MICHAEL HUNDLEY,

Grievant,

v. Docket No. 97-CORR-197A

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Michael Hundley (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC), until his dismissal on April 17, 1997. He filed this action directly at Level IV on April 18, 1997, (See footnote 1) alleging that he was improperly dismissed by CORR.

A Level IV hearing was held on August 21, 1998, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by Elaine Harris, and CORR was represented by Assistant Attorney General Leslie K. Tyree. The final testimony in this grievance was takentelephonically, on March 3, 1999. The parties were given until April 27, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by Corrections as a Correctional Officer until his dismissal on April 17, 1997.

2. Grievant distributed printed materials at MOCC, on October 16, 1996, advocating the election of Charlotte Pritt, during the 1996 gubernatorial campaign.

3. Grievant called in sick, before his scheduled 3:00 p.m. to 11:00 p.m. shift, on October 19,

1996, and later did not file a leave slip for this absence.

4. Grievant left his post at Ash Pod 2, on October 29, 1996, after being relieved, for approximately 15 minutes, because he needed a charged battery for his radio. Grievant got a charged battery and returned.

5. During a six month period of time from October, 1996, through March, 1997, each of Grievant's sick leave days occurred immediately before or after a scheduled day off, and was unsupported by a physician's note. Grievant's unsupported sick leave exceeded five percent of his Time Available for Work.

6. On April 2, 1997, Grievant went to Stewart Hall to meet with Correctional Officer Greg Auxier (Auxier), planning to get a meal together. Auxier said he could not go because there was no one to relieve him. Grievant asked Unit Manager Ruben Pena (Pena) if relief could be found for Auxier, and Pena said he was too busy. 7. CORR waited six months to discipline Grievant for alleged distribution of political material, alleged failure to turn in a leave slip, and allegedly leaving his post.

8. Captain Tim Melton (Melton) was heard by another Correctional Officer to say that “he knew how to take care of someone like [Grievant] - was to take a 30.06 to his head.”

9. Melton was given a verbal reprimand for this remark.

10. The charge of violating § 407-C-12: “Participating in any kind of work slowdown, sit down, or similar concerted interference with state operations,” which was the only Class C offense in Grievant's 28 day suspension on October 4, 1996, was contrived. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997). (See footnote 2)

11. Grievant was an officer of the Communications Workers of America union at MOCC.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of theevidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole

shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985). See Westfall v. W. Va. Dep't of Transp., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

CORR based its decision to terminate Grievant upon provisions of its Policy Directive 400.00 (Policy Directive 400), entitled Employee Standards of Conduct and Performance. Policy Directive 400 provides three levels of disciplinary offenses. A Class A offense includes "types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." A Class B offense includes"acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal." A Class C offense includes "acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal."

Specifically, CORR alleges that Grievant violated § 407-C-24 by engaging in prohibited political activity; § 407-A-2 by failing to file a leave slip for sick leave; § 407-A-2 by sick leave abuse; § 407-A-15 by inadequate job performance; and § 407-C-5 by threatening or coercing other persons. CORR also relied, as part of its system of progressive discipline, on several past disciplinary actions in dismissing Grievant. Grievant responds that CORR's charges are untrue, and constitute reprisal for his union activity. Each of CORR's charges will be addressed in turn.

§ 407-C-24: "Other actions of similar nature and gravity:"

CORR alleges that Grievant violated this section by engaging in prohibited political activity; specifically, by distributing printed materials at MOCC, on October 16, 1996, advocating the election

of Charlotte Pritt, during the 1996 gubernatorial campaign. (See footnote 3) CORR maintains that such distribution is prohibited by W. Va. Code § 29-6-20(d), which provides;

> No employee in the classified service or member of the board or the director shall, directly or indirectly, solicit or receive any assessment, subscription or contribution, or perform any service for any political party, committee or candidate for compensation, other than for expenses actually incurred, or in any manner take part in soliciting any such assessment, subscription, contribution or service of any employee in theclassified service.

CORR also relies on a document entitled “Political Activities Summary,” apparently prepared by the Division of Personnel, and adopted by CORR in April, 1995. This document states that classified employees may not “[p]ost or distribute campaign literature in a State office building. This includes union bulletin boards.”

CORR proved that Grievant distributed campaign literature. At the Level IV hearing, CORR presented the testimony of Paul Lytle, III, a Corrections Case Manager; Cheryl Chandler, an Executive Assistant who investigated this incident; and Correctional Officer Christopher Kane, to that effect. CORR also presented written statements from Jennifer Costa (Costa) and Correctional Officer William Elswick tending to confirm the distribution charge. Grievant's version of events, that the material was taken by others from his open briefcase, where it was located along with union cards and grievance forms, is found to be not as plausible as the testimony and hearsay statements of his five fellow employees, three of whom were eyewitnesses.

However, the record does not support CORR's characterization of this offense as a Class C offense. As noted above, Class C offenses are the most serious under Policy Directive 400, being “acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal.” Examples of these offenses include violence, theft, physical inmate abuse, trafficking in contraband, use of drugs, use of unauthorized firearms, weapons, and explosives, and negligence leading to escape, death or injury. Generally, Class C offenses seem to concern felonious and life threatening violations. It is unreasonable to maintain that the offense of distributing campaign literaturecomprises “other actions of similar nature and gravity” to the listed Class C offenses. It is not of a similar nature and gravity.

It is reasonable to conclude that this offense constitutes, at worst, a Class B offense, such as 407-B-2: “[f]ailure or delay in followings a supervisor's instructions **,** performing assigned work or

otherwise complying with applicable established written policy or procedures." Accordingly, CORR has established that Grievant committed a Class B offense.

§ 407-A-2: "Abuse of state time"

CORR alleges that Grievant violated this section by calling in sick, before his scheduled 3:00 p.m. to 11:00 p.m. shift, on October 19, 1996, and later did not file a leave slip for this absence. CORR relies on its Operational Procedure 4.32A, which provides: "it is the employee's responsibility to complete a leave slip upon their [sic] return to work." CORR further relies on a written statement by Costa, to the effect that she spoke to Grievant, who was at a ball game with a friend in Montgomery at approximately 1:00 p.m. on October 19, 1996. Grievant responds that he had diarrhea and vomiting on that day; that he went to Montgomery to go to the Rite-Aid for Kaopectate; and that, while there, he picked up a friend of his at the ball game. He maintains that he filed a leave slip upon returning to work.

Acting Associate Warden of Administration Linda Coleman (Coleman) testified at Level IV that Grievant did not file a leave slip. She supported her testimony with a copy of Grievant's 1996 Absentee Calendar, stating that she puts a check mark beside each "SL" notation when a leave slip is submitted, and circles the "SL" when a doctor's note issubmitted. Grievant's "SL" notation for October 19, 1996, contains no such marks. Accordingly, CORR has established that Grievant failed to file a leave slip after his sick leave absence on October 19, 1996, a Class A offense.

§ 407-A-5: "Inadequate or unsatisfactory job performance"

CORR alleges that Grievant violated this section by leaving his post at Ash Pod 2, on October 29, 1996, after being relieved, for approximately 15 minutes, saying that he had been called to Central Control. CORR maintains that he was never called to Central Control, and that Grievant provided false information in order to leave his post.

CORR presented the testimony of Charles Reynolds, the Unit Manager of Ash Hall. Mr. Reynolds testified that Grievant asked to be relieved because he had been called to Central Control; that he then assigned Costa to relieve Grievant; that he then called Central Control and learned that Grievant had not been summoned; and that Grievant's absence caused work in his unit to run late, requiring overtime.

Grievant's testimony flatly contradicted Reynolds'. Grievant maintains that he needed a charged battery for his radio; that he told Reynolds that Central Control was going to call when the battery was

charged; that he asked Reynolds to be relieved to go and was properly relieved; and that he then went to get a battery and returned, after using the bathroom.

Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asherand William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Assessing the credibility of Reynolds' testimony, the undersigned finds that his demeanor was straightforward, and that he had a good ability to observe events and communicate them. His reputation for honesty was unknown, and he made no admission of untruthfulness. Other than his inherent desire for his testimony to be believed, there was no apparent bias, interest, or motive shown by him, and his testimony was plausible.

However, the above must also be said about Grievant's testimony, although his reputation for honesty was compromised by his denial of CORR's charge of distributing campaign literature. Furthermore, Grievant's testimony was more detailed than Reynolds'. The undersigned administrative law judge cannot find that CORR established this charge by a preponderance of the evidence. Accordingly, CORR has failed to sustain its burden of proof on this charge.

§ 407-A-2: “Abuse of state time”

CORR alleges that Grievant violated this section by engaging in sick leave abuse. Specifically, Grievant is accused of “hooking,” or taking sick leave days immediately before or after scheduled days off. See Litchfield v. W. Va. Dep't of Health and Human Resources/Lakin State Hosp., Docket No. 92-HHR-127 (Sept. 30, 1992). CORR relies onits Operational Procedure 4.32A, which provides:

> Sick Leave Abuse - For the purpose of this Procedure, sick leave abuse shall be determined to occur when unsupported sick leave hours are equal to or greater than 5.0% of the time available for work in a given period of time, normally six (6) months or greater in duration, and 50% of those absences occur immediately before or after holidays, paydays, weekends, or periods of annual leave. Sick leave days in excess of three (3) days requiring a Doctor's Statement, and sick leave use for death in the immediate family will not be considered when computing

unsupported sick leave of 5.0%.

Unsupported Sick Leave is defined as "[a] period of sick leave not supported by a doctor's statement defining the illness of the employee or the family member that caused the absence." Time Available for Work is defined as "[t]otal regular working hours less holidays and all leave (paid or unpaid) except unsupported sick leave." Working Hours is defined as "[t]otal number of hours, excluding any overtime hours of work, an employee is scheduled to work in any period, not to exceed forty hours per week." Operational Procedure 4.32A.

Although CORR did not support its charge of sick leave abuse with a calculation of the formula set forth in this policy, the undersigned calculates as follows: for the six month period preceding his dismissal, (See footnote 4) Grievant had 73.5 hours Time Available for Work (TAW) in March, 1997; 146.75 hours TAW in February, 1997; 40 hours TAW in January, 1997; zero hours TAW in December, 1996; (See footnote 5) 16 hours TAW in November, 1996; (See footnote 6) and 160.75 hoursTAW in October, 1996. Accordingly, Grievant had 437 hours TAW in that six month period. Five percent of this figure is 21.85. During that period, Grievant had 24 hours of unsupported sick leave. (See footnote 7) Accordingly, Grievant's unsupported sick leave was greater than five percent of his TAW. Since each of Grievant's sick leave days during this period occurred immediately before or after a scheduled day off, and was unsupported by a physician's note, and because Coleman testified at Level IV that Grievant had seven days of unsupported sick leave immediately before or after his scheduled days off, CORR has proven its charge of sick leave abuse under Operational Procedure 4.32A, a Class A offense. (See footnote 8)

§ 407-C-15: "Threatening or coercing other persons"

CORR alleges that Grievant violated this section by saying "[h]ey bud, are you going to get that man a relief or do I have to take you downtown[?]" to Ruben Pena (Pena), Unit Manager, on April 2, 1997. CORR maintains that this statement, combined with Grievant's alleged loud voice (See footnote 9) and aggressive body posture, was a personal and physical threat. Grievant credibly testified, at Level IV, that he went to Stewart Hall to meet with Auxier, planning to get a meal together; that Auxier said he could not go because there was no one to relieve him; that he asked Pena if relief could be found for Auxier; that Pena said he was too busy; that he might have said "downtown;" and that he did not have an aggressive body posture or use a threatening tone of voice. Grievant furthered

testified that the phrase “take you downtown” means resort to the union or grievance process.

Auxier credibly testified, at Level IV, that he was one of the last two officers to be relieved to eat that night; that he asked Pena to be relieved; that he did not hear any “downtown” statement, but would have heard raised voices; that he had worked with Grievant to bring problems, such as the lack of relief officers, to MOCC's attention; that Grievant did not use a loud tone of voice to Pena; and that this incident was so small as to be laughable.

CORR called no witnesses to refute Grievant's and Auxier's version of events, relying instead on a memo, dated April 2, 1997, from Pena to Deputy Warden Howard Painter (Painter), which sets forth substantially the same version of events as does CORR's letter dismissing Grievant. CORR's unsworn memo is hearsay.

Under W. Va. Code § 18-29-6, formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievanceproceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

Applying these factors, the undersigned determines that CORR's hearsay memo is entitled to little weight. Pena was present for the incident. His out-of-court statement was in writing, appears to have been signed or initialed, but was not in affidavit form. CORR gave no explanation for failing to obtain a sworn statement from him. His statement wasnot routinely made, but was the cause of CORR's investigation into this incident. No corroboration for his statement was offered from CORR's records; his statement was flatly contradicted by the testimony of Grievant and Auxier; and the credibility of the declarant when he made the statement could not be assessed.

CORR presented no reason for its failure to call Pena. It is CORR's responsibility to call critical witnesses in support of its disciplinary case. Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-497 (June 15, 1998); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Grievant's and Auxier's testimony outweighs CORR's hearsay evidence, and CORR has failed to meet its burden of proof on this charge. (See footnote 10)

Noting that, under Policy Directive 400, discipline is cumulative, CORR also relied on the following disciplinary actions in dismissing Grievant:

July 20, 1996: Verbal reprimand for unsatisfactory attendance

July 30, 1996: Written reprimand for:

A4: Disrespectful conduct, use of insulting, abusive or obscene language to or about others

A5: Inadequate or unsatisfactory job performance

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

October 4, 1996: 28 day suspension for:

A7: Refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation

B19: Denial of official information to an authorized official

B10: Refusal to work required overtime

C12: Participating in any kind of work slowdown, sit down, or similar concerted interference with state operations. (See footnote 11)

Under Policy Directive 400, a written notice of a Class A offense remains "active" for two years from its date of issuance. A first Class A offense warrants a reprimand to a five day suspension, with a second such offense warranting a suspension of from six to fifteen days, a third such offense warranting a suspension of 16 days through dismissal, and a fourth such offense normally warranting dismissal.

A written notice of a Class B offense remains "active" for three years from its date of issuance. A first Class B offense warrants a suspension of from five to fifteen days, with a second such offense warranting a suspension of from sixteen to thirty days, and a third such offense warranting a suspension of 31 days through dismissal.

A written notice of a Class C offense remains "active" for four years from its date of issuance. A first Class C offense warrants a suspension of from sixteen to thirty days, with a second such offense warranting a suspension of from thirty-one days to six months, and a third such offense warranting dismissal.

The cumulative effect of CORR's disciplinary actions against Grievant is sufficient to support his dismissal. Under Policy Directive 400, all of CORR's previous disciplinary actions against Grievant are still "active," so that, when the charges proved by CORR in thisgrievance are added to them, Grievant has five Class A offenses, and four Class B offenses. As noted above, a fourth Class A offense justifies dismissal, as does a third Class B offense. CORR has established, by a preponderance of the evidence, that it properly dismissed Grievant.

However, it must be noted that CORR's reliance on its October 4, 1996, 28 day suspension of Grievant for violating § 407-C-12: "Participating in any kind of work slowdown, sit down, or similar concerted interference with state operations," was completely misplaced. See Grishaber/Crist v. W. Va. Div. of Corrections, Docket Nos. 97-CORR- 067/068 (Oct. 27, 1997). This offense did not occur. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997). CORR's reliance upon it suggests, at the least, sloppy personnel record keeping and at worst, disregard of the grievance process for state employees. See W. Va. Code §§ 29-6A-1 et seq.. Maintaining a record of such a charge in Grievant's personnel file was also a plain violation of CORR's policy. Policy Directive § 405.04-B states: "[w]ritten notices shall not be removed from the employee's personnel file.

EXCEPTION: (Capitals in original) A written notice shall be removed if the action is ultimately vacated."

Grievant contends that CORR's charges constitute reprisal for his union activity. "Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) thatgrievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his protected activity within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va. 52, 365 S.E.2d 251 (1986), Ruby v. Ins. Comm'n. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

It is clear that, in addition to being a union officer, Grievant had at least one grievance pending when he was dismissed, and that CORR knew about it. The record reflects, by a preponderance of the evidence, that Grievant was subsequently treated in an adverse manner by being dismissed on April 17, 1997. Grievant also produced substantial evidence tending to establish a retaliatory motivation.

Auxier credibly testified at Level IV that, as a union steward, he had worked with Grievant to bring problems, particularly understaffing, to the attention of MOCC's management, but that he left after Grievant was fired, feeling that he "was next." Grievant credibly testified at Level IV that, as vice-president of the union, he had tried unsuccessfully to work with MOCC's administration, but that it got to be a "witch hunt" against him.

As an example of the reprisal he perceives, Grievant cites CORR'S delay in bringing some of the charges that caused his dismissal. Policy Directive 400 provides: "the employee shall be given notice of the charges and an explanation of the agency's evidence as soon as possible. . . ," and "the written notice. . . . shall be provided to the employee either before or promptly following such actions." Grievant's point is not well taken. Although his distribution of political material, failure to turn in a leave slip, and allegedleaving of his post at Ash Pod 2, took place six months before his dismissal, Warden Howard Painter (Painter) credibly testified that Grievant's absence on workers

compensation, which lasted three months, caused the delay in CORR's disciplinary action. It is also noted that disciplining Grievant during his compensation claim might have created an appearance of retaliation against him for filing that claim.

Grievant also cites, as an example of reprisal, alleged discrimination in CORR's assessment of disciplinary penalties. 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." To establish a prima facie case of discrimination, 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.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant presented testimony and documents at Level IV tending to prove thatCaptain Melton was heard by another Correctional Officer to say that “he knew how to take care of someone like Hundley - was to take a 30.06 to his head.” Warden Painter concluded, in a letter dated May 13, 1996, that this remark was made; that it was inappropriate and unprofessional; that it was not made in a threatening manner; (See footnote 12) and that Captain Melton had apologized (See footnote 13) and would receive appropriate disciplinary action. Grievant seeks to compare Melton's remark and subsequent punishment to the punishment CORR selected for Grievant's alleged remarks to Pena.

Grievant has established a prima facie case of discrimination. He has shown that he was similarly

situated, in a pertinent way, to another employee who was subject to the disciplinary procedures of Policy Directive 400, Melton. He has shown that he has, to his detriment, been treated by CORR in a manner that Melton was not, in a significant particular. Melton received, according to Painter's testimony, a verbal reprimand for his remark, (See footnote 14) while CORR assigned a Class C offense to Grievant for his remark to Pena, which warranted his dismissal. In addition to this considerable disparity in discipline, the remarks that triggered CORR's disciplinary responses were very different. CORR assigned a much greater penalty to Grievant's alleged threat to initiate a legal process against Pena than it did to Melton's remark that Grievant should be shot in the head with a high-powered rifle. Finally, Grievant established that this difference in treatment was unrelated to the actual job responsibilities of Grievant and Melton, and was not agreed to by Grievant in writing.

As CORR has failed to offer any theory to rebut Grievant's prima facie case of discrimination, the undersigned holds that Grievant has proven, by a preponderance of the evidence, that he was the victim of discrimination in the way these disciplinary offenses were characterized, and penalties for them assessed. This discrimination bolsters Grievant's retaliation claim because the difference in the way MOCC handled these two incidents would cause a reasonable person to wonder if some motivation other than a desire to fairly enforce Policy Directive 400 was at work.

Grievant, in support of his reprisal claim, also argues that the alleged offenses for which he was disciplined, and the penalties meted out by CORR, were contrived. Certainly, CORR's charge of Grievant's violating § 407-C-12: “Participating in any kind of work slowdown, sit down, or similar concerted interference with state operations,” was contrived, as this Grievance Board has already held. Hundley, supra. CORR's reliance upon this charge, after it had been disproved, as noted above, can reasonably be seen as further contrived. The rating of the Pena incident, described above, as a Class C offense also appears contrived, particularly when compared to the verbal reprimand Melton received for his remark, described above. Also as noted above, CORR's characterization of Grievant's distribution of political campaign material as a Class C offense was excessive, leading to the conclusion that this penalty too was contrived.

Finally, with respect to Grievant's reprisal claim, the undersigned notes that officers of the Communication Workers of America and/or the State Employees Union have repeatedly, but unsuccessfully, raised claims of union animus when disciplined by CORR. Hundley, supra; Hindman v. W. Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Ferrell v. W. Va. Div. of

Corrections, Docket No. 96-CORR-194 (Jan. 31, 1997). Having demonstrated that CORR was discriminatory in its discipline; and that some of CORR's charges, and the penalties for them, were contrived, Grievant has established a prima facie case of reprisal. As CORR has failed to offer any theory or evidence to rebut this prima facie case, the undersigned holds that Grievant has proven, by a preponderance of the evidence, that he was the victim of reprisal by CORR. ___

A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Overbee provides that "deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation."

Accordingly, and despite CORR's reprisal, the undersigned remains convinced that the cumulative effect of CORR's disciplinary actions against Grievant is sufficient to support his dismissal. When the charges proved by CORR in this grievance are added to his previous ones, as CORR's policy allows, Grievant still has four Class B offenses, and five Class A offenses. Because a third Class B offense justifies dismissal, as does a fourth Class A offense, CORR has established, by a preponderance of the evidence, that it properly dismissed Grievant. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579

(1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985). See Westfall v. W. Va. Dep't of Transp., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

3. Respondent CORR proved, by a preponderance of the evidence, that Grievant committed a Class B offense by distributing political campaign material at his workplace; a Class A offense by failing to file a leave slip after a day of sick leave; and a Class A offense by engaging in a pattern of sick leave abuse.

4. Respondent CORR proved, by a preponderance of the evidence, that Grievanthad previously committed three Class B offenses and three Class A offenses.

5. Under Respondent CORR's Policy Directive 400, Grievant's total of four Class B offenses and five Class A offenses constitutes sufficient grounds for his dismissal.

6. “Reprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W.Va. Code § 29-6A-2(p).

7. To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that grievant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va. 52, 365 S.E.2d 251 (1986), Ruby v. Ins. Comm'n. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

8. Grievant established a prima facie case of retaliation.

9. Respondent CORR failed to offer a legitimate reason to rebut the presumption of retaliation created by Grievant's prima facie case.

10. Grievant proved, by a preponderance of the evidence, that he was the subject of reprisal by Respondent CORR.

11. A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va.

Bureau of Employment Programs, Docket No.97-BEP-412 (Dec. 31, 1997); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

12. As CORR established that Grievant committed four Class B offenses, and five Class A offenses, the cumulative effect of CORR's disciplinary actions against Grievant is sufficient to support his dismissal, despite a finding of reprisal.

13. Grievant's dismissal was not clearly disproportionate to his offenses or an abuse of agency discretion.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W.Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 12, 1999

Footnote: 1

This grievance was originally assigned to Administrative Law Judge (ALJ) Jerry Wright, who issued an Order Compelling Discovery to CORR on September 4, 1997, it was reassigned for administrative reasons to ALJ Mary Jo Swartz on November 5, 1997. This grievance was again reassigned for administrative reasons to the undersigned ALJ on March 18, 1998. A Level IV hearing was scheduled for July 10, 1998, but was continued on CORR's unopposed motion of July 8, 1998. After the Level IV hearing of August 21, 1998, a second day of the Level IV hearing was scheduled for December 22, 1998, but was continued on CORR's unopposed motion of December 11, 1998. A second day of the Level IV hearing was scheduled for February 10, 1999, but was continued by agreement of the parties.

Footnote: 2

Grievant's 28 day suspension was upheld based upon the other charges against him. Hundley v. W. Va. Div. of

Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997).

Footnote: 3 *There was no allegation that Grievant solicited any campaign contributions. See W. Va. Code § 3-8-12.*

Footnote: 4 *CORR apparently stopped recording Grievant's time on March 20, 1997. No explanation was offered for this.*

Footnote: 5 *Grievant was absent on Workers Compensation, presumably receiving temporary total disability benefits, for all of December, 1996, and much of thesurrounding two months.*

Footnote: 6 *CORR's records show November 6, 1996, as both an eight hour work day and a day on Workers Compensation.*

Footnote: 7 *A blurred entry on February 24, 1997, a Monday, may also reflect a day of sick leave. However, because this entry can not be clearly read, it will not be counted against Grievant.*

Footnote: 8 *It is also noted that, aside from this six month period, Grievant had approximately nine days of unsupported sick leave, immediately before or after a scheduled day off, in 1996.*

Footnote: 9 *A memo, dated April 2, 1997, from Pena to Deputy Warden Howard Painter, contains no mention of Grievant using a loud voice to Pena. However, WardenPainter makes this charge in his letter dismissing Grievant.*

Footnote: 10 *The undersigned notes that to "take you downtown," used in this context, commonly means resort to some sort of legal process or, in the context of baseball, means to hit a home run, and is not commonly known to mean resort to violence.*

Footnote: 11 *See Footnote 2.*

Footnote: 12 *The record does not reflect how Warden Painter found this remark to be a non-threatening one, particularly as he found Grievant's alleged remark to Pena to be threatening.*

Footnote: 13 *The record reflects that Melton never apologized to Grievant.*

Footnote: 14 *Policy Directive 400 does not provide for verbal reprimands, only written ones, Class A through Class C, as noted above.*