THOMAS R. PREMO

v. **Docket No. 97-CORR-145**

DIVISION OF CORRECTIONS

D E C I S I O N

Pursuant to the provisions of W.Va. Code §29-6A-4(e), Grievant Thomas R. Premo, employed by the Division of Corrections (Respondent) as a Correctional Officer II, filed an expedited complaint at level four after receiving a thirty (30) day suspension, without pay. Grievant alleges that the disciplinary action was "excessive, unnecessary, demeaning, not factual and misleading." Grievant requested for relief that he be awarded back pay, sick leave, vacation and any other benefits to which he was entitled, as well as having all mention of this matter removed from his records. (See footnote 1) An evidentiary hearing was conducted on May 28, 1997, and the grievance became mature for decision with the filing of post-hearing submissions by both parties on or before June 23, 1997.

Background

By letter dated March 17, 1997, James J. Ielapi, Superintendent of the Industrial Home for Youth, advised Grievant in pertinent part:

The purpose of this letter is to advise you of my decision to suspend you from your duties as a Correctional Officer II with the Division of Corrections, WV Industrial Home for Youth, for a period of thirty (30) working days.

* * *

This personnel action is being taken in accordance withSection 13.03 of the WV Division of Personnel Administrative Regulation and the WV Division of Corrections Policy Directive #400, Section 7.00 B-10, Refusal to work required overtime, and Staff Notice 101, Employees Rules and Regulations.

The specific reasons for your suspension is misconduct.

On Sunday, March 9, 1997 at approximately 7:50 a.m., you were told by Sgt. Larry Spencer that you were scheduled to work a 12 hour shift this date. You stated to Sgt. Spencer that you were not working a 12 hour shift, that you had plans, and you were not informed that you were scheduled for 12 hours. Sgt. Winters stated to you that the work schedule was out on Tuesday March 4th of last week and if there was a problem why didn't you let a supervisor know so we could get coverage for the units. You once again said that you had plans and were leaving. You were relieved by Correctional Officer Aaron Christian but did not stop in the Control Office and left the institutional grounds.

On Monday, March 10, 1997 Captain Ash and myself met with you concerning your refusal to work overtime. Your response to us was that you did not see the schedule and had made plans for the day. Also, you stated that you have been having health problems and that you have been driving your son back and forth from college due to him being charged with DUI. We stated that your refusal to work overtime and leaving the institutional grounds breached the security of the institution due to not having enough staff to cover each post, causing the gate house not to be manned until a replacement was called. You stated you made a mistake but, due to your health, you did not want to work overtime and the supervisors did not order you to stay.

I explained to you at this time that as a Correctional Officer, you have to meet the physical requirements of the job. If your health is preventing you from performing your required job, you should seek medical advise [sic] to find out why your feet have been swelling and you have not been feeling well. I told you, should you take my advise [sic] in seeking medical attention, you need to bring in your doctor's recommendations and restrictions, if any.

After reviewing the incident reports and talking with you, I have decided the thirty (30) day suspension is warranted. You were previously given a suspension on January 17, 1996 for DisrespectfulConduct, Use of Insulting, Abuse or Obscene Language to or about others (A4); Disruptive Behavior (A6); Unprofessional Treatment of Inmates contrary to Departmental Policy, Staff Notice, Court Order or Philosophy (B20).

I want to bring to your attention Policy Directive #400 Section 5.02 Class B Offenses Paragraph B; Subsection 2.

A third active “Class B Offense” should normally result in removal. Further a single “Class B Offense” coupled with three active “Class A Offenses” should normally result in removal. **NOTE**: Mitigating circumstances may justify the use of demotion, suspension for thirty (30) or more working days, or transfer as an alternative to removal.

However, under Section 4.02 Aggravating and Mitigating Circumstances Paragraph B; Subsection 1, I am using this portion as an alternative to removal due to mitigating circumstances considering your statement to me concerning your health and family problems at this time.

* * *

Under W.Va. Code §29-6A-6, the burden of proof in disciplinary matters falls on the employer. Stamper v. W.Va. Dept. of Health and Human Resources, Office of Work and Training, Docket No. 95-HHR-144 (Mar. 30, 1996). Respondent has met that burden and the suspension must be upheld based upon the following evidence. At the level four hearing Sergeant Larry Spencer and Chief Correctional Officer Guilda Ash testified that Grievant was scheduled to work a twelve hour shift, from 12:00 a.m. to 12:00 p.m., on March 9, 1997, and that the schedule is posted by Tuesday of the preceding work week. Sergeant Tammy Winters testified that she advised Grievant on March 9 that he was scheduled to work until noon, and that he responded in a manner which she interpreted to be a refusal. Sergeant Winters stated that it was the employee's responsibility to check the work schedule, but if Grievant would have advised her earlier that he did not wish to work the additionalfour hours, she could have made other arrangements.

Superintendent Ielapi offered testimony at level four reiterating much of what was stated in the March 17 letter. He stated that Grievant did not perform his scheduled duties, placing the security of the institution in jeopardy. Based upon prior disciplinary matters, Grievant could have been dismissed under the progressive discipline policy, but he considered mitigating factors, including Grievant's long-term employment, and limited the sanction to a suspension. He confirmed that had Grievant brought the situation to the Shift Supervisor's attention, there would have been an attempt to accommodate his request to not work overtime on March 9.

Testifying on his own behalf, Grievant stated that work schedules are posted in the control office, but that he works in a building approximately one hundred yards away, so he just calls control to save time. Grievant concedes that he “inadvertently” had not checked the schedule for that week and

believed that he was working an eight hour shift because the shift supervisor usually reminded him if he was scheduled to work overtime. Grievant recollected that when he became aware that he was scheduled to work overtime, at 3:30 or 4:00 a.m., he advised the shift supervisor that he couldn't, not that he wouldn't work the additional four hours, because his daughter who lives in Washington, D.C., was visiting. Even though Sergeant Spencer advised him at 7:50 a.m. that a replacement had not been found, Grievant asserted that he acted under the assumption that he was excused from further duty when C.O. Christian relieved him in the dining room at 8:00 a.m. Because he was not "relieved to report to another area," and C.O. Christian "seemed kind of mad", Grievant assumed that C.O. Christian was working Grievant's remaining four hours. Grievant disputed that his absence created a staff shortage, and noted that two other officers were working, and the gatehouse, his assigned area from 8:00 a.m. to 12:00 p.m., was almost never manned duringthose hours on Sundays. Finally, because no one stopped him, Grievant left the premises. Grievant summarized the matter as an "inadvertent mistake" and opined that the appropriate discipline would be a verbal reprimand.

C.O. Aaron Christian testified that he was just told to relieve Grievant and was given no further instructions. He stated that as an employee, he does not rely upon his relief to tell him where to report. C.O. III Eric Billeter substantiated Grievant's claim that the main gate is frequently not covered on Sunday mornings. Don VanScoy testified that Grievant has worked his fair share of overtime and is usually receptive when asked to do so.

Discussion

Policy Directive 400, Section 7.00, Part B, lists twenty-three Class B offenses, including "B10. Refusal to work required overtime." Class B offenses are generally subject to discipline in the form of suspension: five to fifteen days for the first offense; sixteen to thirty days for the second offense; and thirty-one days to dismissal for the third offense.

Section 5.02 provides that "a third 'active' Class B offense should normally result in removal . . . [however,] mitigating circumstances may justify the use of demotion, suspension for 30 or more workdays, or transfer as an alternative to removal." (See footnote 2)

Staff Notice 101, "Employees Rules and Regulations", Paragraph 11, states "[u]nder no circumstance is any employee to leave his place of assignment until he/she has been properly relieved or his/her regularly scheduled shift is over." Other relevant portions are Paragraph 16, which

states “[e]ach employee shall know the institution 'Chain of Command' and utilize it”, and paragraph 23, “ALL employees shall comply with Policy Directive #400.00 (Standards of EmployeeConduct and Responsibility.)”

Because there is no dispute that Grievant did not complete his assignment on March 9, 1997, or that this incident was his third active Class B offense in three years, Grievant was subject to dismissal, and retained his employment only because Superintendent Ielapi chose to consider mitigating circumstances. The discipline was in precise compliance with Respondent's policies, and there is no evidence that the suspension was otherwise improperly imposed. The fact that Grievant may believe the measure of discipline was too harsh does not render the policy invalid. Interestingly, Grievant filed an incident report on March 17, 1997, noting that the gate house was not manned on the morning of March 16, 1997, the Sunday after he was scheduled to work on that very post.

Grievant's remaining arguments are also not persuasive. Grievant lacks credibility regarding his claim that C.O. Christian had been sent to relieve him; therefore, he believed that he could go home. Grievant had indeed been relieved of his duties in the dining room, but he was scheduled to work the following four hours at the gate house. C.O. Christian did not advise Grievant that he would be covering the gate house assignment. Further, Sergeant Spencer had advised Grievant approximately ten minutes earlier that a replacement had not been located for the remaining four hours of his shift. Sergeant Spencer had not provided Grievant with any differing information. Any presumption Grievant made regarding C.O. Christian being his replacement was erroneous, and was unconfirmed by Grievant prior to leaving his post.

Grievant's claim that no one tried to stop him as he left the grounds of the institution is simply ludicrous. It is not the responsibility of any other employee to somehow know that Grievant was acting under unconfirmed and erroneous assumption, stop him, and direct him to report to his assigned post. The claim that the gate house was frequently not covered on Sunday mornings isirrelevant. Grievant was assigned that post on a Sunday morning and was obligated to be there. Respondent bears no burden to demonstrate a legitimate safety concern in making the assignment to justify the suspension imposed upon Grievant.

In addition to the foregoing findings of fact and narration it is appropriate to make the following formal finding of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by the Department of Corrections as a Correctional Officer II at the Industrial Home for Youth.

2. On March 9, 1997, Grievant was scheduled to work a twelve (12) hour shift. The first eight hours Grievant was scheduled his regular duties, and from 8:00 a.m. to 12:00 p.m., he was assigned to the gate house.

3. The schedule notifying Grievant of his scheduled work hours for Sunday, March 9, 1997, had been posted since Tuesday, March 4, 1997.

4. By his own admission, Grievant did not check the weekly work schedule for the time period in question.

5. Grievant declined to work the final four hours of his shift on March 9, 1997.

6. At 7:50 a.m. on March 9, Grievant was advised that no replacement had been located for the remaining four hours of his shift. Grievant was never notified that a replacement had been secured, but left the institution grounds at 8:00 a.m.

7. Grievant had previously been suspended for two (2) days in May 1994, and twenty- one (21) days in January 1996.

Conclusions of Law

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W.Va. Code §29-6A-6. Stamper v. W.Va. Dept. of Health and Human Resources, Office of Work and Training, Docket No. 95-HHR-144 (Mar. 30, 1996).

2. Respondent has proven by a preponderance of the evidence that Grievant failed to work four hours of a scheduled shift on March 9, 1997, a Class B offense.

3. Department of Corrections Policy Directive 400.00, provides that dismissal is appropriate when an employee has committed three active Class B offenses.

4. The imposition of a thirty day suspension was permissible under Respondent's Policy Directive 400.00, when the institution's superintendent considered mitigating factors.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: August 18, 1997

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant also alleged that the overtime policy was discriminatory, and was not allocated equally. Grievant was advised that discrimination was not an issue which could be pursued under the expedited grievance process, and that if he wished to seek relief under that claim, it should be filed at level one.

Footnote: 2

Offenses remain active for a period of three years.