

DARRELL SMITH

Docket No. 95-CORR-547

v.

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

The grievant, Darrell Smith, was employed by the West Virginia Department of Corrections (CORR) as a Correctional Officer I at the Mt. Olive Correctional Complex (MOCC) until his November 14, 1995 dismissal for cause. He filed an appeal of that action to Level IV December 6, 1995, and a hearing was held March 28, 1996. [\(See footnote 1\)](#) The grievant submitted proposed findings of fact and conclusions of law by April 26, 1996. CORR declined to submit written legal argument. [\(See footnote 2\)](#)

Background

Much of what precipitated the dismissal is not in dispute. The grievant was initially employed by CORR as a Correctional Officer I (COI) on May 16, 1994, and it appears that prior to his dismissal, he performed satisfactorily or better and was never formally disciplined.

Per the requirements of CORR policy, the grievant began "Basic Corrections Training Classes" at the West Virginia Corrections Academy located on the campus of West Liberty State College in the fall of 1995. The Academy, whose mission is "to provide a quality training program that will enhance job performance, sharpen skills, develop 'esprit de corps,' and ensure professional growth and development for each correctional employee," is operated and staffed by CORR employees. Its comprehensive and rather precise rules of conduct, embodied in "Staff Notice No. 0013," indicate that students should consider the school "an extension of the work place," and that Academy officials may, independent of other CORR authority, take school-based disciplinary actions, i.e., counseling,

reprimand, academic probation, and expulsion.

On October 19, 1995, student Correctional Officer Dennis Walker [\(See footnote 3\)](#) reported to his class advisor, Sgt. Howard Shiflett, that at approximately 12:10 p.m. on that date, he had overheard the grievant use the term "nigger" approximately six times in a conversation with other officers in or near the Academy cafeteria. He indicated that he had heard other persons use such language during his stay at the school, and that he did not wish to tolerate it further. Officer Walker provided Sgt. Shiflett, Sgt. Roger Elder and CORR Investigator Louis Moore details of the incident and the names of persons who might corroborate the report; he later filed a written complaint with CORR's Equal Employment Opportunity office.

On Friday, October 20, Mr. Moore began an investigation which included tape recorded interviews with the grievant, Mr. Walker, and student Correctional Officers Curtis Thomas, James Gee, George Ballard, Steve Persinger, Steven Ash and John Smith. He also obtained preliminary information from Sgt. Elder and Sgt. Shiflett and their incident report on their brief initial contacts with Officer Walker and several other students. The record is unclear on what portion of the investigation had been completed at the time, but by that afternoon, Academy officials had concluded that the evidence was sufficient to warrant the grievant's expulsion.

At approximately 2:00 p.m., Sgt. Elder advised the grievant that he was dismissed from the Academy and that he was to report to his supervisor, MOCC Associate Warden of Security Tony LeMasters, at MOCC that evening. Upon his arrival at the prison at approximately 8:15 p.m., the grievant sent a message to Mr. LeMasters, via Correctional Officer Tracy Dorsey, that he was not feeling well and would telephone at a later time. A short time later, Mr. LeMasters called the grievant at home and directed him to report to the prison at 8:00 a.m. the next morning. The grievant inquired whether he needed representation at this meeting and Mr. LeMasters advised that he did not. [\(See footnote 4\)](#)

On Saturday, October 21, at approximately 7:25 a.m., the grievant called MOCC's Central Control and advised COI Teresa Amick that he was going to see his doctor that day and would not make his appointment with Mr. LeMasters. The grievant did not attempt further contact with Mr. LeMasters and did not report to work as scheduled on October 23, 24, 25, 26 or 27. The grievant did not see his doctor during this time and did not report that he was ill or otherwise explain his absence to any MOCC official.

On October 23, Brenda Lopez, the grievant's aunt and former employer, approached General Joseph Skaff, Department of Military Affairs and Public Safety Secretary, at CORR's central offices in Charleston, and advised him that she believed her nephew to be the subject of harassment by MOCC officials, and that there were other "problems" at the prison. General Skaff ultimately informed her that he had made an inquiry into the grievant's work history and preliminary findings on the Academy charges, and that he saw no reason to intervene. On October 23, 1995, Mr. LeMasters submitted a "letter of documentation" to MOCC Deputy Warden Howard Painter, in which he concluded that the grievant's failure to report to his office constituted insubordination. Unaware that the grievant had called Ms. Amick on the 21st, and apparently not believing that he was ill on the evening of the 20th, Mr. LeMasters recommended that the grievant be suspended for fifteen days.

Unsure whether the grievant intended to resign his position or confront the issue of his expulsion from the Academy, Deputy Warden Painter, in an October 25 letter, directed him to report for work immediately or advise his supervisor of the reason for the continued absence. Mr. Painter also advised that a failure to comply would be deemed an abandonment of his position, and that his employment would be formally terminated November 10, 1995. The letter cited Sgt. Elder's directive to report to Mr. LeMasters on the evening of October 20, but it did not otherwise mention the dismissal from the Academy.

The grievant met with Mr. Painter on October 27. It appears that Mr. Painter then indicated that the investigation into Mr. Walker's complaint was ongoing and that he had made no final decisions in the matter. The Deputy Warden may have advised the grievant that dismissal might still be avoided. It is undisputed, however, that during or at the conclusion of their discussion, Mr. Painter suspended the grievant without pay pending completion of Mr. Moore's investigation. [\(See footnote 5\)](#)

It appears that the grievant also met with Mr. Painter on November 6, and was advised that the investigation still incomplete and that the suspension would be extended by two weeks. The record suggests that Mr. Painter may have again indicated that a dismissal might not be necessary.

Mr. Moore submitted his report to Mr. Painter between November 6 and November 14. He concluded that the grievant had made the comments attributed to him by Mr. Walker, and that he had violated that portion of Staff Notice 0013 which prohibits "actions, either verbal or behavioral, that would be discriminatory to another based upon race, religion, sex, age, national origin or creed." Mr. Moore made no recommendations regarding disciplinary action against the grievant.

By letter dated November 14, 1995, Mr. Painter advised the grievant that his employment at MOCC was terminated effective November 30, for "Repeated uttering of racial epithets; insubordination; and unauthorized absence from duty." As to his conduct at the Academy, Mr. Painter specifically advised the grievant that the investigation had revealed:

On 19 October 1995, you were a student at the West Virginia Corrections Academy on the Campus of West Liberty State College. At approximately 12:10 p.m., that date, you exited the college dining hall (Rogers Hall) in the company of a number of fellow Academy students. At that time, in the immediate presence of those students and in close proximity to college students, faculty, staff, visitors, etc., you repeatedly uttered racial epithets. These statements which, according to witnesses, were made in a loud and very audible manner and were to the effect that, "this must be nigger-loving day" and how it distressed you to observe Caucasian females and African-American males sitting together in the dining hall. In all, the term "nigger" was uttered approximately five (5) times. An additional comment you made which appears to be related to these racial slurs is that, "they should just send them down to Stone Mountain, Georgia where the Klan is." This statement, considered in the context of your previous statements, is interpreted to refer to the Ku Klux Klan. As a result of these statements being reported to Academy officials, an investigation was conducted which resulted in your 20 October 1995 dismissal from the Academy by Kathryn Lucas, Director of Training.

Mr. Painter cited the grievant's failure to report to Mr. LeMasters office as insubordinate behavior and further characterized it as an "apparent attempt to avoid the consequences" of expulsion from the Academy. He explained that the unauthorized absence charge was based on the grievant's failure to report for work October 23-27, or notify his superiors that he would be absent.

Finally, the letter made specific references to CORR's "Employee Standards of Conduct and Performance" for all charges but stressed those portions which address the "professional" expectations of a Correctional Officer. Mr. Painter closed by advising, "[w]hile any one of these three reasons, when considered separately, may not constitute good cause for dismissal, I have concluded that, considered as a whole, they do constitute good cause."

In a November 21, 1995 letter to Mr. Painter, the grievant responded that the "October 19, 1995 incident . . . has been completely blown out of context." He further explained that he was tired and "stressed" on the evening of October 20, and that he was very ill on the morning of the 21st. The grievant indicated that he believed the call to Ms. Amick was the only explanation necessary for the October 23 through 27 absences, and that, in any event, he had assumed that he would not be returned to work until MOCC officials "resolved" the dismissal from the Academy.

Much of the remainder of the grievant's letter is, in essence, a generally worded claim that Mr.

LeMaster harbored some animosity towards him, and that the charges were levied simply because at some point during his employment, he had “made certain people unhappy.” The grievant also alleged, however, that other employees had committed worse offenses and had been treated less harshly. He did not identify these employees.

Argument

The grievant's legal claims are not clearly articulated and are difficult to reconcile. He now concedes that his October 23-27 absences were unauthorized, and that a suspension was and is in order for that offense, [\(See footnote 6\)](#) yet he seemingly denies that he had any obligation during that time to contact Mr. LeMasters or any MOCC official regarding his expulsion from the Academy or the order given him by Sgt. Elder. Further, the grievant's Level IV fact/law proposals imply that his physical condition on October 20 and 21 precluded his meeting with Mr. LeMasters, but he also asserts that it was Mr. LeMasters' past “intimidations and threats” which caused him to decline to report as ordered.

Significantly, there is no claim in the grievant's proposals that he did not make the racial slurs attributed to him. He merely notes that the complainant suggested, in his EEO complaint, that a suspension would be appropriate, and at least implies that it was arbitrary for CORR to do otherwise. It is assumed CORR takes the position that the evidence is sufficient to show the grievant committed the offenses with which he was charged and that his conduct warranted dismissal.

Findings and Conclusions

When a tenured state employee challenges the sufficiency of the evidence relied upon by the employer in a disciplinary action, the employer must prove, by a preponderance of the evidence, that the employee engaged in the conduct for which he was disciplined and demonstrate that the conduct was of “a substantial nature directly affecting rights and interests of the public.” Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980); W.Va. Code §29-6A-6, ¶5. The employee bears the evidentiary burden on any defenses raised. Lanehart v. Logan County Bd. of Educ., DocketNo. 95-23-235 (Dec. 29, 1995). For the reasons discussed below, the undersigned concludes that CORR has met its burden in the case and that the grievant has failed to substantiate any valid defense to his dismissal.

Determinations regarding the relevant credibility of the grievant and CORR witnesses are dispositive of most if not all issues in the case. [\(See footnote 7\)](#) The grievant was considerably less credible on nearly all matters of substance; the record rather clearly reflects that his responses and representations to the charges against him have been consistently evasive and untruthful. Many are implausible.

The transcript of the Mr. Moore's tape recorded interview with the grievant is telling. It contains the following exchanges.

MOORE:

Mr. Smith I have considerable amount of information that yesterday, sometime shortly after the lunch break, there was a student in the dining hall of Rogers Hall, and you made some remarks, racial remarks coming from the dining room,

GRIEVANT:

I mentioned the word "cultural diversity."

. . .

MOORE:

To the best of your recollection, could you repeat what you said in the dining room yesterday?

GRIEVANT:

Some other staff members and I were sitting there talking. The black, I mean I can't say they were together, I mean they were sitting with these white girls. I said this is a culturally diverse setting today. We had that class at Mount Olive, and students here had it also. The word "nigger" was not said by myself. It was said, but was not said by myself. I heard it several times. You hear it every day. I did not use that word. It did not piss me off. It did not offend me. I just simply said, culturally diverse.

. . .

MOORE:

Do you recall using the word “nigger” or something worse, or otherwise?

GRIEVANT:

No sir I do not recall that. Honestly, I do not.

MOORE:

You didn't say anything in the dining room?

GRIEVANT:

Not to my knowledge.

MOORE:

But you could have used the word “nigger”?

GRIEVANT:

As much or less than anyone else here, and that is a fact.

. . .

MOORE:

And you already admit to the fact that you used the word “nigger”. Could you maybe have used the word “nigger” yesterday inappropriately, and not even been aware of it?

GRIEVANT:

It's always a possibility, but I am not aware of saying that, but it is a possibility. But I am not saying I didn't but I am quite sure at this point I can't remember if I did or not, and I am being honest.

. . .

MOORE:

Could you try your very best to research your memory, and attempt to enlighten me into what conversation transpired in regard of the Ku Klux Klan, and Stone Mountain Georgia?

GRIEVANT:

It was not to offend anyone. I really don't remember. I do remember saying that, and it was kind of like I wasn't trying to hide that from anyone, or offend anyone with that. I can't remember what it pertained to, but I knew there was a group in the back corner there and we were talking about where we could have this, or whatever. As a matter of fact, I think we were talking about some people were upset over Lawrence Farrakhan, and the march in Washington, D.C., and he how he basically said all Jews were blood suckers, and white people were this, that, and the other. That is what that is pertaining to. And somebody said, well lets have us a march. Where we marching to? And I said, well hell march to Stone Mountain Georgia. I never mentioned the K.K.K., and I don't think. . .

MOORE:

You must have mentioned the word clan, if not the K.K.K.?

GRIEVANT:

Well maybe, but I did mention Stone Mountain Georgia.

At or near the conclusion of the interview, the grievant again denied outright that he used the term "nigger" and again asserted that he could not recall whether he did or not. At Level IV, he represented that the term was not a part of his "daily vocabulary" but emphasized that he could not remember whether he used it on October 19. The grievant was very certain that he had mentioned the Ku Klux Klan. He testified that he made a statement to the effect that Louis Farrakhan was a terrorist and that the Ku Klux Klan was a terrorist group and that perhaps a march should be made on Stone Mountain Georgia, the headquarters of the K.K.K.

The remainder of the grievant's Level IV testimony is a rambling, mostly self-serving recital of

various wrongs perpetrated against him by Mr. LeMasters, and the hardships endured and sacrifices made during his tenure with CORR. Summarized, his testimony on remaining issues was that he probably should have called someone at MOCC during his absence; that he was nevertheless justified in not following Sgt. Elders' October 20 order because he was either ill and/or certain that Mr. LeMasters would "use the situation" against him in some way; and that, in any event, whatever wrongs he may have committed were exaggerated. It would be a fair characterization to say that the grievant's testimony portrays him as a victim in the matter.

The grievant's Level IV testimony and his statements to Investigator Moore contain so many inconsistent and implausible responses that a comparative assessment of his credibility is almost unnecessary. At Level IV, he rarely gave direct answers to direct questions, and his demeanor was seldom indicative of truthfulness. Indeed, the grievant's mannerisms and the incongruity of much of his testimony were indicative of a contrived and rehearsed response to the charges against him. As noted, the underlying theme of his testimony was that CORR officials had inflated the seriousness of anything he might have said or done in order to act upon some vaguely defined grudge against him. There is no other evidence of record which even tends to corroborate that contention.

In their taped interviews with Mr. Moore, Officer Walker, and Academy students Steven Ash, John Smith, and George Ballard were all forthright and responsive to questions; there were few if any inconsistencies in their accounts of what they heard and saw. The Level IV testimony of students John Smith and George Ballard, and Sgt. Elder was similarly consistent and credible. [\(See footnote 8\)](#)

There was no showing that any of CORR's witnesses had reason to fabricate any portion of their statements or testimony. For the foregoing reasons, their accounts of what transpired are accepted as the most truthful and reliable. This evidence establishes clearly and convincingly that on October 19, in or around the Academy cafeteria, the grievant made the remarks set forth in the dismissal letter in the manner described. The grievant's lack of credibility also dictates a finding that he had no justification for failing to report to Mr. LeMasters' office on October 20 and/or October 21. It is more likely than not that he was attempting to avoid a confrontation over his expulsion from the Academy and was not ill as he reported or was not so sick that he was unable to comply with Sgt. Elder's and Officer LeMasters' orders. Again, the reliable evidence of record will not support that Mr. LeMasters conspired to discipline the grievant for reasons unassociated with the charges set forth in the dismissal letter or that the grievant had any reasonable basis for believing that he would.

Moreover, regardless of whether illness or a general wariness of Mr. LeMasters justified a failure to initially comply with Sgt. Elder's order, it is clear that, at least as early as October 23, the grievant was physically able to make contact with other MOCC officials. CORR has substantiated the charge of insubordination. See, Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995). ([See footnote 9](#))

Notwithstanding the grievant's concession on his October 23-27 absences, the undersigned finds that they were unauthorized and violative of CORR's personnel policies. The record supports that the grievant's failure to report for work or explain his absence was also motivated by his desire to avoid the consequences of the expulsion. The evidence does not establish that the grievant had any reason to believe that he was not to report for work as scheduled until MOCC officials took some action on the expulsion.

In summary, the undersigned finds that CORR has proven by a preponderance of the evidence that the grievant committed the acts with which he was charged and that his actions constituted cause for dismissal. The grievant has failed to substantiate any valid defense against the charges, including harassment and retaliation, and has otherwise failed to show that CORR acted improperly in any aspect of the dismissal.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West 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.

JERRY A. WRIGHT
ADMINISTRATIVE LAW JUDGE

Dated: June 28, 1996

[Footnote: 1](#)

Several scheduled hearings were continued at the request of CORR.

[Footnote: 2](#)

Because counsel for Corrections also declined to make oral argument at the Level IV hearing, the agency's legal position, as set forth herein, is inferred.

[Footnote: 3](#)

The Academy's enrollment is not restricted to CORR employees and many of the officers identified herein as Academy students are employees of other law enforcement agencies. Mr. Walker is a Correctional Officer with the Hancock County Sheriff's Department.

[Footnote: 4](#)

It was revealed at Level IV that Mr. LeMasters had been instructed by MOCC Deputy Warden Howard Painter to present the grievant with a sealed envelope upon his arrival. Mr. LeMasters represented that he was not advised of the contents of the envelope and was not given any further directions in the matter. It can be inferred that Mr. Painter was attempting to convey some communication regarding the expulsion but the record is otherwise silent on the matter. Ultimately, the reason for Sgt. Elder's order to report to Mr. LeMasters is of little if any significance in the case.

[Footnote: 5](#)

According to the dismissal letter, portions of which are set forth herein, during this meeting, the grievant "neither confirmed or denied" the charges levied at the Academy. There was only general testimony on the content of the discussion, but the record suggests that the grievant most likely advised Mr. Painter that he could not recall making the statements attributed to him by Mr. Walker. No definitive findings on the content of their conversation are needed.

[Footnote: 6](#)

The grievant's union representative purposely elicited this concession during the close of his Level IV testimony. Because the admission was not consistent with his preceding testimony, evidentiary and legal conclusions are required on the issue.

[Footnote: 7](#)

The issue of whether the grievant's expulsion from the Academy "automatically" compelled his dismissal from MOCC was raised but not pursued. While it is apparent that the Academy is part of CORR, the record is unclear on whether its administrators occupy some tier of authority higher than that of other divisions in the agency's organizational structure. It is therefore, difficult to discern whether Academy decisions on school-related disciplinary matters are binding on other divisions, particularly MOCC.

Obviously, the school's decisions can have an adverse impact on a CORR officer's employment. While Staff Notice 0013 provides for an appeal of an expulsion to CORR's Deputy Commissioner for Operations, the record suggests that the Academy has never reinstated an expelled student. During the Level IV proceedings, various witnesses represented that it was unlikely that the Academy would reinstate the grievant and that CORR policy precludes the continued

employment of any officer who, for whatever reason, cannot complete basic corrections training classes. Some even suggested that the Academy's decision to expel was dispositive of the matter of the grievant's further employment at MOCC. CORR counsel made no assertion to this effect.

Clearly, a CORR officer who is successful in refuting allegations of misconduct which are based on actions taken by the Academy can achieve reinstatement to his position. It follows that the Academy, at the very least, would have to reconsider its decision. In any event, CORR does not press and the record is not well developed on the issue. For those reasons, and because the dismissal letter did not indicate that the expulsion, in and of itself, precluded the grievant's further employment, the undersigned declines to make specific findings and conclusions on the matter.

[Footnote: 8](#)

The grievant called several persons to testify generally about his character. Most represented that they had never overheard the grievant make derogatory remarks toward a particular race. This evidence is not particularly persuasive and, in any event, is outweighed and, to some extent, even discredited by the evidence presented by CORR.

The grievant also presented the testimony and transcribed statements of at least two Academy students who professed that they were in the area of the Academy cafeteria when the comments were made but heard nothing. Their testimony was otherwise unenlightening. Again, this testimony was of little probative value and any support it may have provided the grievant's case was minimal and outweighed.

Finally, it is noted that for reasons not explained, CORR submitted Mr. Moore's summary of his interview with Mr. Walker but it did not present the transcript of that interview or call Mr. Walker as a witness. Witnesses Smith and Ash provided direct testimony that they observed and overheard the grievant make the statements attributed to him.

[Footnote: 9](#)

"Insubordination is defined as the failure or refusal to carry out the order of a superior with the authority to give such order."