BRAD GRISHABER and JARRELL CRIST

v. **Docket Nos. 97-CORR-067/068**

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievants, Brad Grishaber and Jarrell Crist, were employed by the West Virginia Division of Corrections (CORR) as Maintenance Technicians at the Mt. Olive Correctional Center (MOCC) until their dismissals on January 31, 1997. They filed grievances at Level IV, on February 7, 1997. A hearing was held April 16, 1997, (See footnote 1) and the parties submitted proposed findings of fact and conclusions of law by June 23, 1997.

Background

The grievants' testimony regarding the events which led to the discharges conflicts with that of CORR witnesses on several key points. Much of the background of the case, however, is not in dispute. CORR policy requires that all MOCC employees complete a basic training course at the West Virginia Corrections Academy. The Academy is a distinct division within CORR and is currently located on the West Virginia University-West Virginia Institute of Technology (WVUIT) campus in Montgomery. Its regulations require strict adherence to a daily eight-hour schedule ofclasses and other activities, but attendees are free from 4:00 p.m. to 11:00 p.m., and are permitted to leave the campus during those hours. Except for a brief period when the training was conducted at MOCC, attendees have always been required to spend nights on campus.

The grievants were notified in December 1996, that they would be required to begin training at the Academy on January 13, 1997. Believing that certain federal wage and hour regulations required that they be compensated for nights on campus, they expressed their dissatisfaction with the residency requirement to co-workers in MOCC's maintenance department. They indicated to at least one fellow employee that they would file a grievance if forced to stay overnight at the Academy. Maintenance department supervisors learned of the grievants' displeasure, and eventually notified MOCC Deputy

Warden Howard Painter; Mr. Painter did not believe the matter warranted any immediate action on his part.

Despite that they were directed to do so, the grievants did not take toiletry and other personal items to the Academy on the first day of classes. Shortly before the 12:00 noon registration deadline on January 13, Grievant Grishaber had not registered, and was talking to an acquaintance at or near the front of an Academy classroom building. He was approached by Supervisor of Academy Operations Roger Elder who advised him that he should proceed to the sign-in desk. Grievant Grishaber indicated that he would go when he had finished his conversation. Mr. Elder believed his tone and mannerisms were insubordinate; Grievant Grishaber believed Mr. Elder acted arrogantly. Mr. Elder directed him to report to his office. Once there, Mr. Elder explained that Academy attendees were expected to follow orders immediately; Grievant Grishaber reported to the registration area as directed.

When Mr. Elder returned to the registration area, he encountered Grievant Crist talking toAcademy Sergeant Jeffrey Wroten. Mr. Elder twice directed Grievant Crist to remove his hat. He complied on the second order, and made a comment to the effect that he could tell the Academy "was going to be a lot of fun." Mr. Elder called him into an adjoining classroom and, with Sgt. Wroten present, explained that all attendees were required to obey, without hesitation, any order given by Academy administrators. Mr. Elder then called Grievant Grishaber into the classroom, and told him that if he obeyed orders, he would not "start out on the wrong foot" at the Academy. According to Mr. Elder's and Sgt. Wroten's written reports on the encounter, Grievant Grishaber made a response to the effect that he was an American citizen, and was not required to follow all orders.

Mr. Elder and Sgt. Wroten eventually reported to Kathy Lucas, the Academy's chief administrator, that the grievants had advised them that they would not be spending nights on campus. Ms. Lucas directed Mr. Elder to talk with them again, and explain Academy policy.

Mr. Elder met with the grievants in his office shortly thereafter. The evidence is conflicting on the substance of their conversation, but it is undisputed that Mr. Elder then provided the grievants copies of Academy policy which reflected the residency requirement, and asked them to sign acknowledgment forms which stated that they had read the policy and understood that failure to comply could result in dismissal from the Academy. Mr. Elder later reported to Ms. Lucas that although the grievants had signed the forms, they still indicated that they would not be spending

nights on campus. Ms. Lucas dismissed the grievants from the Academy at approximately 1:00 p.m., and directed them to report to Deputy Warden Painter upon their return to MOCC.

Mr. Painter met with the grievants at approximately 2:00 p.m. His notes on their conversation reflect that the grievants were equivocal on whether they were aware of the residency requirement prior to their arrival at the Academy, and whether they intended to stay overnight. Mr.Painter suspended them without pay at the conclusion of the meeting, and advised that he would conduct a more complete investigation of the matter.

Mr. Painter met with the grievants again on February 3, 1997. He advised them that the investigation was complete, and they were dismissed effective February 14, 1997. Grievant Crist's dismissal letter provided:

The reason for this dismissal is your recent action of blatantly failing to follow directives given to you concerning your scheduled attendance of the WV Corrections Academy 111th State Basic Class and your allegation that you were not informed that you would be required to reside at the Academy prior to the morning of 13 January 1997. Your actions constitute a violation of WV Division of Corrections Policy Directive 400.00, Section 7.00, specifically the following:

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

On 02 September 1994, your were interviewed for a position at MOCC. During your interview, you were presented with various forms to read and sign. One of these forms was attachment #1 of WV Division of Corrections Policy Directive 441.01, Acknowledgment of Staff Training Requirements. Item one (1) informed you that you would be required to, “Successfully complete the Basic Training Program conducted at the West Virginia Corrections Academy within the first year of employment.” The last paragraph on this attachment states, “I understand that completion of the requirements set forth above is a condition of employment. . . .” You signed and dated the attachment signifying that you understood and were willing to comply with the requirements.

The WV Division of Corrections Academy has been in place since 1979, for the purpose of training individuals within the WV Department of Public Safety. The WV Corrections Academy is a

residential Academy. Since its inception, it has been an established and accepted requisite that all basic students are required to reside “on site” during Basic Training. As noted above, you were advised during your initial interview of this requirement of employment.

C12 Participating in any kind of work slowdown, sit down, or similar *concerted interference with state operations* (emphasis added).

Pursuant to Policy Directive 441.01, the mission of the WV CorrectionsAcademy is “to provide a quality training program that will enhance job performance, sharpen skills, develop 'esprit de corps,' and ensure professional growth and development for each correctional employee.” Academy attendance as a requirement of employment is an attempt to provide the staff member with the knowledge and skills to perform their job duties in a mentally and physically challenging work environment. Programs have been developed through years of experience to assist staff members in building a solid base for a successful career in Corrections. Consequently, the Administration at MOCC does not take the assignment of a staff member to the Academy lightly. Because of the nature of our institution, even if the training were not required, the Administration would still want every employee to have the advantage of this vital training.

Due to the fact that non-uniform personnel, such as yourself, are required to be in attendance at the Academy for three (3) weeks, the Administration must make plans to ensure that your normal and customary duties are taken care of in your absence. Therefore, it may be necessary to temporarily move staff members or change work schedules in order to allow for Academy attendance. As you are aware, we are a maximum security prison and any changes must be scrutinized carefully for the safety and well-being of employees and inmates.

Documentation reveals that you and your co-worker had conspired or at least discussed the fact, that you did not intend to fulfill your obligation to attend the Academy prior to your arrival for check-in on Monday, 13 January 1997. An Incident Report filed by Sgt. Jeffery Wroten, 111th State Class Advisor, reports that when you were being processed, you said that you would not need your linens due to the fact that you “wouldn't be staying.” You further informed Sgt. Wroten that “the next guy coming in after me is in the same boat. He [Brad Grishaber] ain't staying either.” When you were asked again by Sgt. Wroten what you meant., you stated, “I'm getting kicked out.” When Mr.

Grishaber was asked, he also informed Sgt. Wroten that he had no intention of staying at the Academy at night. Your actions in failing to attend the Academy as scheduled interfered with the smooth operation of a State facility as well as creating unnecessary paperwork for MOCC and the Academy. In addition, a memorandum filed by Lt. Roger L. Elder, Supervisor-Academy Operations, reports that you were insubordinate when he approached you at approximately 1204 and asked you to remove your hat inside the building. When you were asked the second time to remove the hat you did so, but walked away saying, “I can see this is going to get fun.”

C4 Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

On 06 December 1996, you received a memorandum from Mr. Mike Spaulding, Maintenance Director, informing you that you were scheduled to attendthe next Academy class beginning on 13 January 1997. On 11 December 1996, you completed a Personal Data Sheet for the State Basic Corrections Class. On this form you were required to provide information for room assignment. On 26 December 1996, you received a letter from T. D. Melton, Program Supervisor, informing you that you had been accepted for attendance for the 111th State Basic Corrections Class. The memorandum discussed items that you would need to bring with you which included personal hygiene articles such as shaving gear, soap, and toothbrush. You were also informed that you could bring a radio or television and that cable outlets would be available in your room. The memorandum stated that the Academy would provide the linens. Although the memorandum does not specifically state “you will be required to stay overnight,” I believe the above statements make the requirement obvious. Therefore, I must conclude that you were, in fact, informed several times that you would be required to stay overnight during the Academy.

As a result of your actions at the Academy, you were dismissed and were directed to report to my office. We met in my office at approximately 1350 hours on 13 January 1997. I informed you that we had received an unofficial report of the incident and that you would be suspended without pay for a period of fifteen (15) calendar days; until the situation could be investigated. I delivered to you a written letter of immediate suspension pending investigation. Despite the fact that you had repeatedly been informed of the resident requirement of the Basic Academy, you stated to me during this

meeting that you had received no notification that you were supposed to stay nights at the Academy. You further stated that you had not asked anyone specifically if you had to stay. A memorandum addressed to me dated 14 January 1997, from yourself and Mr. Grishaber states, “Per our conversation we were asked if we were previously informed that we would have to spend the night at the academy, which we were not.”

In addition to the above incidents where you were informed of the residency requirement, I have a statement from Mr. Spaulding that on many different occasions he, as well as other members of the Maintenance staff, had heard you and Mr. Grishaber complaining that you thought it was unnecessary to spend the night at the Academy. It is apparent to me that you did provide me with false information during our meeting, resulting in a violation of offense C4 as cited above. Your actions are totally unacceptable.

Also, Mr. Crist, your actions in this entire incident constitute a violation of MOCC Operational Procedure 4.15, Item 3 which states, “An employee shall carry out any job assignment to the best of his/her ability, irrespective of his/her job classification, showing respect for the authority of the chain-of-command” (emphasis added). You were assigned by the Warden of MOCC to attend the 111thBasic Academy Class. During the time you were scheduled to attend, the Academy was listed as your assigned post. Consequently, your actions in failing to follow the rules and regulations set forth by the Academy constitute insubordination and are in direct violation of Operational Procedure 4.15 as cited above.

Mr. Crist, all of the above facts lead me to believe that you and your co- worker, Mr. Brad Grishaber, did, in fact, deliberately set out to orchestrate a set of events for an expected outcome, being dismissed from your obligation to attend the Academy. As deputy Warden of MOCC, security and the efficient operation of the institution is my major concern. The Administration cannot afford to allow acts of insubordination on the part of staff members to create an atmosphere where there is constant challenges of established policies and procedures. We must be able to concentrate on our primary responsibility, the inmates. Consequently, I believe that you have demonstrated a definite unwillingness to conform to the acceptable standard of conduct expected of an employee of MOCC. Therefore, I believe this dismissal to be warranted.

Grievant Grishaber's dismissal letter was essentially the same. The record reflects that Mr. Painter considered the grievants equally culpable.

Argument

The grievants' legal position is not clear. In their appeal to Level IV, they asserted that they were never informed in writing that they would have to spend nights at the Academy, and CORR was, therefore, precluded from enforcing the requirement. During their Level IV testimony, their position shifted somewhat. They both stated that they had no prior notice that they would be required to stay overnight on campus, and represented that the acknowledgment forms they signed before Mr. Elder constituted conclusive evidence that they were agreeing to stay. They disputed that they told Mr. Elder or other officers that they would not comply with Academy policy.

The grievants concede that they talked with or in the vicinity of co-workers in MOCC's maintenance department about filing a grievance if required to spend nights at the Academy. They deny that their conversations amounted to a conspiracy to engage in a “concerted work stoppage.” The grievants imply that MOCC officials were angered over their plans to file a grievance concerning the residency requirement and their dismissals were retaliatory. Grievant Grishaber also suggests that MOCC Maintenance Department administrators mistakenly believed he made an unfavorable report on MOCC operations to the West Virginia Department of Environmental Protection (DEP), and were essentially conspiring to fire him for it.

CORR maintains that it has met its burden under Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W.Va. 1985), to show that the grievants' conduct was “seriously wrongful,” and that there were significant consequences for the agency. The agency essentially contends that the grievants were guilty of gross insubordination and misrepresentations during the subsequent investigation of their conduct.

Findings and Conclusions

The undersigned agrees with the grievants that their discussions about a protest over the Academy residency requirement with other MOCC maintenance department employees did not constitute a conspiracy to slow, stop or interfere with state operations. There is no evidence of record which even suggests that the grievants intended to disrupt MOCC operations or persuade others to

do so by engaging in conversations about the possibility of a grievance over the requirement. There is also no evidence that their conversations did disrupt operations. While the grievants' conduct prior to reporting to the Academy generally supports that it was their intent not to stay overnight at the Academy, their conversations cannot be treated as a separate punishable offense. Moreover, as noted, Mr. Painter was aware, prior to January 13, that the grievants were complaining over the residency requirement, and if their actions were violative of MOCC policy, hecould have addressed the matter at that time.

Credibility determinations are dispositive of the remaining issues in the case. While the grievants contend that certain CORR witnesses provided slanted or false testimony, the evidence does not establish that they had motive to do so. The scant evidence presented on the alleged DEP complaint does not even establish whether any such complaint was ever filed. Further, there is no indication that Academy officials had knowledge, prior to January 13, that the grievants planned to protest the residency requirement. Simply stated, there is no evidence of record that supports that Academy and MOCC officials engaged in a necessarily elaborate plan to fabricate documents and testimony in order dismiss the grievants.

Further, the demeanor of CORR witnesses did not indicate deception, and they did not attempt to embellish or exaggerate their accounts of events. The grievants were less credible if only because they were evasive and equivocal on certain key issues, focused on minor aspects of their dismissals, and made representations which were in conflict with their legal positions. When it was necessary to accept the testimony of one witness over another on a particular issue, the undersigned has determined that CORR witnesses gave the more reliable and accurate accounts of what was said and occurred during the various meetings or confrontations between the grievants and their MOCC and Academy superiors.

Insubordination is generally defined as refusal or failure to carry out the lawful order of a superior entitled to give such order. Unless the order entails an illegal act or undue physical danger, the employee must obey, and resolve questions regarding its legality later. Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). This is so even when the order appears contrary to statutes, policies or agreements governing the employee-employer relationship. Id. Further, it is not necessary that the employer give an explicit order. An employee's conduct may be insubordinate if his or her actions are aggressive, confrontational or otherwise designed to challenge the employer's

authority. Sexton v. Marshall University, Docket No. BOR-88-029-4 (May 25, 1989).

The testimony of the grievants' former supervisor, MOCC Buildings and Grounds Manager Arnold Workman, establishes clearly and convincingly that the grievants knew that they would be required to spend nights at the Academy, and that they simply did not like the requirement. The grievants even concede that they received notices from the Academy that they should bring personal items and that bed linens would be provided. It can be inferred that they found it unnecessary, and perhaps even foolish, for MOCC Maintenance Department workers to undergo corrections-related training. To the extent that the grievants implied during their testimony or legal arguments that they were ignorant of the residency requirement, the assertion is specious and indicative of deception on their part.

Their assertion that the residency requirement was unenforceable because it was not reduced to writing is also disingenuous. Accepting for the sake of argument that the various CORR policies made available to the grievants did not specifically state that Academy residency was a requirement for all MOCC employees, the policies contain more than ample language regarding attendance at the school for a reasonable person to infer that it was. In any event, as noted, order in the workplace requires that technical questions about the legality of a particular order be resolved subsequent to compliance with the directive. For that same reason, any defense that the grievants advance regarding federal wage and hour laws, and their applicability to the nights at the Academy, is alsowithout merit. (See footnote 2)

It is accepted that Mr. Elder and Sgt. Wroten provided the more credible testimony regarding the grievant's comments before and after they signed forms acknowledging that they would comply with all Academy rules. The grievants' representations that they were ready to comply after signing the forms was not persuasive. It is likely that they understood the ramifications of being insubordinate, but believed that they would not be in direct contravention of an order until they actually failed to report to the Academy at the 11:00 p.m. curfew. It also appears that they assumed that they could not be charged with insubordination if they believed the Academy's residency requirement to be contrary to federal regulations. There is no legal support for either assumption. CORR has proven by a preponderance of the evidence that the grievants were insubordinate.

The grievants' actions were not trivial. The evidence, particularly the Academy's handbook, demonstrates conclusively that the school, like the law enforcement and detention agencies it serves, necessarily employs a paramilitary structure in which prompt compliance with orders is an important if

not crucial component. It is obvious that at least one purpose of the rule is to condition employees, even those providing support services, to respond reflexively to dangerous situations within a correctional facility. Since the grievants' own safety was a concern, it is difficult to understand their reluctance to attend.

The record also reveals that CORR regards attendance at the Academy a most important facet of its employees' training, and that preparations for attendance can involve considerable time forMOCC staff. Since the Academy is generally at capacity, and serves other agencies, MOCC does not have unlimited access to the school. Cancellations or expulsions can cause MOCC to lose valuable allocated slots.

Finally, it is not completely clear why the grievants chose to defy the employer's authority first and raise defenses to the legality of the order later. Nevertheless, their motives are irrelevant, and they neither alleged that the penalty was too harsh nor offered any evidence which would support that the punishment should be lessened. From the evidence presented, the undersigned can discern no mitigating circumstances which would warrant the extraordinary remedy of a reduction in the discipline imposed.

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 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.

Accordingly, the grievance is **DENIED**

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated:

October 27, 1997

CERTIFICATE OF SERVICE

I, Jerry A. Wright, Administrative Law Judge, do hereby certify that I have this 27th day of October, 1997 served a true copy of the foregoing **DECISION** upon the following to their addresses as follows:

Elaine A. Harris

Leslie Kiser, Esquirere

Huntington Square, Suite 804

Division of Corrections

900 Lee Street

112 California Avenue

Charleston, WV 25301

Building 4, Room 300

Charleston, WV 25305

Brad Grishaber

Jarrell L. Crist

117 Hill Drive

P.O. Box 427

Charleston, WV 25311

Ansted, WV 25812

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

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Footnote: 1 *The grievants appeared pro se, and CORR was represented by Leslie Kiser, Assistant Attorney General.*

Footnote: 2 *The undersigned has reviewed the Academy's schedule and determined that it fully comports with all pertinent federal and state regulations. The grievants apparently misinterpreted the regulations to mean that they could not be forced to stay overnight unless CORR gave them overtime pay for those hours.*