

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**WESLEY FIELDS,
Grievant,**

v.

Docket No. 2020-1412-MAPS

**DIVISION OF CORRECTIONS AND
REHABILITATION/BUREAU OF PRISONS
AND JAILS/SOUTHWESTERN REGIONAL
JAIL AND CORRECTIONAL FACILITY,
Respondent.**

DECISION

Grievant, Wesley Fields, was employed by Respondent, Division of Corrections and Rehabilitation (“DCR”), in its Bureau of Prisons and Jails. He was assigned to the Southwestern Regional Jail and Correctional Facility (“SWRJ”), as a Correctional Officer 3 (“CO 3”). Officer Fields filed an expedited grievance form to level three¹ dated April 20, 2020, alleging that his employment “was terminated without just cause.” He alleges that Respondent did not follow policy and its actions were arbitrary. As relief, Grievant seeks: “Reinstatement at full back pay with interest.”

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on September 3, 2020.² Grievant personally appeared with his representative Paul M. Stroebe, Esquire. Respondent appeared in the person of SWRJ Superintendent, Timothy King, and was represented by Briana J. Marino, Assistant Attorney General. This matter became mature for decision on October 16, 2020, with receipt of the last Proposed Findings of Fact and Conclusions of Law.

¹ See W. VA. CODE § 6C-3-4(a)(4).

² The parties personally appeared. All witnesses testified via Zoom pursuant to a Grievance Board order related to hearing procedures during the pandemic.

Synopsis

Respondent dismissed Grievant for refusing to perform a temporary assignment at the South Central Regional Jail because it was falsely rumored that an inmate had tested positive for COVID-19 at that facility. Grievant did not refuse to perform the temporary assignment. Grievant told his supervisors that he was not feeling well and needed to go to the doctor. The executive officers specifically gave Grievant permission to leave the facility to see a doctor. Respondent did not prove the reasons it cited for the termination of Grievant's employment 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, Wesley Fields, was employed by Respondent, Division of Corrections and Rehabilitation ("DCR"), in its Bureau of Prisons and Jails. He was assigned to the Southwestern Regional Jail and Correctional Facility ("SWRJ"), as a Correctional Officer 3 ("CO 3") with the rank of corporal.

2. At all times relevant to this grievance, the state correctional institutions have been operating continuously under a declaration of a state of emergency issued by the Governor, due to the Covid-19 pandemic and a shortage of correctional officers at many facilities. Correctional officers are considered essential workers and must report to their assigned locations while non-essential workers are encouraged to work from home.³

³ In March 2020, the virus was in its infancy in the United States and little was known about the virus or its effects on people. The Governor of the State of West Virginia began issuing almost daily directives to West Virginians and various State agencies.

3. The Southwestern Regional Jail and Correctional Facility is one of the few regional jails that does not have a chronic problem with a shortage of correctional officers. Consequently, correctional officers working at the SWRJ are regularly temporarily assigned to fill positions to other regional jails to ensure there are sufficient officers for the required minimum security roster.

4. In March 2020, SWRJ correctional officers were regularly given temporary duty assignments to other correctional facilities as follows:

- Two officers per shift per day to the South Central Regional Jail (“SCRJ”).
- Two officers per day to the North Central Regional Jail (“NCRJ”).
- Intermittent assignments to the Mount Olive Correctional Facility.

5. Temporary duty assignments are crucial for providing adequate staffing at the regional jails, and any officer refusing such an assignment creates a hardship for the facility and the other officers, as well as jeopardizing the safety of officers, inmates, and public safety due to the potential for inadequate staffing levels at the state’s jail facilities.

6. In March 2020 Chauncey Maynard was a CO-4 with the rank of Sargent at the SWRJ.⁴ During that time, CO-4 Maynard was in charge of keeping the Daily Duty Roster of the SWRJ.

7. Jimmy Vance is a CO-5 with the rank of Captain at the SWRJ. Hansford Slater is a CO-6 with the rank of Major at the SWRJ. Both officers were holding their respective positions in March 2020.

8. On March 23, 2020, Grievant and other COs assigned to the SWRJ, arrived at the Jail between 6:00 a.m. and 7:00 a.m., to report to work.

⁴ Officer Maynard has subsequently been promoted to a CO-5 with the rank of Lieutenant.

9. Because of the COVID-19 pandemic, all officers were required to have their temperatures taken and answer a series of questions related to symptoms and their recent movements prior to being admitted into the jail to start their shift. Grievant's temperature was normal and he was granted admittance.⁵

10. During the day shift roll call, Grievant and two other correctional officers were told they were scheduled to work at the SCRJ that day. There was a discussion regarding a rumor that one or more inmates had tested positive for COVID-19.

11. Grievant told Lieutenant Maynard that he did not feel well and had to leave work to go to the doctor. Lieutenant told Grievant he would have to speak to Captain Vance.

12. Grievant then met with Captain Vance and Major Slater and reported that he did not feel well and was leaving work to see a doctor. Major Slater told Grievant that if he said he was sick, Major Slater could not make him stay. Grievant was allowed to leave work.

13. Charles Christopher (Chris) Napier is a CO-4 at the SWRJ with the rank of Sargent. On March 23, 2020, Sargent Napier was Grievant's immediate supervisor. Grievant told Sargent Napier that he was not feeling well and was leaving work. Sargent Napier replied that he had to check with Lieutenant Maynard. Lieutenant Maynard told Sargent Napier that it was okay to let Grievant go. Sargent Napier told Grievant he could leave and Grievant left the facility.

⁵ Respondent Exhibit 5, incident reports written by CO Megan Hayes and LPN Jacky Dickerson. Respondent Exhibit 5 contains incident reports completed by five SWRJ employees dated March 23, 2020.

14. Separately, the two other correctional officers⁶ met with Captain Vance and Major Slater and were told to report to their temporary assignment. Each reported that he did not want to go to SCRJ because they believed an inmate in the facility was infected with COVID-19.

15. Captain Vance contacted Timothy King, Superintendent of SWRJ by telephone and advised him of the situation. Superintendent King instructed Captain Vance to tell these officers that they could either accept the temporary reassignment or resign. Both officers left the SWRJ thereafter and did not report to their temporary assignment at the SCRJ.

16. Grievant had already left the facility after he had received permission but before Superintendent King was contacted. Grievant was not given the ultimatum delivered to the other officers. Major Slater and Captain Vance both testified that Grievant's situation was different from the other two officers because he was not told he could not leave and he did not actually refuse to take the temporary assignment.⁷

17. On April 8, 2020, Grievant attended a predetermination conference with Superintendent King, Major Slater, and SWRJ Human Relations Manager, Lisa Vance. Grievant was advised that dismissal was being contemplated for his refusal to report to the temporary assignment at the SCRJ. Grievant replied that he was not feeling well that day and needed to go to the doctor. He stated that at that time he was unable to fulfill his duties at the time.

⁶ For a full discussion of the facts related to one of these other officers see, *Bassham v. Div. of Corr. & Rehabilitation*, Docket No. 2020-1447-MAPS (Nov. 6, 2020).

⁷ Hearing testimony of Major Slater and Captain Vance. Sargent Chris Napier also testified that Grievant was given permission to leave the facility to see a doctor.

18. Grievant was issued a dismissal letter the same day, shortly after the predetermination conference. The stated reason for the dismissal was that when Grievant was ordered to take a temporary assignment at SCRJ he told Major Slater and Captain Vance that he heard there was an inmate there who had COVID-19 and did not want to go to that facility. Grievant was allegedly ordered to take to the temporary assignment and he “refused to report to SCRJ again.” The letter alleges that Grievant replied that he was “sick and going to the doctor.”⁸

19. The dismissal letter alleged that Grievant violated the following provisions of DCR Policy Directive 129 Code of Conduct:

- 1. Failure to comply with Written Instructions (e.g. Policy Directives, Protocols, Commissioners Instructions, Operational Procedures, or post Orders).
- 5. Instances of inadequate or unsatisfactory job performance.
- 12. Failure or delay in following a supervisor’s instructions, performing assigned work or otherwise complying with applicable, established written instructions.
- 14. Leaving a worksite without permission or proper relief during working hours.
- 27. Failure to follow orders during an emergency.

20. Grievant submitted to Respondent a medical excuse from a healthcare provider at Family Healthcare Associates, Inc. stating that Grievant was under the care of the medical provider for the period of March 23, 2020, through April 13, 2020. There was no date listed on the form indicating when Grievant was able to return to work.

⁸ Respondent Exhibit 1, dismissal letter dated April 8, 2020, and hand delivered to Grievant.

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 (2018).

. . . 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).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct

shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Respondent dismissed Grievant for refusal to follow an order. Specifically, Grievant is alleged to have refused to take a temporary assignment at the SCRJ after being ordered to do so. The provisions of DCR Policy Directive 129 which Grievant is charged with violating all deal with not following an order or leaving his post without permission.

Grievant alleges that he did not refuse to follow the order to report for a temporary assignment at SCRJ. Rather he reported that he was not feeling well and needed to go to the doctor. At that point, he was told he could leave. At no time was he ordered to stay at work or told that if he left work, he would be subject to discipline.

Unlike the other officers involved in this incident, Grievant told his supervisors he was not well immediately when he received the temporary assignment. Neither Major Slater nor Captain Vance questioned Grievant’s assertions. Major Slater told Grievant he could go. Thereafter, Sargent Napier checked with Major Slater to verify that he had been given permission to leave the facility for sick leave. Once again, Grievant was authorized to leave.

By the time the executive officers had contacted Superintendent King, Grievant had left the facility. Unlike the other officers, he was not given the ultimatum that if he did not take the temporary assignment he would be disciplined. In fact, both Major Slater and Captain Vance testified that their written reports were not accurate regarding Grievant. The reports stated that Grievant had refused the temporary assignments. Both officers

testified that Grievant's situation was different in that unlike the other officers, Grievant did not refuse to take the temporary assignment.

Respondent points out that Grievant did not have a fever and was not showing symptoms of illness when he arrived at work. It is also noted that Grievant reported to work rather than call in from home. He did not report that he did not feel well until he received the temporary assignment. These were all valid reasons for questioning or denying Grievant's request for leave when he made it. Rather, Major Slater simply told Grievant that if you say you are sick, I cannot make you stay. Additionally, once it was decided that the other officers were not going to be released on sick leave no effort was made to contact Grievant and order him to return to work.

Superintendent King had a serious and valid concern that if he allowed officers to refuse to take these temporary assignments simply by reporting illness once they are assigned, the security in correctional facilities would suffer. Indeed, in the decision *Bassham v. Div. of Corr. & Rehabilitation*, 2020-1447-MAPS (Nov. 6, 2020) the dismissal of one of the other officers involved in this incident was upheld. However, that officer did not immediately ask for leave and he was told that if he did not report to SCRJ he would be disciplined. In this case, the executive officers had already authorized Grievant's leave and he had left the facility with permission from his supervisor's prior to Superintendent's involvement.

Ultimately, Grievant was given permission to take sick leave by his supervisors. They testified that Grievant did not refuse the temporary assignment. Grievant did not leave his post without permission. Respondent simply did not prove the reasons cited for

Grievant's dismissal by a preponderance of the evidence. Accordingly, the grievance is **GRANTED**.

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 (2018). 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. Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. Respondent did not prove the reasons cited for Grievant's dismissal by a preponderance of the evidence.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to the position and rank he held prior to his dismissal, to pay him the backpay for the wages he did not receive as a result of his dismissal minus any wages Grievant received from other employment in the intervening period, and restore all benefits Grievant is entitled to as if he were never dismissed. Grievant is **ORDERED** to provide Respondent with a detailed accounting of any wages he has received from the time of his dismissal until the date of his reinstatement.

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 (2018).

DATE: November 19, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE