spray which inmates could put to nefarious use. On November 2, 2017, Grievant accompanied an inmate into the BCC RSAT control room and allowed the inmate to view information regarding his release date on the facility computer.⁷ This activity was in violation of facility security procedures and potentially impaired his safety and the safety of others at the facility.

Grievant did not deny this activity but noted that he had seen other officers allow inmates near the control center. He provided no proof of specific instances where this occurred or that other officers who violate the procedures were not disciplined. Respondent proved by a preponderance of the evidence that Grievant violated facility security procedures by allowing an inmate to enter the BCC RSAT control room and view the facility computer.

Grievant's main defense is that he is harassed by his supervisor and disrespected by his coworkers. He asserts that he is being picked on and singled out for poor treatment.

⁷ The Performance Standards and Expectations for a Correctional Officer II, includes "Responsible for safeguarding Inmate information found on the computers, and not allowing Inmates to view the computer screens."

Grievant provided no evidence for these assertions beyond his general allegations. The Grievance Board has consistently held that "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Additionally, even if these allegations were true it would not justify Grievant's wholesale violation of policy and procedures.

Finally, Grievant submits that the penalty is too harsh and out of proportion with the misconduct committed. "The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Grievant has received a prior suspension for refusing mandatory overtime. Additionally, he was openly and unapologetically defiant of direct and valid orders which were aimed at maintaining the safety and security of the facility. He refused to answer radio and telephone calls to his unit to manipulate the shift commander into sending

another staff member to ensure his safety for the sole reason of forcing the coworker to cover the post he abandoned. Given Grievant's past discipline history and the defiant nature of his misconduct, mitigation is not appropriate. Accordingly, the grievance is 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 Grievant refused mandatory overtime and abandoned his post on August 28, 2017, in violation of BCC's Operational Procedure #1.21, *Attendance & Authorized Leave*, states at Section V, Subsection Q a.

3. Respondent proved by a preponderance of the evidence that Grievant violated BCC Operational Procedure #2.07, *Inmate Counts* by failing to properly document a count on August 28, 2017.

4. Respondent proved by a preponderance of the evidence that Grievant violated facility security procedures and CO2 performance standards by allowing an inmate to enter the BCC RSAT control room and view the facility computer.

5. "The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent

disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008).

6. Given Grievant's past discipline history and the defiant nature of his misconduct, mitigation is not appropriate.

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: June 19, 2018.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE