

MICHAEL W. LANE

v. Docket No. 96-CORR-260

DIVISION OF CORRECTIONS

DECISION

Grievant, Michael W. Lane, employed by the Division of Corrections (Respondent) as a correctional officer, filed a grievance directly at level four pursuant to W.Va. Code §29-6A-4(e), on June 27, 1996, in which he alleged: [\(See footnote 1\)](#)

[t]hat the grievant was demoted to a lower job classification with a loss of salary, transferred to another institution, lost In-Service Training and Apprenticeship credits, without just cause. That the discipline received was not progressive nor timely and does not meet statutory provisions.

That the discipline imposed is excessive and constitutes both arbitrary and capricious treatment as well as discrimination against the grievant.

Grievant seeks reinstatement to his prior classification of Corrections Trainer at the West Virginia Corrections Academy at a salary equal to \$1,730.00 per month, plus back pay and interest, in addition to the return of all In-Service training and Apprenticeship Program credits, and that his personnel record be expunged of the disciplinary action. [\(See footnote 2\)](#) A level four hearing was conducted on August 13, 1996, and the matter became mature for decision on October 7, 1996, the final date for the submission of proposed findings of fact and conclusions of law. The essential facts of this matter are not in dispute.

1. Grievant was initially employed as a Correctional Officer by the Division of Corrections effective November 1, 1993, and was assigned to the West Virginia Penitentiary.

2. Sometime in or around June 1994, Grievant transferred to the Pruntytown Correctional Center (PCC).

3. While assigned at PCC, Grievant, as well as other employees, was required to complete 40 hours of In-Service training to familiarize himself with Respondent's Policies. The training

included a test at the conclusion of the units.

4. Grievant had received the test answers from a co-worker prior to taking one of the tests.

5. Subsequently, Grievant applied for, and was awarded, a position of Academy Instructor at the West Virginia Corrections Academy. This assignment was a promotion to Correctional Officer IV and included a commensurate increase in salary.

6. In August 1995, William Whyte, Respondent's Deputy Commissioner of Operations, assigned PCC Deputy Warden Frank Phares, to conduct an investigation of employees cheating on tests.

7. In his investigative report dated October 27, 1995, Mr. Phares concluded that four Correctional Officers, including Grievant, were involved in a cheating scheme.

8. Grievant admits that on one In-Service test he used answers given to him by another employee.

9. By letter dated June 14, 1996, Mr. Whyte notified Grievant that he was to be demoted, effective June 30, 1996, from Corrections Trainer at \$1,730.00. to Correctional Officer I at \$1,427.00 per month. He also transferred Grievant to the Northern Regional Jail and rescinded his In-Service Training and Apprenticeship Program credits for all examinations taken during the period of July 1, 1994, through March 16, 1995.

Respondent offered evidence gathered during the investigation that approximately four individuals had cheated on the in-service tests. After consulting with the Division of Personnel, Respondent determined that it was appropriate to take away the training credits from the officers and to impose additional discipline determined by individual circumstances. In Grievant's case, he had been promoted from Correctional Officer to Correctional Trainer since the cheating occurred. Because he would not have been promoted had it been known that he had cheated on the tests, and because he was instructing cadets and administering the same or similar tests, Respondent concluded that Grievant must be removed from the Academy staff. Grievant was subsequently returned to the classification held prior to the promotion and was assigned to the Northern Regional Jail. This assignment was later changed to the West Virginia Industrial Home for Youth at Salem, at Grievant's request.

Respondent concedes, that at first glance, it might appear that Grievant was treated more harshly than the other employees, but argues that it was no different from the discipline

imposed upon John Laulis. After deletion of the training credits, Officer Laulis no longer met the requirements for Correctional Officer II and was demoted to Correctional Officer I, the rank he held prior to his promotion. A second officer, who had not obtained promotion or monetary gain from the cheating, lost his standing in the apprenticeship program, which in turn resulted in his loss of an opportunity to earn an associate degree, receive higher pay, and fulfill the requirements for promotion. He also received a reprimand which will remain in his personnel file for two years. Other employees who had not acquired answers to the tests, but had provided other employees with answers or information, were suspended seven and three days, respectively. Respondent asserts that Grievant's lack of honesty and integrity rendered him unsuitable for the position of Correctional Trainer, therefore, demotion to his previous classification was appropriate.

Because Grievant admits to the charge that he cheated on an In-Service examination, he does not dispute the imposition of discipline, but asserts that demotion and transfer were excessive, not a step in a progressive disciplinary plan, and not timely imposed. Grievant also asserts what is essentially a claim of discrimination in that he was given a more severe level of discipline than other employees involved. Also, Grievant characterizes his action as not so much cheating as continuing with a past practice which was not only accepted but was promoted by Respondent. Finally, he notes that cheating is not specifically prohibited by Respondent's policies and that the penalty for falsification of records, a comparable offense, is only a 15 day suspension.

None of Grievant's arguments are persuasive. It is accurate that a rather lengthy period of time elapsed between the offense and the discipline. This delay is explained in that the initial investigation was not completed until October 1995, and the follow-up investigation is dated February 9, 1996. The matter was then approved by Respondent's Commissioner Nicholas Hun and referred to the Division of Personnel for review. Although the disciplinary action might have been imposed at an earlier date, Grievant does not allege any harm suffered from the delay. To the contrary, the lapse of time allowed Grievant to gain experience, and continue to receive a higher salary, as a Training Officer.

Grievant's assertion that cheating is not prohibited by Respondent's policies is ludicrous. Children quickly learn in elementary school that cheating is not acceptable conduct and

entails punishment if detected. Grievant stresses that cheating was so accepted that during lectures the speakers would pound the podium with their fists to cue the officers that what had just been said would be on a test. One of Grievant's co-workers confirmed this practice; however, it is not clearly established that answers were being provided for a test. Rather, it appears more in the nature of providing emphasis on particularly important items which should be committed to memory.

Respondent admits that Grievant's punishment was more severe than that imposed on other employees, but explains that the measure was determined by their classification level and assignment. Therefore, while another Correctional Officer was suspended for three days, it was determined that transfer and demotion were more appropriate for Grievant because he was assigned to the Training Academy, a position of some prestige, and administered similar tests. This reasoning establishes that the measure of discipline was not arbitrary and capricious and supports a finding that in Grievant's case, it was not excessive. There is no requirement that progressive discipline be applied in any given case and the record contains no basis to support Grievant's claim that he should have received a lesser discipline.

The imposition of a different, or harsher, measure of discipline does not inherently constitute discrimination. When alleging discrimination an employee must establish a prima facie case by showing: (a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employees were not, in a significant particular; and

(c) that such differences were unrelated to the actual job responsibilities of the grievant, and/or other employees, and were not agreed to in writing by the grievant.

Phillips v. W.Va. Dept. of Tax and Revenue and W.Va. Dept. of Admin./Div. of Personnel, Docket No. 91-T-289 (Jan. 15, 1992). The employer may rebut a prima facie case of discrimination by offering a legitimate, non-discriminatory reason for the action. If the employer offers such a reason, the grievant must then show that the stated reason was mere pretext.

In the present case, Grievant has established that he is similarly situated to other employees who were disciplined for related offenses. Perhaps, viewing the situation broadly

and in the most favorable light to Grievant, it may also be determined that he has been treated in a manner that other employees were not. However, the undisputed evidence is that the difference in level of discipline was clearly related to the actual job responsibilities of the employees. Therefore, Grievant has failed to establish a prima facie case of discrimination.

Mitigation of the discipline is permitted by Respondent's Policy Directive 400. Grievant seeks mitigation through his claim that prior to, and after, this incident he was a model employee with no past disciplinary action in his record. While this fact is not disputed, as a relatively recent employee, this factor is not sufficient to mitigate the discipline. It has been noted that Respondent acceded to Grievant's request that he be reassigned to the facility in Salem, instead of the Northern Regional Jail, because it was closer to his home. (See footnote 3).

In addition to the foregoing findings of fact and narration it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must prove the charges by a preponderance of the evidence. Stewart v. W.Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-137 (Sept. 19, 1991).

2. Respondent's charge that Grievant engaged in cheating on in-service training tests, is undisputed.

3. Grievant failed to establish a prima facie case of discrimination. Phillips v. W.Va. Dept. of Tax and Revenue and W.Va. Dept. of Admin./Division of Personnel, Docket No.91-T-289 (Jan. 15, 1992).

4. Grievant failed to prove that the discipline imposed was excessive, disproportionate to the offense committed, or arbitrary and capricious.

Accordingly the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither

theWest Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: November 12, 1996

SUE KELLER

Senior Administrative Law Judge

[Footnote: 1](#)

W.Va. Code §29-6A-4(e) provides in pertinent part that “[a]n employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner.”

[Footnote: 2](#)

Grievant did not establish that he had suffered any loss of income. On the contrary, he stated that he believed he was earning more since his reassignment. Respondent notes that Grievant's perception was likely accurate since correctional officers had received a \$2,000.00 pay increase. The record does not establish whether Grievant would have received this increase as an instructor at the Academy.

[Footnote: 3](#)

Grievant's claims that even with the answers he did not pass the test, that everyone cheats, and that cheating was routine, even encouraged, merit no further consideration.