

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SETH D. GUTHRIE,

Grievant,

v.

Docket No. 2020-0796-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/ ST. MARYS
CORRECTIONAL CENTER AND JAIL,**

Respondent.

DECISION

Grievant, Seth D. Guthrie, was employed by Respondent, Division of Corrections and Rehabilitation, at St. Marys Correctional Center and Jail (SMCCJ). Respondent terminated Grievant's employment during his probationary period. On January 17, 2020, Grievant filed this grievance against Respondent, stating, "Wrongfully accused of actions according to WV DCR, Commissioner, and Governor. Religious representation sought by state officials before investigation concluded. Wrongful Termination Resulting in permanent dismissal. Penalized for following order from senior officer."

As relief, Grievant requests, "Public apology from all who slandered and settlement for troubled times."

Grievant filed directly to level three of the grievance process.¹ A level three hearing was held on June 24, 2020, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*.² Respondent appeared by SMCCJ Superintendent James Maston and was represented by Briana Marino, Assistant Attorney

¹West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

²For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

General. This matter became mature for decision on August 7, 2020. Respondent submitted written proposed findings of fact and conclusions of law (PFFCL). Grievant did not submit PFFCL.

Synopsis

Grievant was employed on a probationary basis as a Correctional Officer. Respondent suspended Grievant without pay pending an investigation, then dismissed him after the investigation substantiated misconduct. Grievant challenged his dismissal, then conceded that his conduct was wrong and his dismissal justified. Grievant now requests backpay for the duration of his suspension, arguing that he was already punished in being dismissed. Grievant's suspension was not disciplinary because it was done to facilitate an investigation into his job-related conduct. Further, the investigation resulted in his dismissal. Grievant did not prove that the suspension was improper and that he is entitled to backpay. Accordingly, this grievance is DENIED.

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 was employed as a Correctional Officer on a probationary basis by Respondent, Division of Corrections and Rehabilitation (DCR), at St. Marys Correctional Center and Jail (SMCCJ).
2. On December 5, 2019, Respondent suspended Grievant pending the completion of an investigation into his alleged misconduct. (Respondent's Exhibit 4)

3. Respondent memorialized this suspension in its January 8, 2020, dismissal letter, stating, "You were placed on suspension pending investigation on 05 December 2019." (Respondent's Exhibit 4)

4. West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1, provides for non-disciplinary suspensions to perform an investigation as follows:

12.3.b. Non-disciplinary Suspension. -- An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Upon completion of the investigation or criminal proceeding, the appointing authority shall:

12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,

12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.
(emphasis added)

W. VA. CODE ST. R. § 143-1-12.3.b. (2016).

5. On January 8, 2020, Respondent dismissed Grievant for disciplinary reasons from his probationary employment, effective January 23, 2020. (Respondent's Exhibit 4)

6. In his grievance and the level three hearing, Grievant challenged the allegations of misconduct and his resulting dismissal. Near the conclusion of the hearing, Grievant conceded that his conduct was wrong and his dismissal justified. Grievant requested that his relief be limited to back wages for the period of his unpaid suspension, arguing that he was punished twice through his suspension and dismissal. (See Grievant's testimony)

Discussion

It is undisputed that Grievant was dismissed on January 8, 2020, for alleged misconduct. Grievant initially denied he engaged in misconduct, but now concedes that his conduct was wrong and his dismissal justified. Grievant no longer seeks to reverse his dismissal, but only requests back wages for the duration of his unpaid suspension. Grievant contends that Respondent acted improperly when it punished him twice through suspending and dismissing him. Respondent counters that Grievant was suspended pending the outcome of an investigation into his misconduct and that the investigation was therefore not disciplinary. The dismissal letter documents Grievant's suspension, stating, "You were placed on suspension pending investigation on 05 December 2019."

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility*

Auth./W. Reg'l Jail, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. 143-1-12.3.b. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. 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 burden has not been met. *Id.*

The West Virginia Division of Personnel's Administrative Rule supports Respondent's position that a suspension pending investigation into an employee's conduct is not disciplinary. Further, backpay is not required when the investigation results in the employee's dismissal. The Rule states:

12.3.b. Non-disciplinary Suspension. -- **An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature** and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Upon completion of the investigation or criminal proceeding, the appointing authority shall:

12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,

12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.
(emphasis added)

W. VA. CODE ST. R. § 143-1-12.3.b. (2018).

In order to prevail on his request for backpay, Grievant must prove that his suspension was improper. Grievant's only allegation of impropriety regarding the suspension is that it resulted in his being punished twice. Grievant failed to address any of the elements necessary to prove the suspension was improper.

In accordance with the Administrative Rule, an unpaid suspension without subsequent reimbursement is allowed in order to facilitate an investigation into conduct related to an employee's job performance if the employee is dismissed upon completion of the investigation. The burden is on Grievant to prove all elements set forth under the Administrative Rule. Grievant did not present evidence covering any of these elements. The dismissal letter verifies Grievant was dismissed after the investigation ended and that his suspension had only been implemented to facilitate the investigation into his alleged misconduct. Grievant failed to present any evidence to the contrary and therefore did not prove by a preponderance of evidence that his suspension was improper. Grievant is therefore not entitled to backpay.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. 143-1-12.3.b. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. 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 burden has not been met. *Id.*

2. Grievant did not prove by a preponderance of evidence that his suspension was improper or that he is entitled to backpay.

Accordingly, this 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* W. VA.
CODE ST. R. § 156-1-6.20 (2018).

DATE: August 31, 2020

Joshua S. Fraenkel
Administrative Law Judge