RONALD ENGLISH,

Grievant,

v. Docket No. 98-CORR-082

DIVISION OF CORRECTIONS/

MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

D E C I S I O N

Grievant, Ronald English, grieves his dismissal by the Division of Corrections ("Corrections") from his employment at the Mt. Olive Correctional Complex ("MOCC"). He seeks reinstatement, back pay, purging of his personnel files, back pay for a prior ungrieved suspension, and the merging of this grievance with a prior grievance filed on his Written Reprimand. As this was a disciplinary action it was filed directly to Level IV pursuant to W. Va. Code § 29-6A-4 (e) on March 20,1998. A Level IV hearing was held on May 7, 1998, and June 5, 1998. (See footnote 1) **This case became mature for decision on June 15, 1998, the deadline for the parties' proposed findings of fact and conclusions of law.** (See footnote 2)

Issues and Arguments

Respondent argued it followed a plan of progressive discipline and properly dismissed Grievant for the three offenses clearly stated in his dismissal letter of February 19, 1998. These offenses and their level were:

1. A-1 Unsatisfactory attendance or tardiness.

2. B-2 Failure or delay in following a supervisor[']s instructions, performing assigned work[,] or failure otherwise complying with applicable written policy.

3. B-9 Failure to report to work as scheduled without proper notification of supervisor.

Grievant argues he should not have been dismissed. He notes he believed Operational

Procedure 4.32, Section XII, E allowed him to arrive at work fifteen minutes late without being counted as tardy, he was allowed to "flex" his schedule without asking prior approval, and his supervisor's failure to complete a recent evaluation prevented him from being aware that his actions were unacceptable.

After a detailed examination of the facts and evidence presented at the Level IV hearing the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was hired as a Unit Manger at MOCC on December 1, 1994. A Unit Manager ("UM") is viewed as a mini-warden, and each UM oversees and administers a particular building housing approximately 96 inmates.

2. When Grievant first began work at MOCC there were no inmates in the facility. Inmates first arrived in approximately February 1995. At times during his tenureat MOCC, Grievant did not have a complete compliment of workers for his treatment team. This situation was not unusual.

3. Corrections has identified potential offenses an employee may commit and separated them into categories based on their severity. Class A offenses are "the least severe in nature but require correction in the interest of maintaining a productive and well- managed work force." Class B offenses are "more severe in nature and are such that a [t]hird Class B offense should normally warrant removal." Resp. Exh. 2, "Policy Directive 400.00," Sections 5.01 and 5.02.

4. "Policy Directive 400.00" recommends either a lengthy suspension or dismissal for a third offense of either a Class A or Class B offense.

5. MOCC's Operational Procedure 4.32, Section IX states:

> **Tardiness: It is important that employees be at their work stations at the department's starting time. When employees are not, they are considered tardy. (Emphasis in original).**
>
> **A. Emergency situations causing lateness beyond the employee's control may be excusable. If an emergency is likely to cause tardiness of more than one half hour, the supervisor should be contacted and given the expected time of arrival.**

B. Chronic tardiness is unacceptable. If an employee develops such a pattern, it shall be the supervisor's responsibility to counsel the employee by discussing the problem and its resolution. When there is a question concerning tardiness, reasonable proof may be required.

C. Continued chronic tardiness will be grounds for disciplinary action.

Jt. Ex. 1

5. "Unsatisfactory attendance or excessive tardiness" is a Class A offense, A-1 and "Abuse of state time" is a Class A offense, A-2. 6. "Failure or delay in following a supervisor[']s instructions, performing assigned work[,] or otherwise complying with applicable established written policy or procedures" is a Class B offense, B-2.

7. "Failure to report to work as scheduled without proper notification of supervisor" is a Class B offense, B-9.

8. As the UM, Grievant completed his monthly schedule, as well as that of his treatment team, and was responsible for insuring there was adequate coverage by the treatment team.

9. After Grievant completed this monthly schedule, it was approved by Teresa Waid, the Associate Warden of Programs. After she approved a schedule, it could not be changed without her permission. Thus, Grievant had no discretion to change his own schedule without Ms. Waid's prior approval.

10. Ms. Waid noted on Grievant's initial evaluation in July 1995, that Grievant was Below Standard in "Following Instructions." She also rated Grievant as Below Standard on "Absenteeism" and as Not Meeting Standard in "Tardiness."

11. In his December 1995 evaluation, Grievant was again rated as Below Standard in "Following Instructions," and Ms. Waid noted she had informed Grievant he needed to notify his supervisor of any change in the schedule in advance. Grievant was rated as Below Standard on "Absenteeism" and "Tardiness."

12. On April 10, 1997, MOCC sent a memorandum to all employees who had demonstrated a problem with tardiness. This memorandum noted it would not be placed in

employees' personnel files, but explained that "[i]n the future any employee who is tardy,without permission, three (3) or more times in one month will receive a written reprimand," and "if an employee has received two (2) written reprimands in a one year period and becomes eligible for a third, that employee will receive a three day suspension without pay." Grt. Exh. 1. (See footnote 3)

13. Grievant received a copy of this memorandum. In relation to the other employees receiving this notice, Grievant was one of the most egregious offenders and was late more often than most of the employees who received a copy of the memo.

14. Grievant received a formal reprimand from Ms. Waid on February 27, 1997, noting unacceptable time and attendance patterns.

15. On June 2, 1997, Grievant received a Written Reprimand from Deputy Warden Howard Painter. This reprimand noted various problems Grievant had had since he began employment with MOCC. After noting these prior problems, Deputy Warden Painter stated this Written Reprimand would deal with only those events that had occurred after April 1997. Deputy Warden Painter found that Grievant had committed offenses A- 1, A-2, B-2, and B-9, referred to in the above Findings of Fact. (See footnote 4) **16. Grievant grieved this Written Reprimand, but he did not grieve the portion dealing with time and attendance issues and the altering of work schedule issues.** (See footnote 5)

17. On September 30, 1997, Deputy Warden Painter sent Grievant a letter of suspension. Deputy Warden Painter noted the ten day suspension was for violation of Policy Directive 400.00: Section A-1, " Unsatisfactory attendance or excessive tardiness;" and Section B-9, "Failure to report to work as scheduled without proper notification of supervisor". This suspension letter noted Grievant had been repeatedly informed by his supervisor, Ms. Waid that he could not change his work schedule without prior approval from her. This letter reminded Grievant that disciplinary action was cumulative, and this suspension should serve as Grievant's final warning regarding his employment at MOCC. 18. Deputy Warden Painter informed Grievant he would be placed on an Improvement Plan after his return to work, and his attendance would be monitored for a period of sixty days. Failure to report to work as scheduled without good cause would result in more severe disciplinary action which could include dismissal.

19. Grievant did not file a grievance over this suspension.

20. On February 19, 1998, after two discussions with Grievant to allow him to respond to his pending dismissal, Deputy Warden Painter sent Grievant a termination notice. This letter informed Grievant he was dismissed for violations of Policy Directive400.00. The specific sections noted were: Sections A-1, " Unsatisfactory attendance or excessive tardiness", B-2, "Failure or delay in following a supervisor[']s instructions, performing assigned work[,] or otherwise complying with applicable established written policy or procedures", and B-9, "Failure to report to work as scheduled without proper notification of supervisor."

21. This letter also noted Grievant's attendance pattern upon his return from the ten day suspension. (See footnote 6)

> **In November, Grievant was scheduled to work seventeen days. He worked fifteen days, taking two days off as unscheduled leave time. Of the fifteen days worked, Grievant was late thirteen days. He did not notify the facility on any of these occasions. Deputy Warden Painter noted that on one of these days Grievant was one hour and forty-four minutes late.**

> **In December, Grievant was scheduled to work sixteen days. He worked fifteen days, taking one day off as unscheduled leave time. Of the fifteen days worked Grievant was late eight days.** (See footnote 7)

> **In January, Grievant was scheduled to work twenty days. He worked fifteen days.** (See footnote 8) **Of the fifteen days worked, Grievant was late fourteen days, ten without a call off and four with a call off.** (See footnote 9)

22. Grievant was frequently tardy, changed his own schedule without prior approval, and failed to follow his supervisor's orders concerning attendance and scheduling issues. (See footnote 10)

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W.

Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause", meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential 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., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv.Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). (See footnote 11)

The only reason Grievant gave to explain his repeated tardiness was his interpretation of MOCC's Operational Procedure 4.32 Section XII, E, which stated:

> **All employees shall be prohibited from clocking in until fifteen (15) minutes prior to their assigned shifts, or fifteen minutes after their assigned shift unless called in for an emergency, overtime, or schedule adjustment situation.**

Jt. Ex. 1. (Emphasis added).

Grievant believed this provision, which was intended to prevent employees from being in a overtime situation, gave him a fifteen minute window before he would be counted as tardy. He testified he did not know this interpretation was wrong until he discussed his termination with Deputy Warden Painter. It is unclear how Grievant could have believed this provision gave him permission to be late. MOCC's Operational Procedure 4.32 Section IX , is very clear on the subject of arriving past starting time. This Section states:

> **Tardiness: It is important that employees be at their work stations at the department's starting time. When employees are not, they are considered tardy.**

(Emphasis in original). Additionally, the Section Grievant relied upon is under the heading of "Time Clock Usage", and notes an employee should not clock in until fifteen minutes before his shift starts, and should clock out within fifteen minutes of the end of his shift. Although this Section may not be the most clearly written portion of the manual, it still does not indicate that tardiness is acceptable. Further, it must be noted Grievant was frequently later than the

fifteen minutes he believed he was allowed. The records demonstrated Grievant was late more frequently than he was on time, and he was frequently twenty to thirty minutes tardy.

As for Grievant's failure to follow Ms. Waid's instructions to receive prior approval before he changed his schedule, and his failure to report to work as scheduled, Grievant did not offer a reasonable excuse for this behavior. He stated he at times worked over and believed he then had the right to "flex" his schedule. It is possible Grievant may have initially believed he could change his schedule in that manner without prior approval, but for Grievant to continue in such a belief, after clear instructions by his supervisor to the contrary and subsequent disciplinary action, is incredible.

The undersigned Administrative Law Judge agrees with Deputy Warden Painter's statement in the dismissal letter.

> **I am at a loss to understand why you would continually disregard direct orders from your supervisor Ms. Waid, but from myself as well. Your disobedience to directives constitutes insubordination and makes it difficult for your supervisor to maintain discipline. Your repudiation of your supervisor's authority disrupted and undermined the employee-employer relationship and in view of your past disciplinary record, it has become obvious that lesser penalties do not motivate you to change your conduct and behavior.**

Deputy Warden Painter found Grievant's actions to constitute insubordination. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second- level supervisor. Sexton, supra at 10.

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin., 36 M.S.P.R. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92- 55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). There are few defenses to the

charge of insubordination. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate the insubordination, is that the employee was given an order, directive, or rule, which did not entail unnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra. Respondent proved Grievant was insubordinate when he failed to follow his supervisor's orders, and when he failed to follow the approved time schedule.

Grievant argued his failure to receive an evaluation in a timely manner prevented him from knowing his work behavior was unacceptable. Although it is certainly important that employees be given timely evaluations, Grievant was clearly placed on notice numerous times, in numerous different ways, that his behavior was unacceptable. Failure of the employer to complete an evaluation does not relieve Grievant of the duty to follow the reasonable orders of his supervisor. (See footnote 12) **See Hundley, supra.**

Respondent has proven the charges against Grievant. Respondent counseled Grievant on numerous occasions about the importance of coming to work on time, following the approved schedule, and receiving prior approval from his supervisor before changing his schedule. Grievant was the UM, and as such, was in a supervisory position. He needed to be a role model to his supervisees. This modeling included setting the proper example in coming to work on time and following orders. Grievant received verbal counseling, evaluations which indicated his tardiness and failure to follow orders were a problem, and a Written Reprimand, which clearly explained these problems must be corrected. Finally, Grievant was suspended and placed on an Improvement Plan in an effort to correct his chronic tardiness and failure to follow the schedule and his supervisor'sorders. Grievant was well aware that his actions were unacceptable. These action were not trivial in nature. Grievant's additional violations, after the numerous warnings, reprimands, and a suspension, amount to good cause for Grievant's dismissal, as is allowed by Policy Directive 400. See Resp. Ex. 2.

The undersigned may mitigate the discipline if the imposed penalty is clearly excessive or clearly disproportionate to the offense. Grievant asked the undersigned Administrative Law Judge to note the indications in the record where Ms. Waid noted Grievant's additional projects and initiative, and indeed the undersigned Administrative Law Judge has reviewed

that information. In assessing whether the decision was excessive or disproportionate the undersigned Administrative Law Judge must look at the totality of the circumstances. Some factors to be considered in the mitigating analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and other mitigating circumstances. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91- ABCC-137 (Sept. 19, 1991). As stated in Buskirk, supra "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." See Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1983); Serrino v. W. Va. Civil Service Comm'n, 285 S.E.2d 899 (W. Va. 1982).

Respondent has demonstrated that had "good cause" to dismiss Grievant, and that his continuing unacceptable patterns of behavior constituted "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., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. Hatfield v. Dept. of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dept of Corrections, Docket No. 93- CORR-538 (May 17, 1994). The discipline imposed here was not clearly excessive. See e.g. Hammer v. Div. Of Corrections, Docket No. 94-CORR-1084 (June 11, 1997). Grievant did not demonstrate mitigation is appropriate in this situation.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an

employee by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). 2. Respondent has proven Grievant violated "Policy Directive" 400.00 Sections:

> **A-1 Unsatisfactory attendance or tardiness.**

> **B-2 Failure or delay in following a supervisor[']s instructions, performing assigned work or failure otherwise complying with applicable written policy.**

> **B-9 Failure to report to work as scheduled without proper notification of supervisor.**

3. State employees who are in the classified service can only be dismissed for "good cause", meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential 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., 164 W. Va. 461, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

4. The offense of insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N. C. 1980).

5. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket

No. 26-89-004 (May 1, 1989). 6. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

7. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

8. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

9. Respondent has proven Grievant was insubordinate in his failure to come to work on time, failure to follow his supervisor's orders, and his failure to receive prior approval for changes in his schedule.

10. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public. Id.

11. Grievant failed to demonstrate the penalty imposed was clearly excessive given the numerous disciplinary actions previously taken against him for tardiness, failure to follow orders, and failure to report to work as scheduled.

Accordingly, this grievance is DENIED.

Any party 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.

Janis I. Reynolds

Administrative Law Judge

Dated: June 29, 1998

Footnote: 1

At hearing Grievant was represented by Attorneys Theodore Dues and Nathan Hicks. CORR was represented by Attorney Leslie Kiser.

Footnote: 2

No proposals were received by the undersigned Administrative Law Judge.

Footnote: 3

Grievant argued he relied upon this notice, and Respondent could not dismiss him as the language in the memo states a three day suspension would be in order for a third tardy offense. It is noted Grievant was dismissed for several offenses, not just tardiness. Several of these were of a Class B type, a more serious offense; thus, Grievant's argument is without merit.

Footnote: 4

Deputy Warden Painter found Grievant had committed other offenses, but these are not germane to the issue at hand.

Footnote: 5

At the Level IV hearing, there was some question whether Grievant had pursued this grievance to Level III, and the undersigned Administrative Law Judge was willing to allow the parties to resolve this issue. Because Grievant did not question the attendance and work schedule issues in the Written Reprimand, and Respondent stipulated Grievant was dismissed only for those issues, questions about this grievance were not pursued by the agreement of the parties.

Footnote: 6

The following is a summary of the remarks in Deputy Warden Painter's letter.

Footnote: 7

It was not noted in the letter if Grievant called on these days.

Footnote: 8

It was noted that Grievant had surgery during this time. At no time in the proceedings did Grievant indicate his health created a problem that prevented him from meeting the requirements of the position.

Footnote: 9

In the suspension letter, Deputy Warden Painter stated the Improvement Period would be for sixty days. The

discharge letter indicated Deputy Warden Painter reviewed Grievant's attendance for three months. Grievant did not raise this apparent extension of the Improvement Period as an issue.

Footnote: 10

It is noted Grievant did not really contest that he had arrived later than his starting time, changed his schedule without his supervisor's prior permission, and did not follow orders as they pertained to these issues.

Footnote: 11

The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra (emphasis added). See Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1983); Serrino v. W. Va. Civil Service Comm'n, 285 S.E.2d 899 (W. Va. 1982). As Grievant was employed for three years it is somewhat unclear whether he should be considered a "long- term " civil service employee. In the interest of fairness, the undersigned Administrative Law Judge considered Grievant's work record.

Footnote: 12

Grievant's counsel indicated at the beginning of the hearing that Ms. Waid had treated Grievant unfairly, or that there was "bad blood" between them. Ms. Waid did not indicate this to be a true state of affairs, nor did Grievant testify to incidences of mistreatment by Ms. Waid. He did indicate Ms. Waid placed his Office Assistant in her office, which made it difficult at times to get things done, but this state of affairs was not further explained as unfair treatment.