STACY COOK

v. Docket No. 96-CORR-037

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, Stacy Cook, was employed by the West Virginia Division of Corrections (CORR) as a Correctional Officer I assigned to the Mt. Olive Correctional Complex (MOCC) until her resignation in March 1996. She filed a grievance at Level IV, on January 29, 1996, protesting a thirty-day suspension without pay. At the grievant's request, the case was held in abeyance until March 1997. An evidentiary hearing was held March 31, 1997, and the parties submitted proposed findings of fact and conclusions of law by May 19, 1997.

Findings of Fact

After a careful review of the evidence presented at the Level IV hearing, the undersigned makes the following findings:

1. The grievant was first employed as a Correctional Officer at MOCC in September 1994. During the times pertinent herein, her designated post was the security desk in the entry section of MOCC's Medical Unit.

2. MOCC security procedures prohibit Correctional Officers from leaving their assigned posts unless they have obtained permission from the Operations Officer on a particular shift or his designee.

3. On or about August 21, 1995, the grievant went to MOCC during off-duty hours, and conversed with two inmates who were involved in an on-going investigation by MOCC officials. She did not protest a five-day suspension without pay for “conducting an unauthorized investigation which could have tainted and./or subverted an official authorized investigation of an extremely serious rule violation and possible felony charge.”

4. On December 8, 1995, Marie Hinkle, a nurse providing contract medical services at MOCC,

completed and signed an incident report in which she indicated that the grievant abandoned her post at approximately 2:30 a.m. that morning. Ms. Hinkle recounted that she and two other nurses, Doris Neal and Jerri Sizemore, approached the entrance to the Medical Unit with a medical supply cart, and found no one on duty at the security desk. According to the report, shortly after Ms.Neal climbed over a counter, and gave them access to the unit, the grievant appeared and stated, “I get lonely so I went to stay in [MOCC's Control Room] until you guys got back.” Despite that the incident report form contained spaces designated for signatures of any witnesses to the events described, neither Ms. Sizemore nor Ms. Neal signed it.

5. Ms. Hinkle completed and signed a second incident report on the same date in which she indicated that the grievant had again abandoned her post at approximately 3:00 a.m. According to this report, Ms. Hinkle, Ms. Sizemore and Ms. Neal were in Quilliams II, MOCC's maximum security section, when the grievant entered and remarked, “I didn't want to be there alone.” Ms. Hinkle recounted that as she and the other nurses were leaving the area, the grievant said, “Don't leave me.” Neither Ms. Neal nor Ms. Sizemore signed the report.

6. For reasons which are unclear, the two reports did not reach MOCC Deputy Warden Howard Painter until late December 1995. Mr. Painter did not keep written records on his brief investigation of the matter.

7. On January 2, 1996, Mr. Painter advised the grievant that she had been accused of abandoning her post, and furnished her copies of the incident reports. The grievant denied that she had ever left her post without proper authorization. Mr. Painter informed her that he would investigate the matter further, but later determined that it was not necessary.

8. CORR personnel policy categorizes abandonment of one's post as a “Class C” offense, and provides that a first time offender may be suspended without pay for up to thirty days.

9. The grievant's January 4, 1996 letter of suspension referenced the August 21, 1995 suspension, and suggested that the former misconduct was cause to disbelieve the grievant's response to the incident reports, and/or impose the maximum penalty allowed.

Argument

Relying wholly on the incident reports and Mr. Painter's testimony about his investigation, CORR maintains that it has proven that the grievant committed the acts with which she was charged. The agency further asserts that the penalty was commensurate with the seriousness of the grievant's conduct and her prior work history.

The grievant concedes that CORR's hearsay evidence is admissible, but asserts that it is insufficient to meet the agency's burden in the case. The grievant essentially contends that Ms. Hinkle's written, unattested complaints are inherently suspect, and her account of events was not corroborated by Mr. Painter's testimony.

Conclusions of Law

After a careful review of the parties' legal arguments, the applicable law, and the foregoing findings, the undersigned makes the following conclusions: 1. In a disciplinary action against a tenured state employee, the employer must prove, by a preponderance of the evidence, that the employee engaged in the conduct for which he was disciplined, and demonstrate that the conduct was of "a substantial nature directly affecting rights and interests of the public." Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980); W.Va. Code §29-6A-6.

2. Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. See, Seddon v. W.Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). CORR provided no reason for not calling Ms. Hinkle or other nurses to testify about the charges made in the two incident reports.

3. Observations on demeanor during testimony are often critical when assessing a witness' credibility. It is difficult if not impossible to make comparative subjective credibility determinations when one witness provides a written account of events and another provides testimony. See, Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1997). Here, the grievant's credible Level IV testimony must be afforded more weight than the statements made by Ms. Hinkle in her two

incident reports.

4. Mr. Painter's often vague and sometimes conflicting testimony regarding what evidence he relied on in the decision to suspend establishes that he most likely had only the incident reports and the grievant's denial. His testimony does not corroborate Ms. Hinkle's account of events in any respect. CORR has failed to prove by a preponderance of the evidence that the grievant abandoned her post at any time.

Accordingly, the grievance is **GRANTED**, and the West Virginia Division of Corrections is hereby **ORDERED** to reimburse the grievant for any loss of wages or benefits she might have incurred as the result of the suspension, and remove all records of the suspension from her personnel file.

Any party may appeal this decision to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither with 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 thisoffice 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:

October 31, 1997