

EDWARD COSTER, SR.,

Grievant,

v.

DOCKET NO. 94-CORR-600

**WEST VIRGINIA DIVISION OF
CORRECTIONS,**

Respondent.

D E C I S I O N

Grievant, Edward Coster, Sr., filed this grievance pursuant to W. Va. Code § 29-6A- 3, et seq., on June 13, 1994, protesting a 15-day suspension, without pay, imposed by West Virginia Division of Corrections Commissioner Nicholas J. Hun, by letter dated June 3, 1994. The grievance was denied at levels one and two, and a level three hearing was held on September 12, 1994. Franklin D. Phares, the level three hearing examiner, recommended, by decision dated September 21, 1994, that Commissioner Hun grant the grievance based on lack of evidence of the charges brought against Grievant. Commissioner Hun denied the grievance on September 29, 1994. Grievant timely appealed to level four on October 5, 1994. A level four hearing was held on June 29, 1995, June 30, 1995, November 1, 1995, November 2, 1995, and November 29, 1995. Post-hearing submissions and reply briefs were filed on or about March 5, 1996, at which time this case became mature for decision. [\(See footnote 1\)](#)

Arguments

At all times relevant herein, Grievant was employed by the West Virginia Division of Corrections (Respondent) as Building Maintenance Supervisor II at the West Virginia Penitentiary. [\(See footnote 2\)](#) Respondent suspended Grievant during his employment for a fifteen (15) day period without pay commencing June 13, 1994, and concluding July 1, 1994, for violating Division of Corrections Policy

Directive 400.00 Sections 7.00 (A4) (disrespectful conduct, use of insulting, abusive or obscene language to or about others), and (A6) (disruptive behavior). Both of these sections are considered "Class A Offenses." Commissioner Hun's June 3, 1994 suspension letter to Grievant is reproduced below:

Dear Mr. Coster,

The purpose of this letter is to advise you of my decision to suspend you without pay from your position as a Building Maintenance Supervisor with the West Virginia Department of Public Safety, Division of Correction, West Virginia Penitentiary, for a period of fifteen (15) days. The period of your suspension without pay will be June 13, 1994, to July 1, 1994. You are to return to duty on July 5, 1994, at your regularly scheduled shift. This personnel action is being taken in accordance with West Virginia Division of Personnel Administrative Rule, Section 12.03 and Division of Corrections Policy Directive 400.

This action is the result of your continued unprofessional behavior. Specifically, on May 2 and 3, 1994, you used insulting, abusive, and obscene language when speaking to O.S. "Scott" Neely, Jerry Jacobs and Thomas Reese. During these conversations you repeatedly cursed Warden George Trent and Deputy Warden Paul Kirby. Your comments where (sic) uttered in the presence of inmates or in a manner where inmates could have heard these statements. Your language was not only demeaning and accusatory, it was replete with obscenities. These statements come close to meeting the elements of slander. Commonly the legal elements of slander include:

- a false and defamatory statement concerning another;
- an unprivileged communication;
- fault amounting at least to negligence on the part of the publisher; and
- either actionability of the statement irrespective of harm

or the existence of harm.

Regardless of whether your statements satisfy these elements, you have willfully and intentionally caused the creditability (sic) of Warden Trent and Deputy Warden Kirby to be diminished among the employees of the West Virginia Penitentiary. Additionally, your comments made in the presence of inmates, or in a manner where inmates could have heard the statements, jeopardizes the security of the institution. Your behavior is in direct violation of Policy Directive 400, Employee Standards of Conduct §7.00 A4 and A6.

I find that your willful and intentional disrespectful conduct is an act of insubordination, in that your statements demonstrate your blatant disregard for the authority of the management of the institution. While commonly the charge of insubordination is related to an employee's refusal to obey an order of a supervisor, it has been found to also include use of abusive, threatening or profane language in speaking of management. Therefore, you are also charged with intentional insubordination.

So that you may realize the seriousness of your continual actions I would be remiss if I failed to share with you that normally willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees results in determination of "gross misconduct." Therefore, you must learn to discipline yourself in such matters. Any further infractions of this nature will result in more severe disciplinary action.

Mr. Coster, you have been disciplined in the past for the same type of disrespectful insubordinate behavior. While your fifteen (15) working day suspension without pay of January 11, 1993, was negotiated as a settlement of your grievance to a two (2) day suspension the factual cause of that action remained in the record. Accordingly this is your second offense and warrants the fifteen (15) working day suspension. In accordance with Policy Directive 400 the sanction for the third offense includes up to dismissal. This is your final warning that any further misconduct will result in your dismissal.

As previously shared with you, as a supervisor employees look to you as a role model for their behavior. Hopefully this suspension will give you an opportunity to reflect on the cause of this action and that you will accept your responsibility for dealing with your anger in more constructive ways.

You may respond to this letter directly to me either in person or in writing within eight (8) days of the date of this letter. If you wish to meet with me, please contact my secretary to schedule an appointment.

Permanent classified employees have appeal rights pursuant to West Virginia Code §29-6A-1 et seq. If you choose to exercise your appeal rights, you must submit your grievance to your immediate supervisor within ten (10) days of the effective date of this action.

Grievant alleges that this suspension was in retaliation for his reports to authorities of a number of instances of alleged improper disposition of state property at the Penitentiary, some of which involved the Warden, and was a continuing criminal conspiracy and operation by the administration to silence and intimidate him so that he would cease further investigating and bringing to light illegal activities occurring at the Penitentiary. Further, Grievant has since retired from the Division of Corrections and alleges that he took retirement under duress and therefore, was, in effect, constructively discharged from his employment.

Background

In order to put this matter into a proper context, it is necessary to briefly summarize the activities that were taking place at the West Virginia Penitentiary and the Northern Regional Jail and Correctional Facility, which ultimately led to Grievant's suspension on June 3, 1994. As early as March 1992, the new Warden at the West Virginia Penitentiary, George Trent, directed a massive cleanup of the Penitentiary, especially the maintenance area. The Penitentiary was filthy, and the City of Moundsville and neighbors to the Penitentiary were complaining. Grievant was the Maintenance Supervisor at the time and had been for many years. The Warden directed Grievant to clean up the maintenance area, make arrangements with Ken Frye of Surplus Property for disposal of all the surplus property, and otherwise dispose of the junk and scrap material that was laying around the area. Over a period of months, Grievant reported to the Warden that the cleanup was coming along and that truckloads of junk and scrap were being taken off the property. The Warden assumed Grievant was properly executing the appropriate paperwork and getting approval from Surplus Property for the disposal of this property.

On July 7, 1992, a retirement and/or surplus form WV64 was submitted to Surplus Property by Penitentiary Garage Supervisor Donald McFarland for two buses, a 1976 Ford and a 1975 International. The form indicated the buses were "beyond repair" and requested approval for their disposal. G. Ex. 8. Subsequently, in November 1992, the buses were transferred from the Penitentiary to the Collins Brothers Dairy Farm. The Collins' arrived at the Penitentiary on November

12, 1992, to claim the buses. Otis Galentine, a maintenance worker in the boiler house, was in the maintenance/garage area at the time. Mr. Galentine supervised the area when Mr. McFarland and Grievant were not around. On the day the Collins brothers came to get the buses, Mr. Galentine could not find any paperwork to indicate the transfer had been approved by Surplus Property. Mr. Galentine had his inmate clerk type up a memorandum documenting the transfer of the buses, showing the date, the make and serial number of the buses, and to whom they were transferred. Mr. Galentine took the document to Warden Trent, who signed off on it. Warden Trent believed the proper paperwork had been taken care of, or would be taken care of, by Grievant.

On December 7, 1992, Grievant engaged in an altercation with Frank McKain, an Administrative Assistant, regarding the assignment of an inmate, "R.P.", to the garage. Grievant used profane and loud language, called Mr. McKain a liar and a snitch, and threatened to take sick leave until January 10, 1993. As a result of this incident, Grievant received a 15-day suspension from Warden Trent on January 11, 1993, for violations of W. Va. Division of Corrections Policy Directive 400.00, Sections (A4) and (A6), "disrespectful conduct, use of insulting, abusive or obscene language to or about others", and "disruptive behavior", respectively. R Ex. 7. He was also removed as maintenance supervisor and Tony LeMasters was made acting maintenance supervisor. [\(See footnote 3\)](#)

In the meantime, on or about January 5, 1993, David White from Surplus Property called to speak to Mr. McFarland to inform him that he had received a bid on the buses. Mr. White said that he was told by Mr. McFarland that the buses had been cut up and hauled away for junk. Mr. McFarland denies this conversation. Mr. White then had to reject the bids made for the buses.

At some point thereafter, Surplus Property started asking questions regarding the disposal of the buses. Warden Trent asked Tony LeMasters, then acting maintenance supervisor, to look into the situation and reply to Joseph Cassis, an inspector from the Department of Finance and Administration. Mr. LeMasters looked into the matter of the buses and wrote Mr. Cassis on February 3, 1993, indicating the whereabouts of the buses and some other vehicles that were "missing". Mr. LeMasters indicated in his letter that Grievant was to have completed the proper paperwork to have these items removed from the property, and that he failed to follow through on completing and filing the necessary documentation to remove the vehicles from the Penitentiary's inventory. G. Ex. 2.

Surplus Property then contacted Douglas Adkinson, an Investigator for the W. Va. Legislative Committee on Special Investigations, to conduct an investigation regarding alleged criminal activities

of theft of property at the Penitentiary. Mr. Adkinson arrived at the Penitentiary on or about May 6, 1993, and first talked to Tony LeMasters, the acting maintenance supervisor. Mr. Adkinson left his card that day, and subsequently received a packet of information from Grievant regarding numerous allegations of criminal activity and theft on the part of the Warden and Deputy Warden at the Penitentiary.

At about the same time, Division of Corrections Commissioner Nicholas Hun received the same packet of information from Grievant. By memorandum dated May 26, 1993, he directed Frank Phares, Warden at Pruntytown Correctional Center, to conduct an investigation into Grievant's allegations. G. Ex. 7.

On May 25, 1993, Deputy Warden Kirby wrote Grievant a warning letter regarding log-in procedures and also warned him that if he did not cease his disrespectful behavior towards his superiors, more serious disciplinary action would be warranted. R. Ex. 1.

Thereafter, Mr. Adkinson and Mr. Phares were conducting simultaneous investigations into the allegations raised by Grievant and Surplus Property. There was some overlap, in that they would go together to the Collins' farm, for instance, but their investigations were done separately and they reached independent conclusions and filed separate reports. While the investigations were underway, both gentlemen continued to receive additional allegations of criminal activity or wrongdoing from the staff and the inmates, and uncovered other things they felt warranted further investigation.

Mr. Adkinson called in Paul Warren, an Accountant Investigator, to conduct a review and analysis of the Inmate Benefit Account at the Penitentiary based upon allegations raised by Grievant of improper use of that account. Mr. Warren's final report is incorporated into Mr. Adkinson's report. Mr. Warren concluded there were improprieties regarding the account, but found no criminal activity. Mr. Warren discussed his findings with Commissioner Hun, the Warden and others in September 1993, and presented his final report in October 1993.

Mr. Phares concluded his investigation into the various allegations raised by Grievant in August or September 1993. Mr. Phares concluded that most of Grievant's allegations were false or misrepresentations or stretched far beyond reason. He found that Grievant failed to carry out his responsibility to take care of the paperwork through Surplus Property. He also found that the Warden and Deputy Warden exercised poor judgment, but that there was no evidence of any criminal

activities on their part. Indeed, the Prosecuting Attorney of Marshall County declined to pursue the matter. As a result of these investigations, Commissioner Hun took the following actions: One employee was dismissed, Mr. McFarland and one other employee received suspensions, and Mr. Trent and Mr. Kirby received written reprimands.

In or about May 1994, Jack Roop, Director of the Regional Jail, requested that Warden Trent send someone from maintenance over to the Northern Regional Jail to aid in the transition. The Penitentiary was scheduled to be closed and all inmates were to be transferred to the Regional Jail. Warden Trent assigned Grievant to report to the Northern Regional Jail Facility on May 2, 1994. That same day, Grievant was in the hallway of the jail, outside the computer room, where Scott Neely, Assistant Administrator of the Computer Division, was installing the jail's computer system. Mr. Neely heard Grievant speaking in a loud voice, directing profanity and defamatory remarks toward the Warden and Deputy Warden. Grievant was calling them "sons of bitches" and "mother fuckers" and accusing them of stealing property from the Penitentiary. There were visitors, outside construction workers, and perhaps some working inmates present when Grievant was speaking. Mr. Neely asked Grievant to either stop or leave the area, which Grievant did. Mr. Neely described Grievant as irrational and angry, and his actions were clearly disturbing to the people around him. Mr. Neely, who reports directly to the Commissioner, informed him of Grievant's conduct on or about May 6, 1994. The Commissioner had already heard about the incident by then.

Jerry Jacobs, an architect and construction manager for Greene Associates, was on-site at the Northern Regional Jail during the entire construction. He met Grievant on a tour of the facility. On May 2, 1994, Grievant discussed his problems with the administration with Mr. Jacobs and was angry and agitated. Mr. Jacobs told Grievant he was not interested and did not want to know what Grievant was telling him. Mr. Jacobs relayed this conversation to Deputy Warden Paul Kirby shortly thereafter.

On May 3, 1994, Mr. Kirby wrote to Warden Trent about Grievant's remarks because he had "had enough". He requested an investigation. Warden Trent assigned Lou Moore to investigate the situation. Mr. Moore talked to Mr. Neely, Mr. Jacobs, Mr. Thomas Reece, and others regarding Grievant's behavior at the Northern Regional Jail.

Thomas Reece, Senior Project Manager for Pray Construction Company, was on-site at the Northern Regional Jail in May 1994. Mr. Reece met Grievant at his construction trailer, when Grievant was looking for Jerry Jacobs. Mr. Jacobs had a construction trailer near Mr. Reece's.

Grievant stopped to talk to Reece and began telling him about problems with the administration, using profane language. Mr. Reece felt it was very out of line for Grievant to conduct himself that way, especially in front of an outsider.

Based upon Mr. Moore's investigation, Commissioner Hun issued Grievant a 15- day suspension letter on June 3, 1994, for violations of Sections (A4) and (A6) of the Division of Corrections Policy Directive 400. This was Grievant's second suspension for the same conduct. Grievant had also been counseled by Deputy Warden Kirby, both verbally and in writing, regarding his language and disrespect for his superiors. R. Ex. 5. Grievant subsequently filed this grievance.

Finally, Grievant was not transferred to the Northern Regional Jail Facility when the transition took place. Warden Trent testified that the transfers were to be made based upon seniority and good standing. While Grievant certainly had seniority status, he was not in good standing at the time of the transfers, and was therefore ineligible for transfer at that time. The Warden indicated that those who were ineligible for transfer could go on the lay-off list and transfer when they later became eligible. Grievant did not elect this option, but instead retired from the Division of Corrections. Grievant alleges that he retired under duress and therefore, it should be considered a constructive discharge.

Discussion

There were numerous allegations of criminal or otherwise inappropriate conduct on the part of the Warden and Deputy Warden made by Grievant. Grievant went to great lengths at the level four hearing to attempt to establish the truth of these allegations as a basis to support his claim that his suspension was in retaliation for bringing these alleged activities to the attention of the authorities. The undersigned finds it expeditious to find merely that Grievant indeed made allegations against the Warden and Deputy Warden to the authorities, that several investigations took place surrounding these allegations, and that no finding of criminal activity was made by those responsible for the investigations. However, it was concluded that some inappropriate conduct had taken place, amounting to poor judgment, and that Grievant, as supervisor of maintenance, had failed to ensure that the proper procedures were followed with regard to the disposal of surplus property at the Penitentiary. Ultimately, appropriate action was taken against the individuals involved by Commissioner Hun. It is apparent that Grievant does not believe that enough was done to punish the Warden and Deputy Warden. Be that as it may, the undersigned is not in a position to make any

determinations regarding Grievant's allegations against those individuals, or the appropriateness of the discipline imposed on them.

The undersigned is concerned with whether Respondent has proven the charges alleged in the June 4, 1994 suspension letter issued to Grievant by Commissioner Hun, and if so, whether Grievant has proven that action was in retaliation for his reporting allegations of wrongdoing to the authorities. Finally, the undersigned must determine whether Grievant has proven that his retirement was, in effect, a constructive discharge.

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. Williams v. W. Va. Div. of Corrections, Docket No. 94- CORR-284 (Sept. 14, 1995). Grievant was suspended for his conduct at the Northern Regional Jail Facility on May 4, 1994, which violated Division of Corrections Policy Directive 400, Section 7, specifically:

A4.
Disrespectful conduct, use of insulting, abusive or obscene language to or about others; and

A6.

Disruptive behavior.

Both A4 and A6 are Class A offenses, which are the least serious instances of misconduct under Policy Directive 400. Policy Directive 400 sets out recommended progressive discipline for Class A offenses:

A. Class A Offenses

First Offense - Official reprimand to a five (5) day suspension.

Second Offense - Six (6) day suspension to a fifteen (15) day suspension.

Third Offense - Sixteen (16) day suspension to dismissal.

R Ex. 4.

Three different witnesses testified regarding Grievant's conduct on May 2, 1994, at the Northern Regional Jail Facility: Mr. Neely, Mr. Jacobs and Mr. Reece. Two of those individuals were outside contractors on-site to assist in the construction of the Regional Jail. All three confirm that Grievant used obscene or abusive language toward the Warden and Deputy Warden, and accused them of criminal or other wrongdoings.

Grievant, while not outrightly denying that these conversations occurred, makes much of the fact that these three gentlemen were not present together when Grievant allegedly made his comments. However, Commissioner Hun's letter does not state that this conversation took place at one time with all three individuals present. It merely states that "you used insulting, abusive, and obscene language when speaking to O.S. "Scott" Neely, Jerry Jacobs and Thomas Reese. During these conversations you repeatedly cursed Warden George Trent and Deputy Warden Paul Kirby." R. Ex. 5 (emphasis added). Thus, it is evident that Commissioner Hun was aware that these conversations between Grievant and these individuals occurred separately and at different times. This is consistent with those individuals' testimony regarding their recollections of their conversations with Grievant.

Based upon these individuals' testimony, the undersigned finds Respondent has proven the charges against Grievant by a preponderance of the evidence. Because Grievant had received one other suspension for the same violations and had received verbal and written warnings from Deputy Warden Kirby regarding his language and behavior, the 15-day suspension cannot be found to be arbitrary and capricious.

Grievant responds that the suspension was in retaliation for his reporting alleged wrongdoing to the authorities, in violation of the "Whistle-blower Law", W. Va. Code §§ 6C-1-1, et seq. Allegations of unlawful retaliation under the "Whistle-blower Law" are properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. Barber v. Div. of Highways, Docket No. 94-H-267 (Feb. 28, 1995); Coddington v. W. Va. Dept. of Health and Human Resources/Weston State Hosp., Docket Nos. 93-HHR-265, 266, 267 (May 19, 1994); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

W. Va. Code § 6C-1-3 provides that:

(a) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. . . .

Code § 6C-1-4 provides that:

(a) A person who alleges that he is a victim of a violation of this article may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within one hundred eighty days after the occurrence of the alleged violation.

(b) An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.

(c) It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts. . . .

See also, Barber v. Div. of Highways, Docket No. 94-H-267 (Feb. 28, 1995).

There is no dispute that Grievant, prior to the alleged reprisal, i.e., the suspension, reported instances of wrongdoing or waste to the employer or appropriate authorities. [\(See footnote 4\)](#) Grievant certainly made no secret of his allegations against the Warden and Deputy Warden. Two separate investigations were conducted, one at the direction of the Warden and one at the direction of Commissioner Hun, to determine the validity of Grievant's allegations. These investigations spanned a period from approximately November 1992 through the Fall of 1993.

Grievant asserts that, even if he had used profanity and made defamatory remarks about the Warden and Deputy Warden to outsiders, he was justified in doing so because of his belief that they had committed some sort of criminal activity. Grievant is in error in this respect. While the "Whistle-blower Law" protects individuals who report criminal activities or wrongdoing on the part of their employer to appropriate authorities, it cannot be interpreted to authorize an employee to engage in the type of conduct utilized by Grievant on May 2, 1994.

Warden Trent testified that it was common knowledge that everywhere Grievant went he talked about the buses, and that he thought the Warden was a thief. Deputy Warden Kirby testified that he put up with Grievant's accusations as long as he could until May 2, 1994, when he finally had had enough and asked Warden Trent to investigate Grievant's conduct at the Northern Regional Jail Facility. Both gentlemen testified that Grievant spread the word of his allegations throughout the prison and the community in which they lived. All witnesses who testified about Grievant's behavior

confirmed that Grievant talked constantly about the buses and about the Warden and Deputy Warden, mostly in disparaging terms.

Grievant's conduct on May 2, 1994 was not protected activity, and he is afforded no protection under the "Whistle-blower Law" for such behavior. Discipline imposed upon an employee who has reported wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances. Church v. Dept. of Army, 6 MSPB 615 (1981), citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979). An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Nagel v. DHHS, 707 F.2d 1384 (Fed. Cir. 1983). An employer can take into account negative reactions of co-workers to an employee who continually reports their minor transgressions. Duran v. MSPB, 707 F.2d 1174 (10th Cir. 1983). Here, two separate investigations concluded that the Warden and Deputy Warden did not engage in any criminal activity, but were responsible for failure to follow proper administrative procedures. Despite these findings, Grievant continued to harangue and disparage those gentlemen on the job and off, to anyone who would listen, often using profane and defamatory language. Grievant was not "justified" in this behavior. Grievant was entitled to, and did, report what he perceived to be wrongdoing on the part of his superiors, and he was entitled to file grievances and lawsuits over this alleged wrongdoing. Grievant was not entitled, however, to continually make obscene and disparaging remarks about his superiors to co-workers and outsiders, which resulted in disrupting the workplace and creating a hostile working environment.

Therefore, it is accepted that Respondent has provided a legitimate, non-retaliatory reason for Grievant's 15-day suspension, i.e., that he engaged in disrespectful conduct, used insulting, abusive or obscene language to or about others, and that this behavior was disruptive to the workplace, in violation of Sections A4 and A6 of Policy Directive 400. Further, this was his second offense of the same behavior, for which he previously received a suspension, and a verbal and written reprimand. Under the provisions of Policy Directive 400, a 15-day suspension was within the recommended sanctions for a second offense of a Class A offense, and was not arbitrary and capricious.

Finally, Grievant claims that he was forced to retire under duress, and therefore, his retirement should be considered a "constructive discharge." In order to prove a constructive discharge, grievant must establish that working conditions created by or known to the employer were so intolerable that a

reasonable person would be compelled to quit. It is not necessary, however, that a grievant prove that the employer's actions were taken with a specific intent to cause him to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (W. Va. 1992). One of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions. Id., at 153.

In Slack, supra, the plaintiff alleged that in retaliation for her cooperation with federal prosecutors against her employer, her employer changed her job position making it more onerous which forced her to quit. Likewise, Grievant claims that he was forced to retire because he had disclosed alleged wrongdoing by Warden Trent and Deputy Warden Kirby. Grievant claims he has proven that the Warden was out to silence him and stop him from pursuing his allegations of wrongdoing, and that Commissioner Hun participated in this plan by imposing the 15-day suspension against Grievant. The undersigned finds Grievant has proven no such thing. Grievant had been pursuing his allegations of wrongdoing against the Warden and Deputy Warden for at least two years prior to his 15-day suspension. Moreover, Grievant persisted in "pursuing" those matters in an unacceptable manner, by his continuous use of obscene and disparaging remarks toward his superiors. There is simply no evidence that the Warden or Commissioner were out to "silence" Grievant. In fact, both of them independently directed investigations into Grievant's accusations. Further, Commissioner Hun testified that, in determining what discipline to impose on Grievant for his behavior, he contacted the appropriate individuals at the Division of Personnel for guidance. He was informed by the Division of Personnel that he could take disciplinary action against Grievant ranging from a reprimand to dismissal for his action. Commissioner Hun elected to take the middle ground and issued the 15-day suspension. Commissioner Hun could have chosen to dismiss Grievant, but did not do so. This flies directly in the face of Grievant's assertions that the Commissioner wanted to "silence" Grievant and force him to quit.

In addition, when Jack Roop from the Regional Jail asked the Warden to send someone over to the Northern Regional Jail to assist in the transition process, the Warden sent Grievant. There is no evidence that this was perceived as some sort of demotion or disciplinary action on the part of the employer. Had Grievant not engaged in his abusive, disruptive behavior on his first day at the Northern Regional Jail, it seems that he would have been transferred to that facility. Instead, he continued his attacks on his superiors, resulting in suspension, which then made him ineligible for

transfer to the Northern Regional Jail.

Grievant's claim that this entire scenario was concocted by the Warden and the Commissioner to make his working conditions intolerable is simply not borne out by the facts. Grievant's perceived "intolerable" working conditions were created by himself. He could not and would not let the matter with the Warden rest, even after the appropriate authorities concluded their investigations. He persisted in behaving in an abusive, disruptive manner toward his superiors, for which there is no "justification", thus forcing them to take some disciplinary action. That they did not dismiss Grievant for his actions is a telling defense to Grievant's claim that they were out to force him to quit. Grievant retired of his own volition. He may have been angry at his superiors and the way the investigations turned out, but he was in no way forced to quit his position with the Division of Corrections.

Based upon the foregoing discussion and the record developed in this matter, it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. At all times relevant herein, Grievant was employed by Respondent Division of Corrections, West Virginia Penitentiary, as a Building Maintenance Supervisor.
2. Grievant had reported numerous allegations of criminal and other wrongdoings by Warden George Trent and Deputy Warden Paul Kirby to the appropriate authorities, which resulted in two formal investigations which took place from approximately the Fall 1992 to the Fall 1993.
3. The West Virginia Penitentiary was scheduled to be closed and all operations were to be transferred to the Northern Regional Jail Facility.
4. On May 2, 1994, Grievant was assigned to the Northern Regional Jail Facility to assist in the transition.
5. While at the Northern Regional Jail, Grievant engaged Scott Neely, Jerry Jacobs, and Thomas Reece in conversations relating to incidents involving alleged illegal activities which were the subject of two formal investigations at the Penitentiary.
6. During these conversations, Grievant directed abusive, insulting and obscene language towards Warden George Trent and Deputy Warden Paul Kirby, and accused them of theft of property at the Penitentiary.
7. Deputy Warden Kirby heard of these incidents and requested that Warden Trent authorize an investigation into Grievant's conduct.

8. Lou Moore, Investigator for the Division of Corrections, interviewed the above three gentlemen and confirmed that Grievant had engaged in the alleged conduct.

9. Based on Mr. Moore's conclusions, and the fact that Grievant had been suspended once before for the same conduct, and had received a verbal and written warning from Deputy Warden Kirby regarding his language and behavior, Commissioner Nicholas J. Hun issued Grievant a 15-day suspension by letter dated June 3, 1994.

10. Because Grievant had received the 15-day suspension, he was not an employee in good standing at the time of the official transfer of operations from the Penitentiary to the Northern Regional Jail Facility. Thus, Grievant was ineligible to be transferred at that time. However, Grievant had the option of going on the lay-off list and being transferred later when he became eligible again.

11. Grievant subsequently retired from the Division of Corrections.

Conclusions of Law

1. In disciplinary proceedings involving state employees, the burden of proof is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Williams v. W. Va. Div. of Corrections, Docket No. 94-CORR-184 (Sept. 14, 1995).

2. Respondent has proven by a preponderance of the evidence that Grievant violated Sections (A4) and (A6) of the Division of Corrections Policy Directive 400, for abusive, insulting or obscene language directed towards his superiors, and that such conduct disrupted the workplace.

3. An allegation of unlawful retaliation under W. Va. Code §§ 6C-1-1, et seq., is properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. Barber v. Div. of Highways, Docket No. 94-H-267 (Feb. 28, 1995).

3. An employee alleging a violation of Code § 6C-1-3 must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of, or under the direction of, the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority. W. Va. Code § 6C-1-4.

4. It shall be a defense to an action under Code § 6C-1-3 if the employer proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretext. W. Va. Code § 6C-1-4.

5. Grievant has proven by a preponderance of the evidence that, prior to the imposition of the 15-day suspension, he had reported instances of wrongdoing to the employer and the appropriate authorities.

6. Respondent presented a legitimate, non-retaliatory reason for imposing the 15-day suspension on Grievant, i.e., violations of Section 7 (A4) and (A6) of Division of Corrections Policy Directive 400.

7. Discipline imposed upon an employee who has reported wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Duran v. MSPB, 707 F.2d 1174 (10th Cir. 1983); Church v. Dept. of Army, 6 MSPB 615 (1981), citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979).

8. In order to prove a constructive discharge, Grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (1992).

9. Grievant has failed to prove that the employer created working conditions at the West Virginia Penitentiary that were so intolerable that a reasonable person would be compelled to quit.

Accordingly, this 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.

MARY JO SWARTZ
Administrative Law Judge

Dated: August 12, 1996

[Footnote: 1](#)

The considerable delay in processing this grievance resulted, in part, due to the reassignment of this grievance to two different Administrative Law Judges during its course, as well as numerous continuances for good cause.

[Footnote: 2](#)

Grievant has since retired from his position with the Division of Corrections.

[Footnote: 3](#)

This suspension was ultimately reduced to a 2-day suspension in settlement of a grievance.

[Footnote: 4](#)

Because of the ultimate outcome of this decision, it is unnecessary to analyze whether Grievant's report to the appropriate authorities was made in "good faith."