JAMES DAVIDSON

v. Docket No. 96-CORR-133

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, James Davidson, is employed by the West Virginia Division of Corrections (CORR) as a Correctional Officer I assigned to the Mount Olive Correctional Complex (MOCC). He filed a grievance at Level IV, April 25, 1996, protesting a thirty-day suspension without pay. A hearing was held August 8, 1996.

Background

Much of the background in the case is not in dispute. The grievant, a seventeen-year employee of CORR, was suspended per the following April 8, 1996 letter from MOCC Deputy Warden Howard Painter:

> This letter is to inform you of my decision to suspend you without pay from your duties as Correctional Officer I at the Mount Olive Correctional Complex for a period of thirty (30) calendar days (twenty-two (22) working days). Your suspension will begin on 14 April 1996 at 2300 hours. You should report back to work at 2300 hours on 14 May 1996. The reason for this suspension is your continuing violation of Division of Corrections Policy Directive 400.00, “Employee Standards of Conduct and Performance,” dated 10 November 1995, as follows:
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> On 03 August 1995, you were issued a letter of reprimand concerning your conduct towards Officer Steve Berryman on 25 May 1995. The investigation revealed that you had violated Policy Directive 400.00, Section 7.00, A4, which reads, “Disrespectful conduct, use of insulting, abuse or obscene language to or about others.”
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> On 22 August 1995, you were issued a letter of suspension for three (3) days without pay as a result of your conduct toward Officer Teresa Amick on 29 May 1995. On 31 May 1995, you were interviewed by Captain Michael G. Millhollin and informedthat you were in violation of Policy Directive 400.00, Section 7.00, A4 as cited above; A6 which reads, “Disruptive behavior”; and B6 which states, “Failure to observe precautions or personal safety; posted rules; institutional staff notices; signs; written or oral safety instructions; or failure to use protective

clothing and equipment."

Officer Davidson, you were warned in your suspension letter of 22 August 1995, that you were in danger of acquiring a record of unacceptable behavior that might result in extreme disciplinary measures. Despite this warning, the following violations of Policy Directive 400.00 have been brought to my attention:

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On 19 February 1996, at approximately 0735 hours, you were interviewed by Captain Rick Nottingham regarding your inability to work your "freeze" because of a bad back. When you were asked why you did not notify the Operations Office until the last minute, you replied, "You don't notify us until the last minute." You also informed Captain Nottingham that while working perimeter, you did not get out of the vehicle to check the fence and drain during bad weather. You stated that you checked them visually due to your falling over the hill. Policy Directive 400.00, Section 7.00, A5, states, "inadequate or unsatisfactory job performance." As a Correctional Officer with many years service, you should realize that the Administration cannot be lax in areas where there is a high risk of possible escape attempts. It is imperative that all areas entrusted to you receive the maximum attention for possible breaches of Security. You cannot perform your duties adequately if you fail to get out of your vehicle for periodic up-close inspections.

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A letter of documentation submitted by Captain Rick Nottingham dated 02 March 1996, states that on 02 March 1996, at approximately 0700 hours you entered the muster room and asked for Captain Millhollin. You were advised that he had went to the Operations office. You asked Captain Nottingham why you had been "froze" at the last minute at which time he informed you that three (3) people had not shown up for the shift. You then stated in a loud voice that people better get together and that this last minute freeze needed fixed. When Captain Nottingham advised you to go to operations, you departed the muster room stating, "You bunch of dumb-dumb asses." Your actions in this instance constitute violation of Policy directive 400.00, Section 7.00, A4, "Disrespectful conduct, use of insulting, abuse or obscene language to or about others."

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In a letter of documentation submitted by Captain Michael G. Millhollin dated 02 March 1996, he states that he was in the process of returning to the Operations officeto make the necessary overtime arrangements for the day when you arrived at the armory/administration corridor sally port. When Captain Millhollin asked if you had been notified that you had been "frozen," your response was loud and mixed with profanity. You stated that you had "been here the entire god damn evening in training and no one had the courtesy to let you know that you were "frozen" until the last god damn minute." At this point Captain Millhollin ordered you to cease with the profanity and to lower your voice. Captain Millhollin informed you that due to the no-shows at the day shift roll call, the opportunity for an early notification was not possible. You continued to argue with Captain Millhollin and make comments concerning lawyers. The entire incident transpired within the presence of other staff awaiting access through the sally port. It is again determined that your actions constitute a violation of Policy Directive 400.00, Section 7.00, specifically the following violations:

A4 - "Disrespectful conduct, use of insulting, abuse or obscene language to or about others."

A6 - "Disruptive behavior."

B2 - "Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures."

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On 08 March 1996, at approximately 1230, you were interviewed by Captain Rick Nottingham and Lt. Craig Hale concerning your violation of Policy Directive 400.00. In regard to offense A4 you stated, "That was not what happened. I didn't use obscene language and I normally have a loud voice. Respect should be shown to us." For offense A6 you stated, "I was mad and you people don't give us any respect by notifying us late for freezes." You were advised by Captain Nottingham that further disciplinary action may be taken.

Officer Davidson, all of the aforementioned deficiencies, when viewed both is singularly and collectively, demonstrate work performance warranting possible dismissal; however, as we discussed in our meeting on 08 April 1996, I am hesitant to take such drastic disciplinary action due to your many years of service with the WV Department of Corrections. Nevertheless, as I also informed you during our meeting, any future violations of MOCC Operational Procedures or Department of Corrections Policy Directives will result in more severe disciplinary action.

The grievant did not file formal protest over the referenced August 3, 1995 reprimand or August 22, 1995 suspension. He does not dispute that he engaged in the conduct for which he was disciplined on those occasions.

It is also uncontroverted that since it opened in 1993, MOCC has experienced significant manpower shortages, and most employees have been required to work a considerable amount of overtime. Employees completing one eight-hour shift are often “frozen” over for another eight-hour shift, on a rotating basis, and may or may not receive notice prior to the end of the first shift.

Argument

The grievant denies that he raised his voice or used profanity toward Captains Nottingham and Milhollin or otherwise acted in an insubordinate fashion toward either superior. He claims that he had permission from Captain James Melton to remain in his patrol vehicle when making MOCC perimeter and drain inspections. The grievant appears to argue, apparently in the alternative, that even if he made the statements attributed to him, they were the result of frustration with excessive overtime generally, and insufficient notice that he had been “frozen over” on the morning of March 2, 1996. He at least suggests that a thirty-day suspension was an abuse of discretion under those circumstances.

Relying on the testimony of Captains Nottingham, Millhollin and Melton, CORR maintains that the grievant was insubordinate on March 2, and that he was admittedly neglectful of his perimeter inspection duties. Citing the two prior disciplinary actions against the grievant, CORR denies that the suspension was disproportionate to his conduct.

Findings and Conclusions

Credibility determinations are dispositive of most issues in the case. The grievant was considerably less convincing than the three Captains. (See footnote 1) The inconsistency of his responses to questions, the implausibility of several of his explanations, and his demeanor were all indicative of untruthfulness. He conceded that there had been no ill-will between him and Captains Millhollin and Nottingham prior to March 2, and could cite no reason why they would fabricate their written reports and testimony concerning his conduct on that date.

Captains Millhollin and Nottingham were forthright in their testimony. Their accounts of how the grievant behaved and what he said on March 2 was entirely consistent with their written accounts submitted to Deputy Warden Painter at the time. Neither appeared to exaggerate the nature of his conduct, and their demeanors did not indicate deception. It is accepted that the grievant acted and

spoke toward them as recounted in the suspension letter. His actions and/or words were clearly insubordinate and violations of the cited portions of “Policy Directive 400,” CORR's standards for officer conduct. See, Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988),(willful and flagrant disregard for authority, whether through words or actions, constitutes insubordination).

Since Captain Melton provided the more credible testimony, it is also accepted that while the grievant was given permission to forego routine close examinations of certain portions of MOCC's perimeter fences and drainage culverts during inclement weather, he was never given permission to make inspections of those areas from his patrol vehicle. The record otherwise reflects that perimeterduty is an important one at the facility, and MOCC has never condoned an inspection of the areas involved from a vehicle. The grievant's admission that he had deviated from MOCC standards was an admission of neglect of duty. CORR has substantiated all charges contained in the suspension letter by a preponderance of the evidence.

To the extent that the grievant seeks mitigation of the term of the suspension, the record does not support that it is warranted. The grievant engaged in insubordination and/or misconduct on two previous occasions during the preceding year, and was strongly admonished in August 1995, that further misconduct would result in “extreme disciplinary measures.” It is clear from Deputy Warden's Level IV testimony that but for the grievant's long tenure with CORR, he would have terminated his employment; the evidence presented would have supported it.

It is understandable but not excusable that the grievant acted on his anger over receiving little or no advance notice that he had to work a sixteen-hour shift. Frustration, justified or not, is no defense to insubordination. Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Moreover, the grievant admits to having a problem controlling his temper, and the record supports that it is probable that the unexpected overtime was only partly to blame for his misconduct. The grievant's testimony reflects that, for an all too brief period following the August 3, 1995 reprimand, he sought counseling in CORR's employee assistance program. It appears that he should make a second effort.

Accordingly, the grievance is **DENIED.**

Jerry Wright

Dated: May 9, 1997

Footnote: 1 The evidence was so clear that the undersigned made several key findings on the witnesses' relative credibility at the conclusion of the Level IV hearing. No rulings were then made on the grievant's claims regarding the propriety of the punishment imposed.