LAWRENCE HINDMAN,

Grievant,

v.

DOCKET NO. 94-CORR-262

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

The grievant, Lawrence Hindman, a Correctional Officer I assigned to the West Virginia Penitentiary at Moundsville, was dismissed for cause by the West Virginia Division of Corrections (Corrections) effective June 2, 1994. (See footnote 1) He filed an appeal to that action to level four on June 29, 1994. A hearing was held September 7, 1994, December 7, 1994, July 8, 1996, and November 8, 1996. (See footnote 2) This matter became mature for decision on December 31, 1996, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 3)

Procedural History

The procedural background of this protracted case will be briefly outlined. Grievant was initially suspended without pay for a period of at least fifteen days pending the outcome of an internal investigation of allegations that he caused or permitted the removal of or reproduction of official documents of the State of West Virginia.

By letter dated June 2, 1994, Penitentiary Warden George Trent notified Grievant of his dismissal for gross misconduct, effective immediately. This letter alleged Grievant violated Policy Directive 400.00, Employee Standards of Conduct and Performance, and listed two specific grounds for the dismissal:

(1)

Class C6 - Theft or unauthorized removal of state records; and

(2)

Class C20 - Trafficking in contraband.

The dismissal letter also indicates that Grievant was arrested and incarcerated as a result of the above. (See footnote 4)

Following Grievant's appeal to level four on June 29, 1994, an evidentiary hearing was set. Between the actual hearing dates, this matter was continued on at least five occasions, with the hearing finally concluding on November 8, 1996. Grievant also moved to recuse the undersigned from this case, but that motion was denied.

Background

Grievant was discharged for engaging in improper activity with two other correctional officers, Mark Williams and Andy Ondeck, involving the removal of confidential documents from the administrative offices of the Penitentiary and the dissemination of suchdocuments to inmate Paul Dorton. Specifically, Grievant allegedly obtained the documents from the Control Center Building while assigned there, and either furnished them himself or through Ondeck and Williams to inmate Dorton. Grievant allegedly used his position to obtain legal services from Dorton in the form of legal research and the preparation of a legal document.

In April 1994, at the direction of Warden Trent, Corrections Investigator Louis Moore began an inquiry into allegations of misappropriation of state property at the Penitentiary. At some point in the investigation, inmate Dorton advised Mr. Moore that Grievant and correctional officers Williams and Ondeck had furnished him confidential documents from the Warden's office and solicited his assistance in filing a legal action against Corrections. On July 2, 1994, as a result of the investigation begun by Mr. Moore, Grievant was dismissed for gross misconduct as outlined above. Officers Williams and Ondeck were also dismissed. (See footnote 5)

Respondent's Evidence

Sometime in April 1994, Warden Trent informed Investigator Louis Moore that documents, some

confidential in nature, had been turned over to him through a chain of employees. These documents were allegedly being directed towards the administration in an effort to “bring down” the administration, and on the pretext of supporting union matters. Sometime earlier in 1994, Grievant, Andy Ondeck and Mark Williams had filed a writ of mandamus against the Penitentiary administration regarding the psychologicaltesting of correctional officers. The documents which had been turned over to the Warden were allegedly supposed to aid the three officers in pursuing their lawsuit. The three officers were members of the West Virginia State Employees Union. (See footnote 6)

Mr. Moore was informed by inmate Paul Dorton, housed at the Penitentiary, that he had observed, received and processed the documents, which had allegedly been stolen by the three officers from the Control Center Building. The Control Center Building is located separate and apart from the Penitentiary, and houses administration offices, including those of the Warden, Deputy Warden, and Chief Correctional Officer. This facility also is the communications command center for the entire Penitentiary, and houses the armory for the Penitentiary. The command center is staffed 24 hours a day, 7 days a week, by a correctional officer. Ingress and egress to the building is monitored and all individuals with business at the center are logged in by the officer. Inmates have no access at all to the Control Center Building. Inmate Dorton told Mr. Moore that the officers were removing documents from the offices, desks and files located in the Control Center Building and bringing him the documents. He would copy the documents for the officers, in connection with the lawsuit they had filed against the administration.

Mr. Moore learned that inmate Dorton had delivered the documents he allegedly received from the three officers to Tammy Bober, currently the Acting Director of Unit Management. Inmate Dorton had also provided Correctional Officer P. W. Glasscockcopies of the same documents. Mr. Moore interviewed these individuals, as well as others, in the course of his investigation regarding the allegedly stolen documents. During the course of his investigation, Mr. Moore contacted the West Virginia Department of Public Safety, and an independent criminal investigation was begun of the three officers. Mr. Moore exchanged information he received with the Department of Public Safety, specifically, Corporal John Gruzyinkas. Corporal Gruzyinkas prepared a report of the criminal investigation (R. Ex. 12) which noted the day and time of the offense as between Monday, February 14, 1994 and Monday February 21, 1994.

Mr. Moore reported his findings to Warden Trent, which resulted in the three officers being

dismissed. It is important to note that Mr. Moore did not identify any specific dates when the offense or offenses allegedly occurred, but rather observed that the taking of the documents occurred over some period of time. Grievant was dismissed by Warden Trent on June 2, 1994. The criminal investigation resulted in the arrest and incarceration of Grievant. Grievant was convicted in Magistrate Court of embezzlement. That charge, and the remaining charges were ultimately dismissed in Circuit Court for failure to prosecute.

P. W. Glasscock, a former correctional officer at the Penitentiary, was interviewed by Mr. Moore and testified at level four. Mr. Glasscock was employed at the Penitentiary at all times relevant to this grievance. In April 1994, Mr. Glasscock was approached by inmate Dorton regarding possible wrongdoings by correctional officers at the Penitentiary. Dorton provided him with some documents he allegedly received from Andy Ondeck, which Grievant was supposedly getting out the Control Center, and informed him that Ondeck, Williams and Grievant intended to set up Chief Correctional Officer Tony LeMasters with these documents. Specifically, they were going to institute a “shake down” of Dorton's cell,find the documents, and Dorton was to say that Lt. LeMasters gave them to him. Dorton apparently decided he did not want to be a part of this plan, and approached Mr. Glasscock. The documents provided to Mr. Glasscock are the same documents which ultimately found their way to the Warden and to Mr. Moore, which were entered into evidence as R. Ex. 1(a)-(v) and R. Ex. 2.. Among those documents was a February 7,1994 Weekend Duty/Observations report from Deputy Warden Paul Kirby to Warden Trent. Mr. Glasscock testified that this was an extremely confidential document, and there was no reason why an inmate would have possession of it.

The “weekend Warden” report includes information from inmates concerning other inmates, including their names, and also includes a report on the transportation and storage of ammunition, and the very specific logistics of that move. It is evident that this type of information in the hands of inmates or the general public could lead to a potentially dangerous situation.

Following the delivery of the first document, the “weekend Warden” report around the second week of April 1994, Dorton provided Mr. Glasscock with subsequent information, almost on a daily basis. Mr. Glasscock was also given a small bottle of seasoning salt in a clear bag stapled shut, which Dorton told him came from Ondeck. Mr. Glasscock turned the bottle directly over to the Warden. Mr. Glasscock relayed the information to his immediate superior, Lt. William Arnold. Mr. Glasscock also filled out an Incident Report on May 5, 1994, documenting what had transpired with

Dorton, and identifying the documents he had received from Dorton. R. Ex. 3. He turned this report over to Louis Moore as part of the internal investigation. Mr. Glasscock testified that Dorton also gave him a copy of an Affidavit he was going to submit, although it was notsigned or notarized at that time and was not included in the list Mr. Glasscock identified in his Incident Report.

Mr. Glasscock's immediate superior, Lt. William Arnold, testified that, on or about April 11, 1994, Mr. Glasscock asked to be relieved from his post so that he could talk to an inmate. Lt. Arnold said this was not an unusual request, in that inmates often wanted to speak to guards confidentially in order to impart information. Mr. Glasscock was relieved from his post and went to talk with inmate Dorton. After meeting with Dorton, Mr. Glasscock asked to speak to Lt. Arnold. Mr. Glasscock told Lt. Arnold that he had received information from Dorton in the form of documents, and was told that Ondeck, Williams and Grievant were attempting to set up Lt. Tony LeMasters.

Mr. Glasscock gave Lt. Arnold the documents he had received from Dorton, including the "weekend Warden" report. Lt. Arnold testified that in his 17-1/2 years at the Penitentiary, he had never seen a "weekend Warden" report, that they were sensitive, and they were not for publication. Glasscock relayed the information he received from Dorton that someone who worked at the Control Center was getting the documents, and also that Dorton was providing legal services for Ondeck, Williams and Grievant, for which they were to pay him. Lt. Arnold testified that inmates are prohibited from performing legal work for correctional officers, and that correctional officers are not permitted to pay inmates for services, with one exception. Correctional officers are permitted to have inmates work on their cars under a payment scheme that is handled through the Penitentiary treasurer's office. Lt. Arnold took the documents from Glasscock, locked them in a cabinet, and gave them to Teresa Waid, the Director of Unit Management, the next day. At about the same time that Dorton gave the documents to Mr. Glasscock, he also approached Tammy Bober, who was then the Unit Manager for the Medical Unit. Dorton apparently had a lot of medical problems and spent a good deal of time in the Medical Unit. While she was speaking with Dorton about another matter, he told Ms. Bober that he had done some legal work for Ondeck, Williams and Grievant, and that they were going to try to set up Lt. LeMasters, Teresa Waid, the Warden, and some other administration officials. He told her he had assisted them in preparing their lawsuit against the administration. Following that conversation, Dorton began to bring Ms. Bober documents, including a copy of the "weekend Warden" report referred to above. He told her he was afraid to have the documents in his

possession, especially the “weekend Warden” report. Ms. Bober testified she had never seen one of those reports, and inmates certainly would not have access to it. Dorton told her Grievant had gotten the “weekend Warden” report from the Control Center Building. He also told her that the three officers offered him “stuff” for his services, and that they had given him a keg of yeast. As with Mr. Glasscock, Dorton continued to bring her additional documents he was allegedly receiving from Ondeck, Williams and Grievant. Ms. Bober told her supervisor about her contact with Dorton, and her supervisor indicated she already had some prior knowledge of what was going on.

At some point, Ms. Bober spoke with Mr. Glasscock about her involvement with Dorton, and learned that Dorton had given him copies of the documents also. They arranged to exchange information they received from Dorton. Dorton would tell Ms. Bober that “they” were going to be giving him something, and he was going to turn it over to Glasscock. She arranged with Glasscock to meet her that evening and to leave the material with her. She informed the Warden that something was going to be exchangedthat evening and would be dropped off at his residence. She testified that Dorton had given Glasscock a small bottle of “something” which he took directly to the Warden's residence. Dorton also gave Ms. Bober a bottle containing a green leafy substance, which he said was given to him by Ondeck, and which she also gave directly to the Warden.

On May 4, 1994, Ms. Bober turned over the documents she had in her possession to Louis Moore, and gave him a statement. Subsequently, on May 6, 1994, she notarized an Affidavit prepared and signed by Dorton listing the documents (R. Ex. 1(a)-(v); R. Ex. 2) he had received from Ondeck, Williams and Grievant. She testified that two other inmates also prepared and signed Affidavits that they had witnessed Ondeck, Williams and Grievant giving Dorton documents, identifying some of the documents, stating that they overheard Williams and Grievant telling Dorton they wanted to set up Lt. LeMasters, and that they overheard Ondeck discuss payment with Dorton for his services. R. Ex. 1(t).

Respondent offered the testimony of Lelia Holmes, a Correctional Officer at the Penitentiary who was a co-worker with Grievant. On or about April 14, 1994, Grievant told her he had taken some papers out of the Control Center regarding psychological testing of the officers. He told her he would go through drawers in the Control Center, and if they were locked, “we” would get in them anyway. He told her “they” were giving the papers to an inmate in the law library who would make copies of them. The inmate was helping them in their lawsuit over psychological testing. Grievant did not say

he personally was giving the inmate the documents. Ms. Holmes said that other officers were talking about these events, and that it was just a matter of time until Grievant got caught, because he was "telling too many people." LIV, Holmes. She did not independently report Grievant, but was aware that Louis Moore was conducting an investigation, and just waited until he gotto her to tell her story. She filled out an incident report relaying these events on June 18, 1994, as part of Louis Moore's investigation. (See footnote 7)

Jeffrey Stephenson, a Correctional Officer at the Penitentiary, was a friend of Grievant and was Vice President of the union. Mr. Stephenson testified that he was working in the Dining Hall when Ondeck came in and told him he had something to show him. An investigation had been done by Deputy Warden Kirby regarding some allegations concerning Lt. LeMasters. Ondeck said Mark Williams had gotten a copy of the Deputy Warden's findings, and the next day brought it to Stephenson. R. Ex. 2. Mr. Stephenson asked Ondeck where he had gotten the memorandum, to which Ondeck replied, "you need to talk to Larry." At the time, Grievant was also assigned to the Dining Hall, and Stephenson asked him where he got the memorandum from the Deputy Warden to Lt. LeMasters. Grievant told him that after all of the keys were dropped off at the Control Center, he would do a "fire check" of the Control Center Building. He said if he found an open door or unlocked file cabinet, and saw something, he would take it. Ondeck also showed him other documents, including some handwritten notes made by the Deputy Warden, and a letter concerning an inmate's litigation with the Warden. Stephenson testified that Grievant was smug, glib, and sarcastic when telling him about the "fire check." Stephenson testified that there is no such thing as a "fire check" at the Penitentiary, and that it was Grievant's way of telling him that he was snooping around.

Stephenson talked to Ondeck, Williams and Grievant about their lawsuit regarding psychological testing in March 1994. The union and the administration had met and decided testing would not be done. Ondeck, Williams and Grievant "went against the good faith bargaining that had taken place" and filed the lawsuit in an attempt to block hiring at the Northern Regional Jail Facility. He told them he did not want his name on the lawsuit. The union subsequently wrote a letter to all members informing them that the activities of Ondeck, Williams and Grievant were not supported by the union. Stephenson felt that Grievant was in the right assignment at the right time, and the three officers took advantage of that. Stephenson went directly to the Deputy Warden and Warden with this information, and Louis Moore later came back and took his statement. R. Ex. 6.

Joseph Myers is also a Correctional Officer who worked with Grievant, and has been his friend for about 20 years. Sometime between February and April, Grievant told him while riding together from work that he had snooped around the Control Center, and showed him some documents, including R. Ex. 2, the Deputy Warden's findings from the LeMasters investigation, and another document regarding psychological testing (R. Ex. 1(o)). He told Myers that the documents were going to help them in their case against the administration. Myers told Grievant what he was doing was wrong. On the way home, Grievant stopped at Ondeck's home and gave him the documents. Myers gave a statement to Louis Moore in April 1994. Moore told him he was also a suspect because of his close relationship with Grievant.

Deputy Warden Paul Kirby testified that he was first informed that documents were being taken from his office when Mr. Stephenson asked to meet with him outside the facility. Stephenson told him he had some documents he felt were private, including the“weekend Warden” report and some handwritten notes. Stephenson repeated facts almost verbatim from that report, which is passed only between the Deputy Warden and the Warden.

Kirby testified that the “weekend Warden” report is not disseminated to anyone besides the Warden and whoever is acting as the weekend Warden, in this case, himself. It is a direct communication for the Warden's eyes only. Kirby's secretary would have been the only other person with access to that report. She prepared the report from his handwritten notes, which were always attached to the final typewritten memorandum.

Kirby testified that his findings regarding the investigation of the allegations concerning Lt. LeMasters (R. Ex. 2) were also private in nature, and only communicated to Lt. LeMasters. No one else but the Warden had a copy of that memorandum. Kirby testified that his secretary's office is not locked. The “weekend Warden” reports are hole- punched and put in a binder, which could have been on her desk or in his office at any given time. Following receipt of this information from Mr. Stephenson, Deputy Warden Kirby immediately started an investigation.

Finally, Rose Noggy, a Correctional Officer at the Penitentiary, testified that she trained Grievant for his assignment at the Control Center. She testified that it was not part of the Control Center assignment to go into offices or around other people's desks. The primary role of the control officer is contained to one room, the communications center. She did not train Grievant to go into offices or to do a “fire check.” Noggy confirmed that they do not do “fire checks”, except maybe on the midnight

shift and only in the armory. She has never done a fire check at the Control Center. Noggy testified that Grievant worked the Control Center on days she was not working, and some weekends. Based upon the results of Louis Moore's investigation, Warden George Trent dismissed Grievant from the Penitentiary on June 2, 1994, specifically for C6 and C20 offenses. C6 is the theft or unauthorized removal of state records, state property or other person's property. C20 is trafficking in contraband. Trent testified that the investigation demonstrated that Grievant had taken documents, some extremely sensitive, from the Control Center Building, and provided them, either directly or indirectly, to an inmate, in violation of Policy 400.00, Employee Standards of Conduct and Performance.

Grievant denies all wrongdoing, and alleges his dismissal was in retaliation for filing the lawsuit over psychological testing, and discriminatory, in that other officers who have committed offenses were not dismissed from their employment. While Grievant alleges that Respondent cannot pinpoint a date or time when he allegedly took the documents out of the Control Center, he does not deny that he was assigned to the Control Center beginning in January 1994.

Discussion

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. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990). State employees, such as Grievant, who are in the classified service (See footnote 8) can only be dismissed for “cause”, meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial orinconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, 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); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

As is often the case in disciplinary matters, the critical facts are in sharp dispute. The outcome of this case hinges entirely upon the relative credibility of the witnesses. Respondent presented the testimony of inmate Dorton to lay the foundation for the events which led up to Grievant's dismissal.

In addition, Respondent presented the testimony of P. W. Glasscock, Tammy Bober and Lt. William Arnold, Correctional Officers who stated they were the recipients of the documents allegedly given to inmate Dorton by Grievant, Ondeck and Williams. Further, Respondent presented the testimony of Lelia Holmes, Jeffrey Stephenson, and Joseph Myers, Correctional Officers who testified that Grievant, at one time or another, told them that he had snooped around and taken documents out of the Control Center Building which would be helpful to his lawsuit against the administration. Two of those individuals were close friends with Grievant, and Officer Stephenson was active in the union in which Grievant was involved.

No evidence was presented or offered to establish any bias or motive on the part of any of these officers which would have induced them to fabricate or lie about the events to which they testified. While it must be noted that this Grievance Board's decisions in Ondeck, supra, and Williams, supra, held that inmate Dorton's testimony was entirely unconvincing or reliable, it does not appear that Respondent offered the additionaltestimony of correctional officers to corroborate Dorton's story in those cases, as it has here. The undersigned was able to observe the witnesses' demeanor while testifying, and did not find any of Respondent's witnesses to be unusually nervous, uneasy, or evasive in answering questions presented by either Respondent or Grievant. Importantly, these witnesses' stories all corroborated each other's, to the extent they were interwoven in the chronology of events. Finally, there was no indication that the witnesses' stories or answers regarding the events they were involved with were rehearsed, coached, or anything but representative of the events in which they were participants. Thus, even if the undersigned were to agree with this Grievance Board's prior decisions regarding the reliability of inmate Dorton's testimony, Respondent has more than compensated for that weakness in its case by presenting the testimony of the various correctional officers noted above.

Grievant denied all wrongdoing, and alleged that his dismissal was in retaliation for filing the lawsuit over psychological testing, and was also discriminatory. Where a defense is raised by a grievant in a discipline-based claim, it is his burden to establish the validity of that defense. Young v. W. Va. Dept. of Health and Human Res., Docket No. 90-HHR- 541 (Mar. 29, 1991). With regard to Grievant's overall denial, the undersigned did not find Grievant a credible witness, and thus he did not succeed in rebutting the testimony of the many witnesses offered by Respondent that he snooped around the Control Center Building and removed or copied documents, some extremely

sensitive and confidential, to be used against the administration. Grievant presented himself as a very hostile and evasive witness. In one particular instance, when questioned about the disposition of the criminal case against him, Grievant was very evasive in his answer, and obviously hesitantto admit that the case was dismissed for failure to prosecute, rather than for lack of evidence or that he was acquitted. Grievant had nothing to gain from evading the answer to such a question, and it simply was more evidence to the undersigned that Grievant was not credible.

Because of the undersigned's findings herein that Grievant did take confidential documents out of the Control Center Building, and caused them, either directly or indirectly, to be distributed to inmates, Grievant's allegation of retaliation need not be addressed, as Corrections clearly had a legitimate, non-retaliatory reason for dismissing Grievant from his employment.

With regard to Grievant's claim of discrimination, W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burdenshifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see

Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to make a prima facie case under the standard set forth above for establishing a claim of discrimination under W. Va. Code § 29-6A-2(d). Grievant has failed to show that he was treated any differently than any other employee in similar circumstances. Indeed, the other two employees who were charged with offenses similar to Grievant's, Ondeck and Williams, were also dismissed from their employment with Corrections. Grievant failed to identify any other correctional officer who had committed the same or similar offenses who had not been dismissed by Corrections.

Based upon the evidence, testimony, and the foregoing discussion, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant, a Correctional Officer at the West Virginia Penitentiary, removed or copied sensitive and confidential documents from the Control Center Building, where he was assigned, sometime during the period February through May, 1994.

2. Grievant caused those documents, either directly or indirectly, to be given to an inmate at the West Virginia Penitentiary.

Conclusions of Law

1. Respondent has proven by a preponderance of the evidence that Grievant did violate Policy Directive 400.00, Employee Standards of Conduct and Performance, “C6- Theft or unauthorized removal of state property,” when he removed or copied sensitive and confidential documents from the Control Center Building. 3. Respondent has proven by a preponderance of the evidence that Grievant did violate Policy Directive 400.00, Employee Standards of Conduct and Performance, “C20-Trafficking in contraband,” when he caused such documents, either directly or indirectly, to be distributed to an inmate within the Penitentiary.

4. Grievant has failed to prove by a preponderance of the evidence that Respondent's actions were in retaliation for filing a lawsuit, or that Respondent's dismissal of Grievant was discriminatory.

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: February 27, 1997

Footnote: 1

Grievant was assigned to the Penitentiary at the time of the disciplinary action. The prison has since moved to Mt. Olive in Fayette County, West Virginia.

Footnote: 2

The case was originally assigned to Senior Administrative Law Judge Nedra Koval. Grievant moved to recuse Ms. Koval on June 29, 1994, and this case was reassigned to the undersigned Administrative Law Judge on August 1, 1994.

Footnote: 3

Despite motions for extension of time for filing their briefs, neither party submitted proposed findings of fact and conclusions of law.

Footnote: 4

The criminal charges were eventually dismissed for failure to prosecute in a timely manner.

Footnote: 5

Both Williams and Ondeck's dismissals were reversed by this Grievance Board in Williams v. W. Va. Div. of Corr., Docket No. 94-CORR-284 (Sept. 14, 1995), aff'd Circuit Court of Marshall County, Civil Action No. 95-AP-45M (Mar. 8, 1996); and Ondeck v. W. Va. Div. of Corr., Docket No. 94-CORR-228 (Sept. 30, 1996).

Footnote: 6

While it is clear from the testimony given that a number of the documents at issue were readily available to inmates and could have come from sources other than Grievant, Ondeck or Williams, the key documents referenced throughout this decision, i.e., the weekend Warden report, and the memorandum to Lt. LeMasters from Deputy Warden Kirby, were clearly confidential in nature, and were not accessible to anyone within the institution except for the Warden, and his secretarial staff.

Footnote: 7

Grievant objected that Ms. Holmes' incident report was prepared after Grievant's dismissal, and thus could not have been used to support his dismissal. However, Ms. Holmes' testimony was simply offered as corroborating evidence of the events which transpired, and her testimony did not differ from her incident report, or the testimony of the other witnesses.

Footnote: 8

"Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"