RICHARD CONLEY,

Grievant,

v. **Docket No. 00-CORR-109**

WEST VIRGINIA DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

DECISION

Richard Conley ("Grievant") challenges the termination of his employment as a Correctional Counselor with the Division of Corrections ("DOC") at the Northern Regional Jail and Correctional Facility ("NRJ"). He seeks reinstatement to his position. The record does not reflect when this grievance was filed at level one. A level two conference was held on February 18, 2000, and the grievance was denied at that level. Upon appeal to level three, a hearing was held on March 13, 2000. The grievance was denied in a written level three decision dated March 15, 2000. Grievant appealed to level four on March 24, 2000. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on May 26, 2000. Grievant represented himself, and DOC was represented by counsel, Leslie K. Tyree.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by DOC as a Correctional Counselor II for approximately seven years.

2. Grievant has suffered from mental illness, diagnosed as schizophrenia, for approximately 11 years. He has constantly been under the care of a physician and takes anti-psychotic medications for his illness.

3. Beginning in 1998, Grievant began missing work on a frequent basis, due to his illness.

4. Grievant was verbally counseled on numerous occasions in 1999 regarding his excessive absences. Grievant provided doctor's excuses for all of his absences.

5. Grievant's supervisor met with him on August 19, 1999, and advised him that he was almost out of sick leave and that further absences could result in disciplinary action, even if a doctor's excuse were provided. Grievant was also advised at that time that he could take a leave of absence, if needed.

6. On October 14, 1999, Grievant's pay was docked in the amount of 3½ hours, because he called in sick, and did not have enough sick leave to cover the absence. Grievant's supervisor issued a written memorandum to Grievant, notifying him that he would no longer be allowed to call off work without sufficient leave. The memorandum also notified Grievant that he had violated provisions of DOC's Policy Directive 400, specifically “unsatisfactory attendance or excessive tardiness” and “abuse of state time,” and he was being officially reprimanded. At that time, Grievant had missed approximately 63 days of work during the 1999 calendar year. 7. Grievant received a written reprimand on June 1, 1999, for changing his work schedule without proper authorization. Grievant had shown up and worked on his regular day off on May 15, 1999. He was verbally instructed by his supervisor that he could not alter his work schedule without prior authorization. In spite of this warning, Grievant again came in to work on his regular day off on May 29, 1999, and worked an eight-hour shift, without permission, resulting in the written reprimand. (See footnote 1)

8. By letter dated November 24, 1999, Warden Evelyn Seifert advised Grievant that, due to his excessive absenteeism--68 days in 1999--he would be required to produce a doctor's verification for all absences, even if less than three days. This practice was to take effect on December 24, 1999, and Grievant would be required to provide verification of his absences for six months.

9. On November 30, 1999, Grievant was suspended for six days for excessive absenteeism and abuse of state time. Grievant had been absent on four occasions in November of 1999, and his pay had been docked on those days due to insufficient leave. The charge of “abuse of state time” was based upon Grievant's absences of 68 days during 1999.

10. On December 26, 1999, Grievant again altered his work schedule without his supervisor's permission. When he left work on December 26, 1999, he left a note for his supervisor stating that he would not be working on December 27, 1999, a day he wasscheduled to work. Grievant stated in the

note that he would work instead on December 29, 1999, his regular day off.

11. Grievant's absence on December 27, 1999, was unauthorized. He did not provide a doctor's excuse, and he did not take sick or annual leave for that absence.

12. On December 30, 1999, Grievant was suspended without pay, pending an investigation into his alteration of his work schedule without permission and for stating to his supervisors in a meeting on December 29, 1999, regarding his job performance and possible disciplinary action, “You guys know that I'm fucked up in the head.”

13. On January 27, 2000, Grievant was dismissed from employment for absenteeism, insubordination, unprofessional behavior and inappropriate conduct. The dismissal letter stated the specific charges as follows:

> On 26 December 1999, you left a note in your work area . . . which stated you were taking Monday, 27 December 1999 off and intended to work your scheduled day off . . . thus altering your work schedule without your supervisor's permission. It must be noted that you had received a formal written reprimand, dated 1 June 1999, for this same action, ordering you to cease this practice.
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> . . . [Y]ou have missed . . . 77½ days on . . . 33 different occasions, during the year 1999. You have been issued both verbal and written reprimands. . . . Your unauthorized absence on 27 December 1999 is the third documented incident and it immediately followed your return from a six day suspension for unsatisfactory attendance and abuse of state time.
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> In addition, your dismissal is necessitated by your comments, on 29 December 1999, . . . during a meeting with [your supervisors]. On five separate occasions during this interview, you made the following statement, “You guys know that I'm fucked up in the head.” These statements were perceived by both Mr. Butler and Mr. Straughn as being belligerent, dangerous, disrespectful and an unstable action.

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.

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); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

DOC based its decision to terminate Grievant upon provisions of its Policy Directive 400.00 (Policy 400), entitled Employee Standards of Conduct and Performance. Policy 400 provides three levels of disciplinary offenses. Class A offenses include "types of behavior least severe in nature but which require correction in the interest of maintaininga productive and well-managed work force." Class B offenses include "acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal." Class C offenses include "acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal." In addition, Policy 400 provides that the commission of a third Class A or Class B offense warrants suspension or dismissal. The policy also states that aggravating or mitigating circumstances may allow for an increase or decrease in the specified sanctions, within the discretion of DOC.

There is no question in this case that DOC has proven the charges against Grievant, and Grievant has not disputed that he has committed the acts alleged. However, he testified that he is receiving medical treatment for his condition and would very much like to continue working. Although he has been offered the option of taking a leave of absence or seeking long-term disability benefits, Grievant stated that his doctor advised him to “keep fighting,” and that, at least when Grievant is working, he is safe and accounted for. It is quite obvious that Grievant is suffering from a serious and debilitating disease. While it is very admirable that he wishes to continue working, the undersigned, while very saddened at his situation, must find that Grievant's dismissal was proper. Grievant committed at least three documented Class A offenses involving unsatisfactory attendance and abuse of state time, for which dismissal is permitted. In addition, he changed his work schedule without permission on two

occasions, in spite of having been reprimanded for such conduct, constituting the Class B offense of "failure or delay in following a supervisor's instructions." Additionally, "unauthorized absence"constitutes a Class B offense, so Grievant also committed three Class B offenses, for which Policy 400 allows dismissal.

The undersigned may mitigate the discipline if the imposed penalty is clearly excessive or clearly disproportionate to the offense. 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 Serv. 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 it had "good cause" to dismiss Grievant for his continuous attendance problems, failure to obey directives, and consequent poor performance. Although Grievant did have an excellent work record and good attendance prior to 1998, it appears that over the past two years, his condition has worsened and has severely affected his ability to work. Employers have the right to expect employees to attend work as required and to follow orders that 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). While the undersigned sympathizes with Grievant's difficulties, he did not demonstrate mitigation is appropriate in this situation. (See footnote 2)

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, Section 7.00(A1), “unsatisfactory attendance or tardiness” on at least three documented occasions, constituting three “Class A” offenses.

3. Respondent has proven that Grievant violated Policy Directive 400.00, Section 7.00(B1), “unauthorized absence of one to three days” on at least one occasion, and Section 7.00(B2), “failure or delay in following a supervisor's instructions, performingassigned work or otherwise complying with applicable established written policy or procedures” on at least two occasions, constituting three “Class B” offenses.

3. Policy Directive 400.00 allows for suspension or dismissal for the commission of three Class A offenses or three Class B offenses.

4. 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).

5. Grievant was terminated for good cause and in compliance with the provisions of Respondent's policies.

6. Grievant failed to demonstrate the penalty imposed was clearly excessive given the numerous disciplinary actions previously taken against him for excessive absenteeism, failure to follow orders, and unauthorized absences.

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, and 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 EmployeesGrievance 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.

Date: June 30, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, Grievant's reason for doing this was to add work hours to his schedule, which he would then use in lieu of sick leave he had exhausted. Grievant was advised by his supervisor that this was not permitted.

Footnote: 2

Because DOC has established the charges discussed, the undersigned does not believe it is necessary to discuss the charges regarding Grievant's statements to his supervisors on December 29, 1999. However, there is no evidence that these comments were meant to be threatening or belligerent in any way, but were merely Grievant's way of describing his condition, albeit a rather poor choice of words.