

**STEVEN BERRYMAN,**

**Grievant,**

**v v.**

**Docket Nos. 99-CORR-377**

**WEST VIRGINIA DIVISION OF CORRECTIONS/**

**MOUNT OLIVE CORRECTIONAL COMPLEX,**

**Respondent.**

### **DECISION**

Steven Berryman (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer (CO) VI/Captain at the Mount Olive Correctional Complex (MOCC). He was suspended by CORR from August 2, 1999, until September 13, 1999, and dismissed on September 20, 1999. [\(See footnote 1\)](#) Grievant alleges that CORR engaged in discrimination, favoritism, harassment, arbitrary and capricious decision making, retaliation, unethical practices, and defamation, as well as violating his constitutional due process rights, in suspending him. [\(See footnote 2\)](#) Grievant seeks reinstatement, back pay, reimbursement of his medical expenses and other costs, attorney fees, removal of any reference to his suspension from MOCC files, and otherwise to be made whole. [\(See footnote 3\)](#) This grievance was denied at Level I, on August 18, 1999, by Chief Correctional Officer/Major Paul Parry; and at Level II, on August 31, 1999, by MOCC Warden Howard Painter. A Level IV hearing was held on November 23 and 24, 1999, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant represented himself, and CORR was represented by Joe Wittington, Esq. and Leslie Kiser Tyree, Esq. The parties were given until January 20, 2000, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. [\(See footnote 4\)](#) 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 CORR as a CO VI/Captain, for a period of approximately seven years, until his dismissal on September 20, 1999.
2. By letter dated August 2, 1999, MOCC Warden Howard Painter suspended Grievant without pay for a renewable period of 15 days pending the completion of an investigation.
3. Painter's letter stated that "[t]he specific reasons for this suspension is [sic] your violations of WV Division of Corrections Policy Directive 400.00, Section 7.00, specifically but not necessarily limited to the following: C-22 - "Breach of facility security or failure to report any breach or possible breach of facility security." [and] C-24 - "Other actions of similar nature and gravity."
4. Painter's letter contained no other details of Grievant's alleged offense.
5. By letters dated August 17, 1999, and September 2, 1999, Painter extended Grievant's suspension without pay until September 13, 1999.

### **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 the evidence 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.

CORR based its decision to suspend 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. 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."

As noted in Finding of Fact three, CORR's letter suspending Grievant alleges that he committed two Class C offenses. However, Grievant alleges that CORR's letter failed to protect his constitutional due process rights, because it did not state the specific factual events upon which CORR based its disciplinary action. Grievant's argument has merit.

Grievant, as a tenured state employee, has a property interest in his employment. Perry v. Sindermann, 408 U.S. 593 (1972), cited in Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July 28, 1993), aff'd, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995).

"When an individual is deprived of this interest, certain procedural safeguards are merited. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." Jones, supra.

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977).

It has been CORR's practice to state the specific factual events upon which discipline was based in its letters suspending and dismissing grievants. See Hosaflook v. W. Va. Div. of Corrections/Pruntytown Correctional Facility, Docket No. 98-CORR-446/447 (Jan. 20, 2000); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999); Frisenda v. W. Va. Div. of Corrections/Industrial Home for Youth, Docket No. 97-CORR-373 (Mar. 24, 1998); Grishaber/Crist v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-067/068 (Oct. 27, 1997); Cassity v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-267 (August 25, 1997); Davidson v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 96-CORR-133 (May 9, 1997); Pingley v. W. Va. Div. of Corrections/Huttonsville Correctional Center, Docket No. 95-CORR-252 (July 23, 1996); Pingley v. W. Va. Div. of Corrections/Huttonsville Correctional Center,

Docket No. 94-CORR-1122 (June 30, 1995); Hammer v. W. Va. Div. of Corrections/Huttonsville Correctional Center, Docket No. 94-CORR-1084 (Nov. 30, 1995).

The West Virginia Division of Personnel requires that a suspension be accompanied by a statement of the reasons for the suspension:

Suspension - Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.

143 CSR § 12.3, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

Grievant's Exhibit two at Level IV included a document entitled "Disciplinary Action Guide," apparently issued by the Division of Personnel, which states that "essential components of due process are: 1. Notice of disciplinary action, including specific charges (WHO, WHAT, WHEN, WHERE, HOW) and an explanation of the evidence in support of the charges. . . " and "[g]enerally, notice will be adequate if it sets out sufficient facts about the alleged misconduct so that its details are noted with some particularity." This document also included a sample suspension letter, which parenthetically informs the drafter of such a letter to "[g]ive SPECIFIC reasons for the suspension\_employee must be informed, with reasonable certainty and precision, of the cause of his suspension from employment."

This requirement is also reflected in CORR's policy. Policy 400, Section 4.03, provides:

Prior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond. EXCEPTION: An employee may be immediately sent away from the work area when the employee's continued presence may be a threat to the welfare of the agency or fellow employees. In such cases, the employee shall be given notice of the charges and an explanation of the agency's evidence as soon as possible thereafter and shall then be given a reasonable opportunity to respond prior to being placed on suspension without pay or being removed.

This policy requires notice and an opportunity to respond to allegations and evidence, prior to the employee being deprived of either his pay or his job. Cassity, supra.

CORR clearly failed to give Grievant specific written notice of his alleged offense, and an explanation of the agency's evidence in support of the charge, as it is required to do by its own policies. CORR's allegation that Grievant committed a breach of facility security is so vague as to encompass almost any transgression that might occur at a maximum security prison, and its charge of "other actions of a similar nature and gravity" is still more vague. CORR clearly failed to provide Grievant with the sort of dates, names of persons, or identification of property, "to the extent that the accused employee will have no reasonable doubt as to their identity[.]" required by Clarke, supra, [\(See footnote 5\)](#) or the sort of statement of reasons for the suspension which informs the employee, with some particularity and with reasonable certainty and precision, of the cause of his suspension from employment that is required under Division of Personnel policies. CORR's suspension letter failed to provide Grievant with an essential component of due process: reasonably specific notice of the charges against him.

Accordingly, CORR has failed to prove, by a preponderance of the evidence, that it properly suspended Grievant. Consistent with this Board's authority to fashion relief, See W. Va. Code § 29-6A-5(b), CORR will be ordered to reinstate Grievant for the period of his suspension; to reimburse him for his lost wages and benefits, including any overtime that he would have worked had he not been suspended, with interest; to remove any reference to his suspension from his file; and to restore his seniority.

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. Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity. Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977).

3. The West Virginia Division of Personnel requires that a suspension be accompanied by a statement of the reasons for the suspension. 143 CSR § 12.3, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

4. CORR's Policy 400, Section 4.03, provides that prior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

5. CORR's suspension letter to Grievant failed to provide him with an essential component of due process: reasonably specific notice of the charges against him.

6. CORR failed to prove, by a preponderance of the evidence, that it complied with applicable policies in suspending Grievant.

Accordingly, this grievance is **GRANTED**, and Respondent CORR is **ORDERED** to reinstate Grievant for the period of his suspension; to reimburse him for his lost wages and benefits, including any overtime that he would have worked had he not been dismissed, with interest; to remove any reference to his suspension from his file; and to restore his seniority.

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.

**ANDREW MAIER**  
**ADMINISTRATIVE LAW JUDGE**

**Dated: March 3, 2000**

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[Footnote: 1](#)

1 Grievant apparently spent one week on medical leave between his suspension and dismissal. His dismissal is the subject of Berryman v. W. Va. Div. of Corrections, Docket No. 99-CORR-443.

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[Footnote: 2](#)

2 Due to the outcome of this Decision, Grievant's claims of discrimination, favoritism, harassment, arbitrary and capricious decision making, retaliation, unethical practices, and defamation need not be decided.

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[Footnote: 3](#)

3 Attorney fees are not awarded by this Grievance Board, Smarr v. Wood County Bd. Of Educ., Docket No. 54-86-062 (June 16, 1986), and Grievant was not represented by an attorney.

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[Footnote: 4](#)

4 Grievant submitted his own proposals, and CORR's were submitted by paralegal Cindy L. Quillen. CORR's proposals do not address Grievant's due process claim.

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[Footnote: 5](#)

5 CORR did not argue, and produced no evidence to show, that Grievant's alleged act was so singular that no specific notice of it was necessary.