

**ANDREW ONDECK**

**v. Docket No. 94-CORR-228**

**WEST VIRGINIA DIVISION OF CORRECTIONS**

### **DECISION**

The grievant, Andrew Ondeck, Jr., a six-year Correctional Officer II assigned to the West Virginia Penitentiary in Moundsville, [\(See footnote 1\)](#) was dismissed for cause by the West Virginia Division of Corrections (CORR) effective May 25, 1994. He filed an appeal of that action to Level IV, June 6, 1994. A hearing was held January 13, 1995, February 10, 1995, and May 16, 1996. [\(See footnote 2\)](#) The parties submitted proposed findings of fact and conclusions of law by June 17, 1996.

### **Background**

This much is not in dispute. In April 1994, at the direction of Penitentiary Warden George Trent, CORR Investigator Louis Moore began an inquiry into allegations of misappropriation of state property at the Penitentiary. At some point in the investigation, inmate Paul Dorton advised Mr. Moore that the grievant and correctional officers Mark Williams and Lawrence Hindman had furnished him confidential documents from the Warden's office and solicited his assistance in filing a legal action against CORR. Mr. Moore was making further inquiries into the matter when, on May 13, 1994, inmate Dorton reported that the grievant had offered to sell him, Dorton, several packets of yeast.

Aware that yeast was considered contraband in the prison, [\(See footnote 3\)](#) and that the sale of contraband was a criminal offense, Mr. Moore advised Trooper J.D. Gruzinskas of the West Virginia Department of Public Safety of his discussion with the inmate. Trooper Gruzinskas directed him to provide the prisoner with money and a tape recorder to secure evidence of the exchange.

On May 14, 1994, Investigator Moore furnished Dorton a microcassette recorder and

**\$100.00. The inmate signed a written waiver which indicated that his cooperation was voluntary and uncompensated. Later that afternoon, Dorton gave Sgt. James Whorton, the officer in charge of his cell block, a microcassette purportedly containing a recording of a conversation between Dorton and the grievant in the prison's law library. [\(See footnote 4\)](#) Dorton related to Investigator Moore that the grievant accepted the money and promised to return the next day with several packets or blocks of yeast.**

**On May 15, Mr. Moore instructed Correctional Officer Ron O'Neill, who shared library duty with the grievant, to take particular note of the grievant's actions during their afternoon shift. Officer O'Neill was also directed to conduct an inspection of the library prior to the grievant's arrival. That afternoon, Dorton gave Sgt. Whorton a bag containing several cakes of yeast and another microcassette. The inmate advised Investigator Moore that per the grievant's instructions, he had retrieved the yeast from beneath a stack of supplies in a storage room in the library. He also reported that his conversation with the grievant during the transaction was recorded on the second microcassette.**

**Officer O'Neill subsequently confirmed that he had inspected the library as directed and had found nothing unusual. He also advised that he had observed the grievant and inmate Dorton talking in the general vicinity of the library storage room. Ultimately, Trooper Gruzinskas and Mr. Moore concluded that the microcassette recordings and Officer O'Neill's observations corroborated Dorton's account of what had transpired. Mr. Moore provided Warden Trent a written summary of his findings, and Trooper Gruzinskas brought criminal charges against the grievant.**

**Relying on Mr. Moore's report, Warden Trent dismissed the grievant for "trafficking in contraband. . .aiding and abetting inmate violation of any law, rule or regulation, [and] breach of facility security or failure to report any breach of facility security." The dismissal letter contained specific references to various portions of "Policy Directive 400," CORR's written standards for officer conduct.**

**On July 13, 1994, as a result of the investigation begun by Mr. Moore in April 1994, Correctional Officers Mark Williams and Lawrence Hindman were dismissed for allegedly "trafficking in contraband [documents], receiving or soliciting gifts, favors, or bribes in connection with official duties, and breach of facility security or possible breach of facility**

security.” Inmate Dorton played a large role in the investigation.

Officer Williams challenged his dismissal; [\(See footnote 5\)](#) in Williams v. W.Va. Division of Corrections, Docket No. 94-CORR-284 (Sept. 14, 1995), the Administrative Law Judge found that the agency had failed to establish the truth of the charges against him. A key finding in the case was that inmate Dorton, for numerous reasons, was not a credible witness. The decision was affirmed by the Circuit Court of Marshall County on March 8, 1996. On April 29, 1996, the same Court ruled that the tape recordings of the alleged May 14 and 15, 1994 conversations between Dorton and the grievant herein were “of such poor quality” that they and a “transcription thereof” were suppressed in the criminal case brought by Trooper Gruzinskas. The charges were ultimately dismissed due to the State's failure to prosecute within one year of the issuance of the warrant.

### Argument

To meet its burden to show that the grievant committed the acts with which he was charged, see, Smith v. W.Va. Dept. of Corrections, Docket No. 95-CORR-547 (June 28, 1996), CORR relies heavily on the recordings and transcript suppressed by the Marshall County Circuit Court. The agency asserts that the tapes are reliable, and that they corroborate Dorton's otherwise credible Level IV testimony that the grievant sold him yeast. The grievant denies all charges; he avers that the recordings are wholly unreliable, and that Dorton is inherently untrustworthy. The grievant suggests that the inmate obtained the yeast from other sources and fabricated the charges against him in an effort to obtain positive parole recommendations and/or other favorable treatment from CORR officials.

### Findings and Conclusions

Three separate reviews of the recordings reveal them to be, as the grievant asserts, wholly unreliable. The undersigned agrees with the Court's assessment of their quality and summarily excludes them from consideration. [\(See footnote 6\)](#) Any evidence based on the recordings, i.e., the transcript and the testimony of witnesses who stated they could discern a particular person's voice and/or words on one or both of the tapes, is similarly excluded. What remains of the agency's evidence is insufficient to carry its burden in the case.

The undersigned agrees in most respects with the grievant's evaluation of inmate Dorton's credibility. The findings in Williams, supra, make it clear that he has fabricated charges against Penitentiary officers and other inmates on numerous occasions, in hopes of gaining preferential treatment from administrators. The record in the present case reflects that he is serving a life sentence with mercy and is slated for a parole hearing in four years. The evidence otherwise indicates that he continues to have an incentive to contrive; his testimony that he reported the grievant's offer to sell yeast because of a recently- acquired desire to curb the ill-effects of alcohol on the prison population is not convincing. [\(See footnote 7\)](#) It does not necessarily follow that Dorton's allegations against the grievant were entirely fabricated. Officer O'Neill's testimony corroborates that the grievant and the inmate did meet and talk in the library on at least one of the dates in question, and it can be inferred from the record as a whole that their meeting was intended to be covert. The grievant was generally unconvincing in his assertion that he was innocent of any wrongdoing. Indeed, when reviewed exclusively, the grievant's entire testimony is not particularly persuasive. [\(See footnote 8\)](#)

A resolution of the case, however, requires an assessment of the relative credibility of the grievant and Dorton and the latter's history of making false accusations is of considerable significance, if not controlling, in that assessment. Simply stated, the testimony of a tenured correctional officer with no previous history of misconduct must be accepted over the uncorroborated testimony of a convicted felon with a record of inventing charges against officers and other prisoners. [\(See footnote 9\)](#) Accordingly, the undersigned concludes that the Respondent has failed to prove by a preponderance of the evidence that the grievant violated any portion of its rules for officer conduct.

### Relief

The procedural record in the case reflects that the agency presented its case-in-chief on January 13 and February 10, 1995, and that the grievant subsequently obtained new counsel. Various correspondence reflects that the grievant did not advise that he was prepared to proceed with his presentation of evidence until July 14, 1995; he then requested and was granted at least two continuances of hearings scheduled in September and November 1995.

By letter dated October 26, 1995, CORR asserted that in the event the grievant prevailed, it should not be held liable for back wages beyond July 14, 1995. The grievant did not respond to this contention.

After a careful review of all matters of record, the undersigned finds that at least six months of the delays in the proceedings were directly attributable to the grievant's failure to obtain new counsel or otherwise proceed with his presentation of evidence in a timely fashion. He is not owed back pay for that period. See, generally, Weimer-Godwin v. Bd. of Educ. of Upshur County, 369 S.E.2d 726 (W.Va. 1988).

For the foregoing reasons, the grievance is GRANTED and Corrections is hereby ORDERED to reinstate the grievant and compensate him, consistent with the holdings herein, for the loss of wages he incurred. 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.

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JERRY A. WRIGHT  
ADMINISTRATIVE LAW JUDGE

Dated: September 30, 1996

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[Footnote: 1](#)

*The grievant was assigned to the penitentiary at the time of the disciplinary action. The prison has since moved to Mt. Olive in Fayette County.*

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[Footnote: 2](#)

*The case was originally assigned to Senior Administrative Law Judge Nedra Koval; she presided over the evidentiary hearings. Ms. Koval left her employment with the Education and State Employees Grievance Board in July 1996, and the case was reassigned to the undersigned Administrative Law Judge on or about August 6, 1996.*

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**Footnote: 3**

*The record reflects that yeast is used by inmates to manufacture an alcoholic beverage commonly referred to as "julep."*

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**Footnote: 4**

*In order to avoid arousing the suspicions of other inmates, it had been prearranged that Dorton would secretly pass the items to Officer Whorton as he made his usual contacts with prisoners assigned to the cell block.*

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**Footnote: 5**

*Notice is taken that Officer Hindman's appeal of his dismissal is pending at Level IV.*

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**Footnote: 6**

*It is not surprising that the recordings were inadequate. The record reflects that they were made with a small microcassette recorder with a "self-contained" microphone; it appears that the recorder was of the type commonly utilized for office dictation and was not designed for the purpose for which it was used.*

*It is also noted that the undersigned, and apparently the Circuit Court of Marshall County, reviewed recordings which had been mechanically "enhanced" by Trooper Rick Hall, a certified audiotape enhancement technician with the Department of Public Safety. Trooper Hall testified at Level IV that even after much of the background noise was removed from the tapes, the recordings still fell within the "mid-range of poor quality."*

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**Footnote: 7**

*It is worth noting that when testifying in the Williams case, Dorton represented that he agreed to prepare legal documents for the grievant and officers Williams and Hindman in exchange for seventy-five dollars and a bottle of whiskey.*

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**Footnote: 8**

*The undersigned also doubts that other witnesses called on the grievant's behalf, including his wife, Mary Ondeck, and Officer Mark Williams, were completely forthright in their testimony.*

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**Footnote: 9**

*Because the undersigned did not observe the witness' testimony, see, n.1, there was no opportunity to make demeanor- based determinations regarding their credibility. It is not likely, however that such determinations would outweigh the strong objective evidence on that issue.*