

KENNETH B. PINGLEY

v. Docket No. 95-CORR-252

DIVISION OF CORRECTIONS

DECISION

Grievant, Kenneth B. Pingley, employed as a Correctional Officer II by the Division of Corrections (Respondent) at Huttonsville Correctional Center (HCC), filed a grievance at level four on June 19, 1995, after receiving notification on or about June 7, 1995, of his dismissal, effective June 22, 1995. [\(See footnote 1\)](#) Grievant asserted that the reasons listed by Warden William C. Duncil for the termination of his employment were pretextual, while the true motivation was retaliation for his involvement in whistleblower activities and a previously filed grievance and lawsuit. For relief, Grievant requested reinstatement with back pay and benefits, a guarantee that he would never be involuntarily transferred to any other institution, on either a temporary or permanent basis, that all discriminatory treatment against him stop, and that his days off be changed from Sunday and Monday to Saturday and Sunday. After two continuances were granted for good cause, an evidentiary hearing was conducted on December 12, 13, and 14, 1995. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by Respondent, and a proposed decision by Grievant on or before April 15, 1996.

Warden Duncil cited ten violations of Respondent's Policy Directive 400 as the basis for Grievant's dismissal. Those violations, and the brief description of Grievant's alleged actions, contained in the June 7, 1995, letter follows.

(1) A-3 - Loafing, wasting time, or inattention to duty.

As reported by your Shift Commander Captain Billy Carter and verified by the assigned Investigator Captain Gary Roy during the period from April 1994 to April 4, 1995 you spent much of your working hours making derogatory remarks about fellow staff members, making

threats against management staff and discussing institutional matters which were not central to assigned tasks. In statements given to Captain Roy your peers indicated that they did not want to work with you because your behavior interrupted the performance and completion of scheduled assigned tasks.

(2) A-4 - Disrespectful conduct, use of insulting, abusive or obscene language to or about others.

As reported by your Shift Commander Captain Billy Carter and confirmed by the assigned investigator Captain Gary Roy on numerous occasions you made derogatory remarks about fellow officers. Specifically you, on numerous occasions, stated that fellow Officers Brian Edmonds and Glen Johnson, Jr. should not be working here because they have "Criminal Records". These statements included such remarks as "They are not out of the woods yet", and "he has a rough road to hoe". Statements made by you about officers Edmonds, Johnson and others included derogatory statements and obscene language.

(3) A-6 - Disruptive Behavior

As reported by your Shift Commander Billy Carter and confirmed by the assigned investigating officer Captain Gary Roy your continued threatening comments, statement and remarks from April 1, 1994 to April 4, 1995 were disruptive to the operation of your assigned shift to the degree that Captain Carter found it necessary to assign you to a post outside the institution. These remarks included threats about who "I am going to get ..." what "I am going to do ...", who a former staff member "Was going to get...", condemnation of fellow officers and threats of "law suits"[.]

(4) B-2 - Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures.

As reported by your shift commander and confirmed by Captain Gary Roy on April 3, 1995, you were instructed by Captain Carter to file a written report on an incident involving an unacceptable conversation by you with inmates. Prior to you completing the task as instructed Sergeant Terry Kyle found it necessary to give you a direct order to complete this

task approximately two (2) hours after you were assigned the task.

(5) B-15 - Giving or offering an unauthorized article or favor to any inmate, parolee, ex-inmate, their families or friends.

Captain Roy's investigation of your conduct revealed that on several occasions you did give newspapers, sport magazines and sport digest magazines to three (3) or more different inmates. Captain Roy's investigation further revealed that these magazines were often used as reference text and utilized to copy the official "point spread" for use in establishing the betting line by inmates in the institution. Your statement to Captain Roy reveals that you were aware of this fact.

(6) B-20 - Unprofessional treatment of inmate contrary to department policy, staff notices, Court Orders or philosophy.

Captain Roy's report confirms that on numerous occasions you used unprofessional, derogatory language to inmates. Examples of this language are reference to inmates by you such as "whore", and "I will be your daddy tonight"[] Examples of unprofessional conduct with inmates are "grab assing" and wrestling with inmates while on duty.

(7) C-4 - Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

Captain Roy's investigation reveals that on January 25, 1995 and again on January 26, 1995, you violated this policy.

On January 26, 1995 you falsely reported that an officer slandered and harassed you. In your allegation you named fellow officers who you stated had witnessed this event. These officers denied that they witnessed this alleged event or had any knowledge of it.

On January 18, 1995 you left work at approximately 6:00 p.m. without punching your time card. On January 25, 1995 you altered your time card by punching out at 9:50 p.m. for January 18, 1995.

(8) C-15 - Threatening or coercing other persons.

On November 4, 1994 your [sic] telephoned Training Officer Sergeant Dan Jack at his residence and attempted to intimidate him by making accusations and allegations regarding the Correctional Officer Apprenticeship Training Program and accusing him of falsifying records.

Captain Roy's investigation farther [sic] reveals that between the period April 1994 and April 1995 that you routinely made threatening comments to other employees regarding other staff at the Huttonsville Correctional Center.

(9) C-16 - Leaving a security post without permission.

Captain Roy's investigation revealed that on January 18, 1995 you did leave your security post on Dormitory 7 without permission. The investigation further revealed that at the time you abandoned your post inmates from the Isolation Unit wereshowering on that dormitory.

(10) C-24 - Other Actions of similar nature and gravity.

In a meeting with your Shift Commander Billy Carter on April 3, 1995 you admitted that you had a converstion [sic] with Inmate Darrell White on how to obtain information about employees through the Freedom of Information Act.

In the dismissal letter Warden Duncil also reviewed Grievant's prior disciplinary record. Incidents cited therein were a 1992 shift change effectuated as a result of Grievant's unspecified behavior, and a November 1994 suspension. In addition to these formal disciplinary actions, Warden Duncil noted that Grievant had been counseled "on a number of occasions from 1992 to the present." Based upon the foregoing, the Warden concluded that Grievant did not exhibit a reasonable standard of conduct, but rather, his actions warranted dismissal.

Events leading to Grievant's dismissal began in April 1995, when Captain Bill Carter, shift commander for the 2:00 to 10:00 p.m. shift, was authorized by the Chief Correctional Officer to investigate disruption on the shift. After interviewing eighteen Correctional Officers and the Assistant Shift Commander, Captain Carter determined that Grievant had engaged in

numerous activities which were violations of Department of Corrections policies and/or were generally disruptive to the shift. Captain Carter cited Grievant's practice of continually talking about lawsuits which he and another employee had filed, or were threatening to file, against the Department, the institution, and the Warden, making slanderous statements regarding other Correctional Officers, discussing inappropriate matters with inmates, giving inmates newspapers and magazines, and falsifying a document.

Subsequently, in May 1995, Warden Duncil directed Captain Gary Roy to conduct a formal investigation of the situation. Captain Roy filed a report on June 6, 1995, in which he concluded two other officers were exonerated, and Grievant was found to be solely responsible for the disruption. In addition to disrupting the shift, the actions exhibited by Grievant were listed as eleven violations of Policy Directive 400. Finally, Captain Roy noted that the shift had been functioning smoothly since Grievant was reassigned outside the building. Subsequently, Warden Duncil issued the letter on June 7, 1995, terminating Grievant's employment.

Discussion

Pursuant to W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W.Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "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. W.Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Service Comm'n., 380 S.E.2d 226 (W.Va. 1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical

violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W.Va. 1965).” Scragg v. Bd. of Dir./W.Va. State College , Docket No. 93-BOD- 436 (Dec. 30, 1994). Further, “the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” Buskirk, supra.

In this case, Respondent's disciplinary policy, Policy Directive 400, must also be taken into account. The Policy provides examples of types of misconduct, and recommends sanctions. The Policy establishes three levels of violations: Class A, Class B, and Class C offenses. The listing of offenses within each category is extensive, but not all inclusive. The recommended punishment for the offense is also specified by Policy 400. The policy generally provides a framework of progressive discipline; however, mitigating circumstances, including a long record of satisfactory service, may reduce the recommended sanction.

Three of the charges against Grievant are Class A offenses, defined by Policy Directive 400 as “types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Class A offenses warrant a reprimand to a five day suspension for the first offense, a six to fifteen day suspension for the second offense, and a sixteen day suspension to dismissal for the third offense. The Class A offenses are: (1) Loafing, wasting time, or inattention to duty; (2) Disrespectful conduct, use of insulting, abusive or obscene language to or about others; and (3) Disruptive Behavior. Because these charges are interrelated they will be discussed collectively.

The activities upon which these charges are based include Grievant making derogatory remarks about, and threats against, fellow staff members, and discussing institutional matters not central to his assigned tasks. Testifying at the level four hearing, Corporal Glen Johnson, Jr., one of the correctional officers targeted by Grievant as being ineligible for employment due to a prior felony record, stated that Grievant was “just keeping something going all the time.”

Specifically, he found Grievant “telling people things so I [Corporal Johnson] could hear it - things were going to be in the news.” Corporal Johnson recollected that after a “pow-wow” he

and Grievant had with Lieutenant Murphy, he commented that he was glad that his criminal record was out in the open and the matter settled, but that Grievant had told him “[o]h, you're not out of the woods yet. You're a long way from being out of the woods.” He claimed this made him fearful of what might happen. Corporal Johnson noted that he had received a promotion for which Grievant had applied, and that their working relationship was never the same. Other officers had reported to him that Grievant stated he would not respect Johnson or his rank.

Corporal Albert Fordyce testified that he had filed an incident report regarding Grievant making statements during the last quarter of 1990 that a female employee was not pulling her weight and received higher evaluations. Corporal Fordyce stated that he was also aware of Grievant's lawsuit against Warden Duncil and opined that Grievant is motivated by money. At a time when the Warden was in the hospital with a life threatening illness, Corporal Fordyce stated that he overheard Grievant saying that if the Warden died, he would “just sue the ass off his wife.” In yet another matter, Corporal Fordyce stated that in December 1992, Grievant offered him a percentage of the monetary award if he would join in a legal action against Lieutenant Glenn Smith which Grievant referred to as a “common law lien.” [\(See footnote 2\)](#) In his written statement, Corporal Fordyce noted that after a class he taught relating to sexual harassment, Grievant and several other officers approached him with questions. When he attempted to explain how the policy worked, they advised him that they were not concerned with the details but “just want[ed] the money.”

Corporal Fordyce stated that he took a leave of absence from February through May 1991 to escape the work environment and deal with the stress. He opined that it had taken him five years to redevelop a positive work role, and that he does not ever want to work with Grievant again.

CO II Brian Edmonds testified that Grievant was always talking about what he was going to do to the Warden and others, such as sue them or “have their jobs.” Officer Edmonds stated that he found Grievant nearly unbearable to be around due to his ongoing vendettas and bragging that “I got the Warden by the balls now.” CO Edmonds was also targeted by Grievant for having been arrested on a felony charge, and because his brother and father also worked at HCC. He filed an incident report on March 31, 1995, after learning from both a coworker and

an inmate that his situation was to be reported in the Charleston Gazette and on the local news. The inmate identified Grievant as the source of this information.

Included in the investigative report was a statement by Officer Johnny Barnhart who noted that Grievant “just keeps things going all the time with the law suits and what he was going to do to the administration and that thing with him and Brian.”

Officer Michael Clay stated that there was a disruption on the shift and that he observed animosity between Grievant and Officers Edmonds and Johnson. Officer Clay opined that the animosity was caused by Grievant and his constant comments to the other officers. Officer Clay also stated that he declined an offer made by Grievant, at an unspecified time, to join a lawsuit claiming sexual harassment and discrimination.

Officer Patrick Shreve also gave a statement to Captain Roy during his investigation. According to Officer Shreve, Grievant and Officer Edmonds “didn't like each other in high school” so he was not surprised that they could not work together. Officer Shreve overheard Grievant state that Officer Edmonds “was going to have a tough row to dig or something like that.” Besides his concern regarding individuals with felony records working at HCC, Officer Shreve stated that the only other subject Grievant talked about was what he and another employee were going to do to the institution.

Officer William Foe concurred that Grievant disrupted the shift with his constant talk of lawsuits. He stated that Grievant wanted to get everyone involved and that he was “always looking for someone to burn - over nothing. And that's in the back of everybody['s] mind.” Grievant's own witness, Sergeant Terry Kyle, opined that Grievant's work “left much to be desired” from April of 1994 through April of 1995 because he was concentrating too much on grievances. He also noted that other officers became reluctant to talk to Grievant because of his obsession with grievances and their concern that he carried a tape recorder nearly all the time. Sergeant Kyle stated that he had informally counseled Grievant when he heard Grievant making threats regarding CO Edmonds.

Captain Billy Carter testified that Grievant had been disciplined for loafing and wasting time in 1992 when he was transferred to the “hoot owl” shift. After showing improvement, he granted Grievant's request for reinstatement to the afternoon shift in 1994. Captain Carter noted that Grievant had the ability to be a good officer but that he could not keep quiet, and

that he and Robin Hammer kept HCC in constant turmoil. Captain Carter stated at the level four hearing that following Captain Roy's investigation, he recommended Grievant's dismissal.

CO II Randall Balducci, who identified himself as a friend, concurred that involvement in lawsuits had hurt Grievant. Captain Mike Miller also testified that the officers all talk about each other but not on a daily basis. The exception, according to Captain Miller, was Grievant, who talked about Edmonds and Johnson every day.

Grievant does not deny most of these activities, but notes that none of his supervisors documented counseling or other discipline for diminished work performance due to the alleged "wasted time." On the contrary, his evaluations for the time period were satisfactory. Grievant does deny threatening Officer Johnson. His recollection of the meeting when Officer Johnson indicated that he was glad everything was out in the open was that he told him the matter was not over, that lawsuits regarding nepotism and criminal records of employees were pending and that he would have to go over these issues again. Grievant noted that he believed Mr. Johnson was a good officer, but did not believe that he should have been promoted because he saw Johnson stealing papers off a desk.

Grievant also specifically denied that he offered Officer Fordyce a split in the award if he would testify in the common law lien proceedings. Grievant claims that he had the testimony on tape from other proceedings and had no need to make such an offer.

Three of the charges are categorized as Class B offenses which are defined by Policy Directive 400 to "include acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal. Discipline for Class B offenses "shall normally take the form of the notice and five or more days suspension without pay A third 'active' Class B offense should normally result in removal. Further, a single Class B offense coupled with three 'active' Class A offenses should normally result in removal. Mitigating circumstances include conditions related to a given offense that would otherwise serve to support a reduction of the disciplinary action in the interest of fairness and objectivity and a long service with a history of otherwise satisfactory work performance.

The first Class B offense listed in the dismissal letter was Grievant's failure or delay to complete a written report as directed by Captain Bill Carter on April 3, 1995. At hearing,

Captain Carter testified that CO Brian Edmonds reported that Grievant was directing threats to him through other officers, and even an inmate. After a conversation with Officer Edmonds and Grievant, Captain Carter directed Grievant to write an incident report documenting a related conversation which Grievant first stated that he had with the inmate, but later changed to having overheard during a conversation between two inmates. Grievant did not complete the report. Two hours later, Captain Carter directed Sergeant Terry Kyle to order Grievant again to complete the report. Grievant's response to this charge is that he believed he could complete the report in his spare time, as he had in the past. [\(See footnote 3\)](#)

The second Class B offense involved giving newspapers, sport magazines and sport digest magazines to three or more different inmates. These materials provided the official point spread to establish the betting line used by inmates in the institution. Numerous officers, including Corporal Glen Johnson, Jr., Corporal Albert Fordyce, and Officer Brian Edmonds, testified that they had observed Grievant give his newspaper to inmates. Officer Barnhart stated that one inmate in particular would look for Grievant, asking if he had a newspaper that day. However, additional officers testified that others had engaged in the practice, and no one had ever written an incident report for this activity. Grievant admits that after reading his newspaper he gives it to inmates or co-workers, whoever asks first. Grievant recollects that Officer Glenn Smith spoke with him in 1992, warning him that inmates like to “play games” and that giving them his newspaper could lead to requests for other items. According to Grievant, having given the warning, Officer Smith stated that he had no problem with Grievant giving the inmates the newspapers. Grievant additionally provided a list of newspapers and periodicals received at the HCC library and stated that the newspapers and magazines he passed on to inmates were all received by the institution. [\(See footnote 4\)](#)

The last of the Class B offenses was the unprofessional treatment of inmates. The dismissal letter cites both unprofessional language and actions by Grievant. Specific reports of this behavior included a broad spectrum from his being “overly friendly” to wrestling, bumping arms and chests with inmates, telling an inmate that he would like to tape a centerfold to his back and f--- him or grabbing his own privates and telling an inmate “you can be my punk and have some of this.” Grievant notes a lack of documentation regarding any such inappropriate behavior in his evaluations or incident reports. He notes that officers

utilize a variety of “styles” and that he is not aware of any inmate grievances alleging him to be abusive. Grievant denies that he ever made the centerfold comment to any inmate and notes a lack of date, names, or other specific information relating to that report.

Four Class C offenses, “acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal” were cited as reasons for Grievant's dismissal. Discipline for these offenses “shall normally take the form of the notice and removal or notice and 16 or more days suspension without pay in lieu of removal.” Again, mitigating circumstances may justify the use of demotion or transfer rather than dismissal.

The dismissal letter describes the first Class C offense as consisting of three incidents. First, Grievant left work prior to the end of his shift on January 18, 1995, and did not punch his time card. Second, on January 25, 1995, the card was clocked at 9:50 p.m. for January 18, 1995. The third incident, unrelated to this matter, involved Grievant falsely reporting that an officer had slandered and harassed him, when other officers named by Grievant as witnesses to the event denied any knowledge of the matter.

Numerous officers testified as to the procedure for completing employee time cards. Their understanding was collectively consistent that if the card is punched in the wrong place it should be corrected, while forgetting to punch the card requires a report to the shift commander. At level four, Grievant testified that he did not know exactly what had happened with the time card, but surmised that he may have made a mistake or that someone else could have punched the card.

On January 26, 1995, Grievant filed an incident report in which he stated:
I officer K. Pingley have been approached by fellow officers and inmates of Huttonsville Correctional Center many times the last few weeks concerning officer Brian Edmonds. From the stories that I have been told, officer Edmonds must have a personal problem with me officer K. Pingley. I've been told that he's been making a lot of comments about me such as about my 15 days off and that he knew why I was being investigated saying that I was dealing with inmates, tampering with urien [sic] test, telling inmates about shake downs. Do [sic] to things that officer Brian Edmonds has done in his past, he has NO right to say anything. If this happens again I officer K. Pingley will take legal action against Mr. Edmonds. This is called

harassment and slander and I officer K. Pingley will put officer Brian Edmonds in his place.

Although the next line indicated "(End of Report)," an attached page listed the names of nine other officers. Apparently, these names were intended, or at some point construed, to be officers who supported Grievant and did not wish to work with Officer Edmonds. This interpretation was disavowed by Officers Fordyce, Barnhart, and Shreve, in subsequent incident reports.

Grievant was next charged with threatening or coercing other persons when he telephoned Sergeant Dan Jack at his home regarding the Correctional Officer Apprenticeship Training Program and made "threatening comments to other employees regarding other staff." Mr. Jack, no longer employed at HCC, testified that Grievant did call him regarding records of the apprenticeship program which were in question; however, Grievant did not accuse him of any wrongdoing and he did not perceive the call to be a threat. Even if no threat was perceived, Sergeant Jack's incident report, dated November 4, 1994, illustrates this charge. He stated, in pertinent part, that Grievant apologized for calling him at home and stated:

'I wanted you to know that there is an investigation going on concerning the academy, Ms. Lucas, Warden Duncil, and you.' I said how do you know this. This reply was 'I got a call from an investigator out of Joe Smith's office and he wants information and names on the apprenticeship program and the promotion's [sic] system at Huttonsville. He said to tell you that if you don't give this information up you can and will be charged with up to (3) felony's [sic] and go to prison and fined.' I then laughed and said 'Kenny I have not done anything without going through my chain of command and had their permission and guidance. He then said, 'they want to know this information and who ordered you to commit fraud. I am your friend and don't want to see you get in any trouble.' I then said, 'who was the investigator who called, what was his name?' He said 'I don't remember his name but you had better call Joe Smith's office and they don't want Warden Duncil or Kathy Lucas to know about this investigation so you are not to tell them about this. Just call them and give them the information and they will help you because if you don't you will be charged.' And he read (3) state Codes and the penalty's [sic] involved. . . .

Sergeant Jack stated that he then called Captain Carter, Warden Duncil, and Lieutenant Mike

Coleman at the Corrections Academy.

At level four, Grievant explained that during a conversation with Joe Smith he had expressed his concern that Mr. Jack might be forced or pressured to falsify records relating to the apprenticeship program. Because of his immense admiration for Mr. Jack he did not want to see him suffer any harm. Mr. Smith advised him of the potential charges which could be imposed for such an offense, and Grievant claims that he was merely passing the information along to Mr. Jack.

The second allegation under this charge apparently relates to Grievant's activities discussed under the Class A offenses, i.e., his efforts to correct personnel matters in which he perceived wrongdoing by showing favoritism toward female employees, nepotism, and the employment of individuals with criminal records.

The third Class C offense allegedly occurred on January 18, 1995, when Grievant left his security post without permission. Grievant was assigned to the Isolation Unit of Dormitory 7 on the evening in question and was supervising showers when an inmate advised him that he was the subject of an investigation. Grievant abruptly left the area, passing his keys to a correctional officer in the hallway.

Officer Patrick Shreve stated that he and Officer Michael Clay were working North Hall at the time and "had a whole hallway full of inmates. He could wait 5 minutes or so until we got the hall cleared. He just left 7 unsupervised and he threw the keys down the hall and said he had to go. He left and never came back. That pissed me off. It left us in a bind." In an incident report, Officer Clay stated that he was walking past the door to Dorm 7 when Grievant appeared, gave him the keys, and said that he had to go. Incident reports were also filed by Sergeant Kyle who stated that Grievant did not request to be relieved from his post on the date in question, and Lieutenant Murphy who noted that "at no time did I give permission for this officer [Grievant] to be relieved at that date & time."

Testimony of the correctional officers establishes that Grievant should not have left his post without first securing a replacement. Captain Glen Smith stated that an officer must be posted at the showers. Corporal Glen Johnson, Jr., testified that prior to leaving an assigned post, a correctional officer must contact his supervisor to obtain relief. The officer may not leave until a replacement officer has arrived, and that this procedure must be followed under

all circumstances. Captain Arbuthnot testified that he assumed Grievant had obtained proper relief, and, taking a more relaxed attitude, stated that asking an officer on the hall to relieve him could be okay but that it would be more appropriate to call a supervisor. Grievant asserts that he called an officer to relieve him and presumed Officer Clay, to whom he had given his keys, had been sent in response. [\(See footnote 5\)](#) The final Class C offense is based upon the alleged admission by Grievant to Captain Carter that he had a conversation with inmate Darrell White as to the procedure used to obtain data about employees through the Freedom of Information Act. This issue was not part of Captain Roy's investigative report and was not addressed by Respondent at level four. Mr. White, since paroled, appeared on behalf of Grievant and testified that he had been conducting his own investigation of officers with criminal records. Mr. White explained that he was knowledgeable of the Freedom of Information Act and did not discuss his activities with Grievant, who may have overheard him in a discussion with another inmate. Grievant explained that his investigation of the criminal records of his co-workers was based upon a personal belief that "convicted felons should not be over other felons." Although he denied soliciting inmates to provide him with legal research, he admitted that an inmate did locate an address for him in 1992. [\(See footnote 6\)](#)

The evidence in this matter is somewhat contradictory in that performance evaluations for 1993 and 1994 rated Grievant as "very good." In an undated letter "To Whom it may concern" Sergeant Kyle gave Grievant "my highest recommendation for the upcoming rank of Corporal." In a memorandum dated August 12, 1994, Captain Carter also recommended Grievant's promotion, referring to him as "an outstanding employee." Although Grievant's numerical ranking was somewhat lower in 1994, 7.33, down from 8.4 out of a possible 10, the events cited in this matter as occurring in 1994 were not mentioned and no improvement was required. Charge number 8, threatening Sergeant Jack on November 4, 1994, is listed as one of the Class C, or most severe, offenses. Yet, no action was taken by Respondent to discipline Grievant at that time. All three of the Class A charges were characterized as ongoing, but had warranted no discipline.

Evidence indicates that Grievant's conduct with inmates, including giving them his newspaper, was common knowledge at HCC. The fact that no incident reports were ever filed and no discipline was imposed, notwithstanding the fact that his actions were in

contravention of Policy Directive 400, indicates a laxity in enforcement, if not an outright acceptance of such behavior. It is significant to note that HCC officials were not even aware that Grievant had left his post without authorization on January 18, 1995, until the official investigation was conducted several months later.

Respondent failed to prove all of the ten of the charges made against Grievant. No evidence was offered to prove that Grievant solicited an inmate to conduct legal research, or instructed the inmate as to how to conduct the research.

Notwithstanding these matters, Respondent has clearly established that Grievant invested a substantial amount of time in discussing, and otherwise pursuing, investigations, grievances, and lawsuits relating to personnel at HCC. Time spent in this matter by necessity resulted in an inattention to duty and a waste of work time. Comments directed to or about co-workers and administrators were abusive to the individuals, were disruptive to others, and constituted disrespectful conduct. Respondent has also proven that Grievant did not complete an incident report as directed and gave newspapers and magazines to inmates.

Grievant denied treating an inmate in an inappropriate manner by expressing his inclination to tape a centerfold to his back, etc. Because this inmate was not identified it leaves only the conflicting testimony of Grievant and a co-worker. Based upon the testimony of many officers that Grievant's interaction with inmates was less professional than they would expect, it must be concluded that Grievant's testimony regarding this issue lacks credibility. Respondent has also submitted Grievant's time card with an inaccurate representation of time worked, established that he threatened or attempted to threaten Mr. Jack, and left his post on January 18, 1995, without authorization.

Grievant's assertion that his actions were directed toward the betterment of the institution and not for personal gain are, at best, disingenuous. Public employees who gain knowledge of wrongdoing within an agency are encouraged to report such matters to the appropriate authorities. However, the overwhelming evidence in this matter establishes that Grievant was not content to perform his civic duty, but turned the personnel issues into personal vendettas. Grievant and a co-worker initially complained of nepotism and favoritism at HCC. Grievant then proceeded with an investigation of co-workers with criminal records. This activity led to the imposition of a fifteen day suspension when Grievant allegedly used an inmate to obtain

legal research. [\(See footnote 7\)](#)

Not content with filing a grievance relating to the prior disciplinary matter, Grievant also sued the warden at HCC in the Circuit Court of Randolph County seeking compensatory and punitive compensation for loss of income, emotional distress, anxiety, humiliation and damage to reputation. Having reported his concerns to General Skaff, Joe Smith at the Division of Personnel, newspapers, television, and numerous politicians, Grievant has cited the individuals and their situations in two grievance hearings, even after investigations apparently revealed no wrongdoing by Respondent in any of the matters.

This activity is not representational of an employee who simply wants to be treated fairly or is acting in the best interest of the institution. Grievant's actions establish an ill motive, an objective to burden his employer with charges predominately without merit, and secure some measure of personal gain, be it financial or merely notoriety. Respondent has established that the decision to dismiss Grievant was "for cause" in compliance with Division of Personnel Administrative Rule 12.02. [\(See footnote 8\)](#)

As previously noted, a lesser disciplinary action may be imposed in situations which ordinarily merit dismissal when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long servewith a history of otherwise satisfactory work performance. In the present matter, Grievant's actions were self-motivated. Even after informal warnings and a suspension, he continued to pursue personnel matters in an inappropriate manner. He does not argue, and it does not appear, that any conditions exist which require a reduction of the discipline in the interest of fairness and objectivity.

Neither may Grievant's employment history with Respondent serve as a mitigating factor. First employed in October 1989, Grievant had accrued only six years' seniority. During this relatively short period of time, Grievant has, since 1992, been warned, reassigned to a post outside the HCC complex and suspended for fifteen days. This work record is far from meritorious.

Just as the employer bears the burden of proving that the employee engaged in the conduct for which he was disciplined, the employee bears the evidentiary burden on any

defenses raised. Smith v. W.Va. Dept. of Corrections, Docket No. 95-CORR-547 (June 28, 1996); Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995). Grievant asserts that “[t]he true reason for my dismissal is retaliation for my involvement in whistleblower activities and the subsequent grievance and lawsuit which are currently pending against the Huttonsville Correctional Center and Warden Duncil.”

“Reprisal” is defined in W.Va. Code §29-6A-2 (p) to mean “the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” [\(See footnote 9\)](#) The purpose of statutes prohibiting acts of reprisal is to make it unlawful for an employer to take any action designed to punish an employee for engaging in a protected activity, such as filing a grievance and pursuing it vigorously, and/or to deter an employee from exercising such rights. Connor v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994).

The Grievance Board has previously addressed the prohibition against reprisal, and has adopted a modified version of the analytical framework employed in retaliatory discharge cases under the West Virginia Human Rights Act. [\(See footnote 10\)](#) Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). That standard can be fairly paraphrased as follows: A grievant may make a prima facie showing of reprisal by establishing by a preponderance of the evidence

- (1) he engaged in a protected activity;
- (2) the employer was aware of the protected activity;
- (3) the employer subsequently took an adverse action against the employee; and,
- (4) retaliatory motivation, or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred.

The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action. Should the employer succeed in rebutting the prima facie showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.

No matter what analytical approach is used to determine whether an employer has engaged in a prohibited personnel practice, such as reprisal or retaliation, the critical question is whether the grievant has established by a preponderance of the evidence that his protected

activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a “significant,” “substantial” or “motivating” factor in the adverse personnel action. Warren v. Dept. Of Army, 804 F.2d 654 (Fed. Cir. 1986); Connor, *supra*.

It must be concluded that in the present matter, the evidence is sufficient to establish a prima facie case of reprisal. Grievant has shown that he filed a previous grievance in November 1994. At approximately the same time, Grievant filed a complaint in the Circuit Court of Randolph County seeking monetary damages. This claim arose from the same factual situation as the grievance and named Warden Duncil as a defendant. Both of these actions fall in the category of a protected activity. Corrections responded to both actions and was well aware that Grievant had engaged in these protected activities. Subsequently, Respondent took an adverse action against Grievant, dismissing him from his employment some eight months later, a period of time in which retaliatory motivation can be inferred.

Respondent has also met its burden of proof to rebut the prima facie case, by establishing legitimate, non-retaliatory reasons for the adverse action. Respondent asserted the dismissal was based upon Grievant's involvement in a number of incidents which individually and collectively disrupted the 2:00 to 10:00 p.m. shift. As previously determined, Respondent provided evidence adequate to prove the allegations. The remaining issue is whether Grievant can overcome that showing and establish that the reason given by Respondent for his dismissal was merely a pretext for an act of reprisal. This, he has not done. Grievant admits to or does not deny that he engaged in many of the incidents cited by Respondent. Further, the evidence establishes that Warden Duncil did not instigate the initial investigation of the shift disruption. It was the undisputed testimony of Captain Carter that upon his return from a leave of absence he found the shift in such disarray that he sought and received permission from Chief Correctional Officer, Major Herman Cox, to investigate the matter. It was only upon receipt of Captain Carter's findings that Warden Duncil ordered a formal investigation. Most persuasive is the testimony of thirteen of Grievant's co-workers that he “keeps things stirred up all the time.”

Thus, it is concluded that Grievant did not prove retaliatory motive. Grievant was not dismissed for engaging in protected activities of filing grievances and lawsuits, but rather for

his ceaseless interactions with inmates and co-workers, making threats, and non-stop discussion of his involvement in the protected activities which led to his dismissal. This type of activity is not protected and does not render Grievant immune from appropriate discipline.

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

FINDINGS OF FACT

1. Grievant was employed by the Division of Corrections in October 1989 and was assigned as a Correctional Officer II at Huttonsville Correctional Center at all times pertinent herein.

2. In approximately 1992 Grievant began complaining of nepotism and favoritism at HCC. His concerns later expanded to include employees convicted of felonies. Grievant reported his findings to Respondent's Commissioner, the Division of Personnel, numerous politicians, and the media.

3. Grievant spent a significant amount of work time discussing his investigations, grievances and lawsuits involving coworkers and HCC administration. He specifically targeted two coworkers who he claimed were improperly employed, making comments to them and others regarding their employment status.

4. Grievant delayed complying with an order from Captain Gary Roy on April 3, 1995, to write an incident report regarding Grievant's conversation with an inmate. Grievant did not complete the report until after being ordered to do so a second time, some two hours later.

5. Grievant gave his personal newspapers and magazines to inmates.

6. Grievant used derogatory language and acted in an unprofessional manner with inmates.

7. Grievant submitted a time card in January 1995, which falsely or erroneously indicated that he worked an entire shift on January 18, 1995.

8. Grievant called Officer Dan Jack at his home and warned him that falsification of records could result in his being charged with felony offenses, that certain records should be sent to Charleston, and that the Warden should not be told of that matter.

9. On January 18, 1995, Grievant left his post without authorization. 10. Collectively, Grievant's actions disrupted the 2:00 to 10:00 p.m. shift.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W.Va. Dept. Of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. The level of discipline may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the length of the employee's service, and his past disciplinary record. See Hammer v. Division of Corr./ Huttonsville Correctional Center, Docket No. 94-CORR-1084 (Nov. 30, 1995); Stewart v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

3. Respondent has established good cause for the dismissal as required by Division of Personnel Administrative Rules, Section 12.02.

4. Grievant's relatively short period of employment and prior disciplinary record do not constitute a basis for mitigation of the discipline.

5. Reprisal is defined as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.Va. Code §18-29-2 (p).

6. Grievant established a prima facie case of reprisal; however, Respondent offered legitimate reasons for the action. Grievant failed to prove that the reasons for dismissal were merely pretextual.

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 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.

DATE: July 23, 1996 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Grievant bypassed the lower levels of the grievance procedure as permitted by W.Va. Code §29-6A-4(e).

Footnote: 2

This matter may have been related to a letter Grievant and other officers sent to Major General Joseph Skaff, dated July 13, 1992, in which they complained that Lieutenant Glenn Smith “was using different types of harassment toward officers” and that HCC administration had not properly considered their complaints. They requested that Lieutenant Smith be fired or forced into retirement.

Footnote: 3

In the incident report eventually completed, Grievant stated an inmate told him that he was doing record checks on all employees at HCC through the Freedom of Information Act.

Footnote: 4

This argument is specious at best because the violation involved Grievant's action, not the items he was passing along. Further, since the newspapers and magazines were already available, there was no need for him to give his copy to an inmate.

Footnote: 5

Captain Roy filed an incident report dated May 25, 1995, when he found during the course of his investigation that Grievant had not submitted a leave slip for January 18, 1995.

After leaving his post, Grievant met with Captain Arbuthnot, Sergeant Terry Kyle, and Lieutenant John Murphy to obtain information regarding the alleged investigation. By all accounts, Grievant became extraordinarily upset during this meeting. Lieutenant Murphy recalled that Grievant's face became red and he was “raving.” Captain Arbuthnot noted that Grievant was upset and belligerent. It is not precisely clear whether Grievant asked permission to go home, or was told to go home, but he left work, with permission, sometime between 6:00 and 7:30 p.m. Later that evening Grievant sought medical assistance in the emergency room of Davis Memorial Hospital in Elkins. The physician notes indicate Grievant described his symptoms as a tightness in chest, difficulty breathing, and red spots on his chest and shoulders. After a course of testing, the diagnosis was severe anxiety and stress induced hypertension. Grievant was given Vistaril and an appointment card for Appalachian Mental Health Center. Grievant did not return to work until January 24, 1995, and filed a Workers' Compensation Claim for the time he was absent.

Footnote: 6

It is noted that the record in this matter contains a plethora of information which does not fit into any of the charges. Two interesting examples include an officer who claimed to have heard from inmates that Grievant had taken their urine tests with toilet water and that he had warned them to dispose of their drugs for an impending shakedown. A second matter, which was addressed in the investigative report, was that on November 11, 1994, Grievant complained to Corporal Harry Simmons that the South Observation Post was poorly lit. Grievant allegedly stated "If I fall out here, I'm going to sue the shit out of them for having an unsafe work area and I'm going to win, you watch and see." Approximately an hour later Grievant reported that he had fallen, left work, and later filed a claim with Workers' Compensation. Although these matters were not used as a basis for the dismissal and will not be considered for that purpose, they do illustrate the ongoing swirl of commentary and controversy which surrounded Grievant at the workplace.

Footnote: 7

The suspension was upheld at level four in the matter of Pingley v. W.Va. Division of Corrections, Docket No. 94-CORR-1122 (June 30, 1995).

Footnote: 8

Division of Personnel Administrative Rules, Section 12.02 provides in pertinent part that "fifteen (15) calendar days after notice in writing to an employee stating specific reasons therefor, may dismiss any employee for cause."

Footnote: 9

W.Va. Code §29-6A-3 (h) also provides that "[n]o reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination."

Footnote: 10

See Frank's Shoe Store v. W.Va. Human Rights Comm'n., 179 W.Va. 53, 365 S.E.2d 251 (1986).