

LEWIS CHILDERS,

Grievant,

v.

Docket No. 99-CORR-403

WEST VIRGINIA DIVISION OF CORRECTIONS,

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

On September 24, 1999, Lewis M. Childers (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 29-6A-4(e)(2), challenging his dismissal by Respondent West Virginia Division of Corrections (WVDOC). On March 29, and May 2, 2000, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. [\(See footnote 1\)](#) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on June 6, 2000, following receipt of the parties' written post-hearing arguments. Consistent with the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

Grievant was employed by WVDOC as a Correctional Counselor I at the Mount Olive Correctional Complex (MOCC). On September 10, 1999, MOCC Warden Howard Painter issued a dismissal notice to Grievant which stated the following:

This is to notify you of my decision to dismiss you from your position as a Correctional Counselor I with the Mount Olive Correctional Complex of the West Virginia Division of Corrections, effective 10 September 1999, as a result of the actions listed below. This action is taken in accordance with Section 12.2 of the Administrative Rules of the West Virginia Division of Personnel. Further, since your immediate separation from the workplace is required, you will be paid up to a maximum of fifteen (15) calendar days severance pay as authorized by WV Code 29-6-10(12) instead of being given the opportunity to work out the fifteen calendar day

notice period. However, you still have the opportunity to respond to the matters of this letter, provided you do so by close of business on 25 September 1999. You will also be paid for all annual leave accrued and unused as of your last working day.

An internal investigation has been completed and has established by a preponderance of the evidence that on August 8, 1999, as a result of negligence in the performance of your duties, you did cause or permit a breach of facility security which resulted in a life threatening incident at the Mount Olive Correctional Complex. Your actions or inactions are violations of West Virginia Division of Corrections Policy directive 400.00, section 7.00, as follows:

C-22 - "Breach of facility security or failure to report any breach or possible breach of facility security."

C-O8 - "Violating safety rules where there is a threat to life."

B-O2 - "Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedure."

B-O6 - "Failure to observe precautions or personal safety; posted rules; institutional staff notices; signs; written or oral safety instructions; or failure to use protective clothing and equipment."

On August 8, 1999, at approximately 0800 hours, inmate DOC#12219 requested to be seen by a Correctional Counselor as he had something to discuss and you responded to the request. You then supervised the removal of this inmate from his cell and performed the mandatory strip search of the inmate prior to his being taken to the Multipurpose Room in Quilliams II, a segregated housing unit. You and the inmate remained in the Multipurpose Room for approximately thirty (30) minutes. At the inmate's request for more privacy, you escorted him up a flight of stairs to the Quilliams II Contact Visiting Room to continue your discussion.

By your own admission, you relinquished visual control of this inmate on two occasions: once, when you left the Visiting Room to get coffee for yourself and the inmate; and again when the inmate used the restroom in the Quilliams II Contact Visiting Room. You stated that he was out of sight for four to five minutes.

You were responsible for inmate DOC#12219 from approximately 0900 to 1130 hours in the Quilliams II Contact Visiting Room. At approximately 1130 hours you assisted in escorting him from the Visiting Room to the holding cell in the Security Corridor, where he remained in your custody. At approximately 1150 hours you escorted him to the office of the Associate Warden of Security to meet with Deputy Warden Michael Coleman and Executive Assistant Cheryl Chandler. During the meeting with these officials, at approximately 1212 hours, inmate DOC#12219 drew the loaded weapon from his pants and discharged two rounds of ammunition before being subdued by Deputy Warden Coleman.

MOCC Operational Procedure 2.26, "Control Unit Procedures," subsection P. requires that all searches conducted in this unit will be strip searches. MOCC Operation Procedure 1.87, "Inmate Searches," section D. indicates that searches be performed prior to entry or exit from any restricted and/or disciplinary housing unit or section. Post Order XI.02, "Escorting Control Inmates," numbers 1. And 3. require a proper strip search to be performed before escorting the inmate and that escorting officers will maintain visual control of the inmate at all times.

The investigation causes me to conclude that either inmate DOC#12219 had the weapon when he exited his cell, or more likely, that he obtained the pistol from a hiding place in the Quilliams II Contact Visiting Room inmate restroom. In either circumstance, you had supervisory responsibility for him from the time he left his cell until his meeting with the Deputy Warden and Executive Assistant. Had the inmate been properly strip searched prior to departing the unit for the holding cell and had you maintained visual control of the inmate at all times, the weapon would have been discovered.

You were hired as a Correctional Officer I at the Mt. Olive Correctional Complex on 20 February 1995. You completed Academy Basic Training on 06 September 1995 and subsequently completed a two year Apprenticeship Program 17 March 1998. As a result you were reallocated to a Correctional Officer II effective 01 June 1998. On 01 April 1999 you [were] hired as a Correctional Counselor I for Mt. Olive. The duties of a Correctional Counselor overlap the duties of an Officer and as a Counselor, you have a duty and responsibility to supervise inmates, conduct searches and like responsibilities pursuant to established policies, procedures and post orders.

The preponderance of the evidence causes me to conclude that as a result of your negligence in the performance of your duties, you did cause or permit a breach of facility security which resulted in a life threatening incident at the Mount Olive Correctional Complex. I believe such negligence not only violated the Division of Corrections' Policy Directive, but also placed at risk the health, safety and welfare of the public and the employees and inmates of the facility which warrants your dismissal from employment.

I spoke with you via telephone at your residence at approximately 3:35 p.m. on 10

September 1999. I explained the results of the investigation and the fact that I was considering your dismissal.

You responded by requesting to be transferred in lieu of the dismissal. I answered by stating that this was not possible. You further stated that you fully understood that you had "messed up" and were sorry that "I let you down."

I do not find your responses to be credible and am affirming your dismissal.

You have the opportunity to either meet with me in person or to present me with a written explanation of the reason why you may think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, providing that you do so within fifteen (15) calendar days of receipt of this letter. Should you require additional information or have any questions, contact my office.

* * *

J Ex 1.

Grievant has appealed challenging this action, generally contending that the punishment is disproportionate to the offense, and that he has been singled out for discriminatory treatment in that other employees who were similarly culpable in this matter were not disciplined in a like manner.

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Certain aspects of the charges which resulted in this dismissal are disputed by Grievant. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dep't of the Navy, 33

M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Accordingly, the evidence presented by the parties on matters in dispute will be discussed in some detail.

Ordinarily, formal rules of evidence, excepting the rules of privilege recognized by law, are not applied in grievance proceedings. Therefore, hearsay evidence is generally admissible. Massey v. W. Va. Public Serv. Comm'n, Docket No. 99-PSC-313 (Dec. 13, 1999); Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998); Perdue, supra. See W. Va. Code § 29-6A-6; Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. Massey, supra; Cook v. W. Va. Div. of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997). See 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 declarants' 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. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

Prior to becoming a Correctional Counselor, Grievant was employed by WVDOC at MOCC as a

Correctional Officer. In that capacity, Grievant completed WVDOC's Basic Correctional Employee Training Program in residence at the West Virginia Corrections Academy in September 1995. In addition, Grievant completed the United States Department of Labor's apprenticeship program for Correctional Officers in March 1998. R Ex 1. In the course of these programs, Grievant was trained to properly strip search prisoners. He was also trained to recognize when a prisoner is behaving strangely, so that additional precautions may be taken. On August 8, 1999, a Sunday, Grievant was working his assigned shift as a Correctional Counselor I at MOCC. MOCC is the state's highest security prison. Early that morning Inmate David Williams, a Level 5 prisoner housed in MOCC's Quilliams II unit, asked to speak with a prison counselor. Inmate Williams suggested that he had some important information he wanted to relay to the proper authorities.

Within MOCC, Quilliams II houses the most dangerous, most violent, maximum security inmates, who are classified, like Inmate Williams, at Level 5. Because West Virginia does not have a death penalty, the "worst of the worst" prisoners end up being housed in Quilliams II. Level 5 offenders "include those with recent or patterns of severe behavioral problems such as, but not limited to, escape, riot, hostage taking, assault and/or battery, murder, rape, possession of weapons, active gang activity, strong-arm, trafficking and/or theft during incarceration." R Ex 6. Inmate Williams had previously been involved in a mass escape from the West Virginia Penitentiary in Moundsville, West Virginia, in 1979. In 1992, Inmate Williams again escaped from Moundsville, this time taking hostages after he was out of the prison. Within the last two years, escape plans involving Inmate Williams were uncovered at MOCC. Grievant knew, or should have known, of Inmate Williams' history, as he is one of the most infamous inmates in MOCC.

Grievant agreed to meet with Inmate Williams after the prisoner took his morning shower. After Inmate Williams showered, Grievant and a Correctional Officer, Joseph Connelly, strip searched the prisoner before he was handcuffed and shackled to be moved from his cell. This dismissal action was generated by what transpired after that point. Grievant and Officer Connelly initially took Inmate Williams to a nearby multi- purpose room to talk. On the way to the multi-purpose room, they were joined by the Quilliams II Unit Supervisor, Corporal Steven Neal. While in the multi-purpose room, Inmate Williams asked to speak to Deputy Warden Michael Coleman. The prisoner appeared visibly nervous, and claimed that he had information he wanted to pass on concerning a gun. Officer Connelly left and made contact with the Shift Commander at MOCC that day, Captain Rick

Nottingham.

Captain Nottingham responded to the multi-purpose room where Inmate Williams suggested that he had proof of his claims in a paper bag in his cell. Corporal Neal retrieved a brown paper bag from Inmate Williams' cell. Inmate Williams indicated that he wanted more privacy, and Grievant escorted the prisoner to the visitation area.

Corporal Neal brought the paper bag to the visitation area. Examination of the bag revealed two .22 caliber bullets taped to the bottom of the bag. After this discovery, Corporal Neal turned the bullets over to Captain Nottingham, and focused on searching Inmate Williams' cell for more contraband.

Grievant remained with Inmate Williams in the multi-purpose room. At some point after the bullets were discovered, Grievant left the prisoner alone on two occasions. On the first occasion, Grievant left Inmate Williams in the visitation area while Grievant went to get a cup of coffee. On the second occasion, Inmate Williams went in a restroom in the visitation area, where he was out of Grievant's sight. In addition, the parties stipulated that Grievant did not strip search Inmate Williams after he was left alone on either occasion, prior to escorting the inmate to another location. The record indicates that anytime a Level 5 inmate is out of his cell, there must be direct visual conduct between a guard and the prisoner at all times. R Ex 5. If there is a break in contact, the guard is responsible for strip searching the inmate. While this is established policy at MOCC, there was substantial evidence that this policy was not consistently followed by the staff.

In any event, as requested, Deputy Warden Coleman responded to the prison from his residence in order to meet with Inmate Williams. Grievant and Corporal Neal escorted Inmate Williams from the visitation area to a holding cell. Approximately 45 minutes later, Captain Nottingham and Grievant escorted Inmate Williams to the office area to meet with Deputy Warden Coleman and Executive Assistant Cheryl Chandler. During that meeting Inmate Williams pulled out a .22 caliber automatic pistol, and fired two rounds, the first toward Ms. Chandler, before he was subdued by Deputy Warden Coleman.

At no time prior to the shots being fired did Grievant indicate to Corporal Neal, Captain Nottingham, or anyone else that Inmate Williams had been out of his sight on two occasions since being strip searched at his cell, and no further searches, not even a pat- down search, had been conducted. A preponderance of the evidence indicates that these officers reasonably expected

Grievant to have performed his job in a proper manner, and had no reason to suspect the prisoner had been out of Grievant's sight when he did not reveal that to them. Had Grievant mentioned that fact, they would have shared responsibility for conducting a proper search at that point. Had these officers not acted prudently after Grievant informed them that the prisoner had been out of his direct view, then Grievant would not stand out as the one person most culpable for this nearly disastrous incident.

After the incident, a thorough investigation was conducted by WVDOC's Investigator, Charles B. Hudson, a former Trooper with the West Virginia State Police. In the course of this investigation, Anna Thomas, a friend of Inmate Williams, admitted to purchasing the weapon and smuggling the pistol and ammunition to Inmate Williams through the visitation area at MOCC. Ms. Thomas, who is apparently quite obese, was able to hide the pistol and 50 rounds of ammunition on her person, and proceed into the inmate contact area because the metal detector was not functioning properly, the guards did not conduct a proper "pat-down" search, or any pat-down search would have failed to reveal the weapon and ammo, given Ms. Thomas' physique. Apparently, MOCC policy does not condone strip searches of visitors.

After the incident, WVDOC brought a specially-trained canine unit into the prison to search for weapons, particularly guns. The dog, which was trained to detect explosives by alerting on the active ingredient in gunpowder, reacted to two locations in MOCC, Inmate Williams' cell, and the restroom in the visitation area which Inmate Williams visited while being escorted by Grievant on the morning of August 8, 1999. Based on over 30 years' experience in the field of corrections, Warden Painter concluded that Inmate Williams most likely hid the weapon and some ammunition behind the commode in the restroom, and retrieved the pistol while he was briefly out of Grievant's sight for three or four minutes. Grievant contends that he is being treated unfairly because he and Officer Connelly should be held equally responsible for Inmate Williams' leaving his cell with a weapon. Unfortunately, the undersigned Administrative Law Judge is not convinced that Officer Connelly bears any culpability in this matter. When questioned by troopers and investigators shortly after the incident, Grievant and Officer Connelly indicated that Inmate Williams was properly strip searched in accordance with standard procedure before Grievant escorted him away from his cell. Officer Connelly, now employed by the federal government as a correctional officer with the Bureau of Prisons, testified credibly at the Level IV hearing that he and Grievant properly searched inmate

Williams on the morning of August 8. Corporal Neal and Captain Nottingham were in the vicinity when Inmate Williams was strip searched, but they did not participate in the search.

Grievant's claim of disparate treatment is substantially based on Inmate Williams' claim that he smuggled the weapon out of his cell in a pair of underwear that he was carrying. This claim is contained in the hearsay statement Inmate Williams made during the official investigation into this incident. It is understandable that Inmate Williams was not called to testify in person, thus hearsay evidence is admissible in these circumstances. However, in assessing the credibility of this statement, it is noted that Inmate Williams' story is inconsistent with other credible evidence in that he denied any knowledge of how the pistol got into the prison, while Ms. Thomas admitted to passing the gun to Inmate Williams in the visitation area in July. In addition, Inmate Williams conceded that his claim of important information that he needed to pass to Deputy Warden Coleman that morning was nothing more than "bullshit." R Ex 2. The undersigned finds Inmate Williams' claim that he smuggled the loaded weapon past Grievant and Officer Connelly, despite being strip searched, to be completely incredible.

Given the reaction of the explosives detection dog, it is much more likely that the weapon was hidden in the restroom. Although grinding tools were found in Inmate Williams' cell, and the serial number was ground or filed off the weapon, it was not established if the serial number was removed before or after the gun was brought to MOCC.

Even if Inmate Williams did smuggle the weapon out of his cell past Grievant and Officer Connelly in a pair of underwear, Grievant had the last clear opportunity to find the weapon by advising his co-workers or superiors that Inmate Williams had been out of his sight briefly, and requesting assistance in conducting a strip search before taking the prisoner to meet with Deputy Warden Coleman. Given Inmate Williams prior history, the prisoner's behavior that morning regarding wanting to pass unspecified information to a senior prison official, and the fact that two bullets had already been retrieved from Inmate Williams' cell, Grievant's failure to exercise the utmost caution in dealing with this inmate, in accordance with established procedures he had been trained to follow, was directly responsible for an incident that was nearly fatal.

Grievant contends that his treatment in this disciplinary action involves discrimination prohibited under the state employee grievance statute. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that agrievant, seeking to establish a prima facie case [\(See footnote 2\)](#) of discrimination under Code § 29-6A- 2(d), must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94- DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

The undersigned Administrative Law Judge is not persuaded that Grievant is similarly situated to any other WVDOC employees involved in this incident to a sufficient degree to establish a prima facie case of discrimination. Further, even if, for the sake of argument, Grievant did establish a prima facie case of discrimination, WVDOC established that Grievant's level of culpability in this matter was greater than any other individual, thereby warranting the penalty of dismissal. Similarly, Grievant's offense was unique in the annals on MOCC, and his penalty is not comparable to any other situation where disciplinary action has been meted out to WVDOC employees at MOCC.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are

appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Division of Corrections (WVDOC) as a Correctional Counselor I at Mount Olive Correctional Center (MOCC).

2. Grievant was previously employed at MOCC as a Correctional Officer. As a Correctional Officer, Grievant completed WVDOC's Basic Correctional Employee Training Program in residence at the West Virginia Corrections Academy in September 1995, as well as the United States Department of Labor's apprenticeship program for Correctional Officers in March 1998.

3. There is substantial overlap between Grievant's duties as a non-uniformed Correctional Counselor and the duties performed by uniformed Correctional Officers at MOCC.

4. MOCC is West Virginia's maximum security prison. Within MOCC, the Quilliams II unit houses the most dangerous inmates, who are classified at Security Level 5. 5. On August 8, 1999, Grievant and Correctional Officer Joseph Connelly strip searched David Williams, a Level 5 inmate with a history of escape attempts from the West Virginia Penitentiary, prior to a requested meeting with Grievant.

6. Thereafter, Inmate Williams acted extremely nervous, and claimed to have information regarding a gun being smuggled into MOCC. In support of his claims, he directed guards to a brown paper bag in his cell.

7. After Corporal Steven Neal, Quilliams II Unit Supervisor, retrieved the bag from Inmate Williams' cell, and brought it to the visitation room where Grievant was guarding the prisoner, two, .22 caliber bullets were found taped to the bottom of the bag.

8. While Captain Nottingham was notifying MOCC officials of Inmate Williams' representations, and Corporal Neal was supervising a search of Inmate Williams' cell, Grievant was alone with Inmate Williams in the visitation area.

9. Subsequent to the events described in Findings of Fact 6 through 8, Grievant left Inmate Williams alone on two occasions. During the first occasion, Grievant went to get coffee. On the second occasion, Grievant allowed Inmate Williams to enter a restroom in the visitation area where he was out of Grievant's sight for three to four minutes.

10. Corporal Neal and Grievant subsequently escorted Inmate Williams to a holding cell in the

Security Area, and from there to an office to meet with Deputy Warden Michael Coleman and Executive Assistant Cheryl Chandler.

11. During the meeting with Deputy Warden Coleman and Ms. Chandler, Inmate Williams pulled out a .22 caliber automatic pistol and fired two shots, the first of which was directed toward Ms. Chandler. Deputy Warden Coleman subdued Inmate Williams and took away the pistol before anyone was injured.

12. At no time after the two occasions when Grievant let Inmate Williams out of his direct view did Grievant conduct a strip search, a pat-down search, or otherwise inspect Inmate Williams for weapons or contraband.

13. Prior to the shooting incident, Grievant did not inform Corporal Neal, or any other MOCC official, that Inmate Williams had been out of his direct view, nor did he request assistance from another employee in conducting a strip search of Inmate Williams.

14. MOCC policy requires strip searches of Level 5 inmates, such as Inmate Williams, anytime they are moved out of their cell, and whenever they have been out of the direct sight of their escorting officer.

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. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151

(1980). 3. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) 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." In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995).

4. Grievant failed to establish a prima facie case of discrimination in that his level of culpability for an incident where a maximum security inmate pulled a loaded pistol and fired two rounds before he was subdued by a Deputy Warden was not comparable to that of any other WVDOC employees who were involved in the events which led up to that incident.

5. Grievant's failure to search a Level 5 maximum security inmate, in accordance with standard operating procedures at MOCC, after the inmate had been out of his sight on two occasions, prior to escorting the inmate to a meeting with the Deputy Warden, thereby allowing the inmate to confront the Deputy Warden with a loaded pistol, established a violation of official duty sufficient to warrant termination of Grievant's employment as a Correctional Counselor I with the West Virginia Division of Corrections.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 15, 2000

[Footnote: 1](#)

Grievant was represented by Steven Berryman. Respondent was represented by its General Counsel, Leslie Tyree.

[Footnote: 2](#)

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).