NANCY RYAN,

Grievant,

v.

DOCKET NO. 02-DJS-132

WEST VIRGINIA DIVISION OF JUVENILE SERVICES/SOUTH CENTRAL REGIONAL JUVENILE DETENTION CENTER,

Respondent.

D E C I S I O N

Grievant, Nancy Ryan, filed this grievance directly to level four on May 10, 2002, protesting her dismissal from the West Virginia Division of Juvenile Services/South Central Regional Juvenile Detention Center ("DJS"), effective May 6, 2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on September 9, 2002, and this case became mature for decision on October 9, 2002, the mailing deadline which was set for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Bradford W. Deel, Esq., and DJS was represented by Barbara F. Elkins, Esq., Assistant Attorney General. (See footnote 1)

SUMMARY OF EVIDENCE

DJS' Exhibits

Ex. 1 -

September 28, 2000 DJS Corrections Case Manager Interview Format.

Ex. 2 -

September 29, 2000 DJS Corrections Case Manager *(Written)*.

Ex. 3 -

December 20, 2000 Employee Drug Awareness Certification Form; W. Va. Division of Personnel Drug-Free Workplace Policy.

Ex. 4 -

May 6, 2002 letter from Manfred G. Holland to Nancy Ryan.

Ex. 5 -

Hand-drawn map by Cynthia Largent Hill.

Ex. 6 -

W. Va. Division of Juvenile Services Policy Number 4.01, Employee Standards of Conduct and Performance.

Ex. 7 -

W. Va. Division of Personnel Workplace Security Policy.

Ex. 8 -

Photograph of front of Administration Building.

Ex. 9 -

Photograph of Front of Gatehouse (left side).

Ex. 10 -

Photograph of Front of Gatehouse.

Ex. 11 -

Incident Report by Marshall Berger.

Ex. 12 -

Incident Report by Trinia Thompson dated April 15, 2002.

Ex. 13 -

Incident Report by Michael D. Goode dated April 15, 2002.

Ex. 14 -

Transcript of Recorded Interview of Nancy Ryan by Johnny L. Richardson, dated April 16, 2002.

Ex. 15 -

Undated Incident Report by Nancy Ryan to Marshall Berger.

Grievant's Exhibit

Ex. 1 -

April 3, 2002 memorandum from Alvin Ross to Ralph Terry.

Testimony

DJS presented the testimony of Cynthia Largent Hill, Ralph Terry, Marshall Berger, and Johnny Richardson. Grievant testified in her own behalf.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At all times relevant to these proceedings, Grievant was employed by DJS as a Case Manager at the South Central Regional Juvenile Detention Center ("Detention Center") in Harrison County, West Virginia. 2. Grievant was hired by DJS in November, 2000. Grievant had been working for the Department of Health and Human Resources ("DHHR") prior to applying for a job at DJS.

3. After accepting the position, but before starting work with DJS, the Detention Center was relocated from Dunbar, West Virginia, to the maximum security campus at Salem, West Virginia. Grievant was informed of this change and was offered a choice of taking the job offer, with the understanding she would have to travel to Salem on a weekly basis, or to continue working at her current job at DHHR. Grievant was also informed that DJS did not know if, or when, the facility would ever relocate back to Kanawha County.

4. Grievant chose the Case Manager position with DJS, and arranged for her work schedule at Salem to be a 40-hour week, Monday through Thursday. Thus, Grievant traveled to Salem every Monday morning, stayed in a motel for the week, and returned to Kanawha County on Thursday evening.

5. The Industrial Home for Youth ("IHY") and the Detention Center are housed on the same campus. Both are maximum security detention facilities for juveniles. At least 75% of the juveniles housed at IHY or the Detention Center come from a home where substance abuse is a problem or currently have a substance abuse problem of their own.

6. The IHY, Detention Center, and its officers, are charged with the custody and care of juvenile residents. State law requires an elevated level of care at facilities such as the IHY. The standard of care says that a child in any out-of-home care facility should receive care that would be even better than it would receive in a good home. Additionally, the officers are expected to act as role models as well as counselors because they are the first line of contact for the residents. 7. All staff is given instruction on the facility's general security procedures and DJS' drug free workplace policy. All staff is required to sign a Drug Free Awareness Certification Form specifically stating that they received a copy of the policy, that they agreed to abide by the policy, and that they are aware that any violation will subject them to disciplinary action up to and including termination.

8. Grievant signed a Drug Free Awareness Certification Form on December 20, 2000. R. Ex. 3.

9. Grievant's practice for the work week was to pack some food from home to take with her to Salem. On the morning of Monday, April 15, 2002, Grievant was packing a thermal bag and noticed a beer in her home refrigerator, and placed it in her bag to have with her dinner that night. That Monday, she drove directly from home to the facility, went to the employee's lounge, and placed her thermal bag in the refrigerator. She did not remember she had placed the beer in the bag.

10. At lunchtime that day, she retrieved her bag from the refrigerator, and discovered the beer. She was upset that she had brought it into the facility, and decided the best thing to do would be to leave it in the bag in the refrigerator, and take it out at the end of the day. She did not report that she had inadvertently brought the beer in with her to anyone.

11. That evening as she prepared to leave the facility, she retrieved the bag, left her office, and proceeded to leave the building. When she got to the security guard, she was told they were doing

random searches of all staff exiting Building A of the IHY facility. She placed her belongings on the desk, except for the thermal bag which was slung overher shoulder. Security Officer Trinia Thompson asked her to place the thermal bag on the desk as well, and she complied.

12. Search policies are necessary at the facilities and have been in effect for years. Employees are notified that searches are possible at any time, and that no staff is exempt. There are signs to this effect posted on the outside of the buildings as well as in the interior of the buildings. R. Exs. 8-10.

13. The search was properly conducted, according to the West Virginia Division of Personnel Workplace Security policy. The policy pertains to:

> A worksite where work is performed. The workplace shall include facilities, property, buildings, offices, structures, automobiles, trucks, trailers, or other means of conveyance (private or public, while engaged in performance of duties), and parking areas, whether owned or leased by the agency or entity.

R. Ex. 7.

14. The policy also outlines the procedure for workplace searches, stating in pertinent part:

> As a public employer, each appointing authority may open and inspect public properties for a work related purpose; additionally, based on a reasonable, good faith, objective suspicion of public danger, appointing authorities may search not only an employee's work area, locker, or desk but also personal property which may include a briefcase, purse, lunch box, backpack, or car while on the employer's premises.

R. Ex. 7.

15. Officer Thompson discovered the sixteen-ounce can of Budweiser Lite beer in Grievant's lunch bag, and immediately reported the discovery to Officer Michael Goode. R. Exs. 12,

13. 16. Officer Thompson reported that when she informed Grievant that beer was not allowed in the facility, Grievant stated, “I took it across the hill to keep it cool, since it would be warm when I left, if I left it in the car.” R. Ex. 12.

17. Officer Goode reported Grievant stated she took the beer to her work area to keep it cold to have with her dinner in her hotel room as it would get hot sitting in her car all day. R. Ex. 13.

18. At no time before, during, or immediately after the search did Grievant object to the search, nor did she mention she had inadvertently taken the beer into the facilities, that she meant to leave the beer in her car, or was not aware of policy forbidding the possession of alcoholic beverages in

the facility.

19. After the search, Grievant left the facility and went to her hotel room. She did not attempt to contact her supervisor at the Detention Center, Marshall Berger. R. Ex. 11. R. Ex. 11.

20. Mr. Berger was notified of the incident at approximately 7:35 p.m. by Officer Thompson at IHY, and then by Johnny Richardson in the Central Office. R. Ex. 11.

21. Mr. Berger, both disturbed by the incident and surprised that Grievant had not called him, called Grievant's hotel room. Although Grievant had checked in, she did not answer, so Mr. Berger left a message for her to return the call. R. Ex. 11.

22. Over two hours later, Grievant returned Mr. Berger's call, and stated she knew it was her responsibility to report the incident, but had decided she would notify him the next day. R. Ex. 11. Mr. Berger instructed Grievant to file an incident report.

23. Grievant sent Mr. Berger an undated incident report specifically stating she knew “mostly by common sense” the “no tolerance policy of alcoholic beverages(contraband) within the boundaries of any Division of Juvenile Services facilities [sic].” R. Ex. 15.

24. In this report, Grievant suggested for the first time that she had the intent of removing the beer from her lunch bag before entering the facility, that she was unaware she carried the beer into the facility, and that she did not know alcoholic beverages were not supposed to be in the facility. R. Ex. 15.

25. Grievant gave a recorded statement to investigator Johnny Richardson, in which she admits that taking a beer into the facility was “not right, that's very common sense that you don't know, no matter where you work, not that its just the [IHY] or any type of juvenile detention center, no matter what your occupation is, you should not have an alcoholic beverage on your, in your work environment.” R. Ex. 14.

26. On April 16, 2002, Grievant was notified she was suspended for fifteen days based on misconduct in violation of DJS' Policy Directive 4.01, Section 7.00, parts Bll, C19, and C23.

27. An ensuing investigation found Grievant had knowingly disobeyed security- related instructions, had brought contraband on the juvenile facility, and once she had placed it in a refrigerator, did not report the presence of the contraband in the facility.

28. On May 6, 2002, Grievant met with Division Deputy Director Cynthia Largent to discuss the incident. Thereafter, Grievant was given a dismissal letter, charging her with violations of DJS' Policy

Directive 4.01, Section 7.00, parts B11, C19, and C23.

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 apreponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). However, in cases involving suspension or dismissal of classified-exempt at-will employees, state agencies do not have to meet this legal standard. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

Grievant raised several arguments with respect to the at-will issue for the first time in her post-hearing brief: 1) that DJS employees generally are not classified-exempt at-will employees; 2) that she, in particular, is not a classified-exempt at-will employee; and 3) that DJS has modified the at-will status of its employees by adopting Policy Directive 4.10.

This Grievance Board has consistently held that employees of DJS are classified- exempt employees, pursuant to the provisions of W. Va. Code § 49-5E-5a. See Hacker v. Div. of Juvenile Services, Docket No. 01-DJS-543 (Oct. 28, 2002); Bennett v. Div. of Juvenile Services, Docket No. 01-DJS-127 (Aug. 17, 2001). Classified exempt-employees are not covered by the civil service system and are at-will. See Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996); Ramos v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-363 (Jan. 29, 1999); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995). However, the West Virginia Supreme Court of Appeals has held that an employer may be liable for damages if an employee was discharged in contravention of some substantial public policy. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Thus, Grievant's claim that DJS employees in general are not classified-exempt at-will employees is rejected. Grievant also claims that DJS' adoption of Policy 4.10 served to modify the at-will status of its employees, comparing that policy to one adopted by the former Department of Public Safety discussed in Patterson v. Dept. of Public Safety, Docket No. 95-DPS-572 (May 28, 1996). In Patteson, the Department had not only adopted an internal policy setting forth rules of conduct, classes of offenses, and progressive discipline, it had submitted them for adoption as legislative

rules, specifically, 81 C.S.R. 10. The Grievance Board found that the codifying of that policy into a legislative rule served to modify the at- will status of the Public Safety employees. In this case, there is no evidence that DJS' Policy 4.01 has been submitted or codified through the legislative rule-making process, and thus, while DJS may choose to employ that Policy in dealing with misconduct and discipline, it does not alter the at-will status of its employees.

Grievant also claims that she, specifically, is not a classified-exempt at-will employee because she was not told when hired by DJS that her employment was classified-exempt. Prior to her employment at DJS, Grievant was employed in a classified position by the West Virginia Department of Health and Human Resources. Grievant alleges that a state employer should have an obligation to inform classified service employees that taking a certain job will cause them to be removed from the classified service, and to lose all of their job protections. In fact, this Grievance Board has found exactly that, in White v. W. Va. Division of Highways, Docket No. 97-DOH-444 (Mar. 11, 1998). However, despite Grievant's counsel's representations in his post-hearing brief, there is no testimony of record regarding what Grievant was told or not told upon her hiring at DJS with respect to her employment status, and no other testimony or documentary evidence was produced to substantiate her claim that she did not know what heremployment status would be at DJS. However, even were there some uncertainty on Grievant's part as to her employment status, the facts establish that she engaged in conduct warranting her dismissal from DJS.

Grievant was charged with violations of DJS Policy Directive 4.01, Section 7.00, parts B11, C19, and C23. Part B11 states:

> Reporting for duty while under the influence of intoxicants or other drugs; unauthorized possession of intoxicants or drugs on state owned or leased property or while in state vehicles.

Part C19 states:

> Refusal to obey security related instructions.

Party C23 states:

> Breach of facility security or failure to report any breach or possible breach of facility security.

Grievant was notified she was subject to the disciplinary actions outlined in DJS Policy Directive 4.01, Section 7.00, Offenses and Sanctions. Class B offenses include acts and behavior which are more severe in nature [than Class A offenses], and are such that a third Class B offense should normally warrant removal. Class B offenses disrupt the normal operation of the facility.

Class C offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal. These offenses may do direct harm to people, including the surrounding communities, such as aiding an escape. They do not include those offenses that are merely disruptive to the organization, they are severe and may get someone injured. DJS has proven that Grievant, with knowledge of the State Workplace Security Policy and DJS Directives, brought an unauthorized intoxicant, a sixteen-ounce can of beer, on to the maximum security IHY facility on April 15, 2002. Grievant admitted to knowing the policy against having any intoxicant on state-owned property. But even giving her the benefit of the doubt that she forgot about the beer when she entered the facility on the morning of April 15, 2002, she nevertheless failed to follow proper procedures when she discovered the beer at lunchtime. She chose to put the beer back into the refrigerator, and did not report the infraction to anyone at the facility. In essence, she hid the beer, and hoped she would be able to exit the facility without detection.

Unfortunately for Grievant, that day was chosen to conduct searches of staff exiting the IHY facility, and Grievant was caught with the beer. When Officer Thompson found the beer, Grievant attempted to make light of the situation by saying something to the effect that, at least the beer would be cold for her dinner tonight.

Grievant admits she committed the Class B11 offense of unauthorized possession of an intoxicant on state owned property, and points out that the penalty for a first Class B offense is a five (5) to fifteen (15) day suspension. It does not permit termination for the first Class B offense, but permits termination only after the third Class B offense.

However, Grievant denies committing the Class C19 and C23 offenses, which are the most serious charges, allowing for termination after a first occurrence. C19 speaks to refusal to obey security-related instructions, and C23 speaks to a breach of facility security or failure to report any breach or possible breach of facility security. Grievant contends bringing the beer into the juvenile facility in her thermal bag, and placing it in a refrigerator in the employees' lounge, does not

constitute a breach of security. Grievant maintains theresidents of the IHY did not have access to the employees' lounge, and there was no danger of any resident finding and taking the beer.

Grievant argues DJS has failed to produce any “security-related instructions” which Grievant, a social worker, would have had knowledge of, or a responsibility to abide by. However, Grievant herself admitted she was well aware that the Detention Center and IHY were secure facilities, and that she was subject to search at any time. Further, Grievant admitted that it was “common sense” that a person would not bring an intoxicant into a facility housing juvenile delinquents, most of whom came from homes where substance abuse was a problem, or who had substance abuse problems themselves.

The DJS Policy Directives, the Drug Free Workplace Policy and the Work Place Security Policy, all of which Grievant was aware, together constitute security-related instructions as they pertain to the Detention Center and the IHY. The security-related instruction in this case is clear: do not bring intoxicants onto the facility. As Grievant said, it is “common sense,” and Grievant's claim that she, as a social worker, was not subject to “security-related instructions” is specious and rejected.

Next, Grievant claims that bringing the beer onto the facility was not a breach of security. She compares bringing the beer in with bringing in a gun or a knife, and argues that “everything” cannot be a breach of security. Frankly, in a detention facility housing juvenile criminals and delinquents, the undersigned wonders why not. Grievant asked DJS' witnesses whether abuse of leave or excessive tardiness would rise to the level of a breach of security, and they answered in the affirmative, for the simple reason that if the facility is understaffed, it necessarily increases the risk that something could go awry in the day-to- day management of these youths. While Grievant's arguments are interesting, the undersigned has no problem finding that bringing an intoxicant into a juvenile facility is a security breach, as well as a violation of the West Virginia Drug-Free Work Place Policy. Grievant's plea is she meant no harm, she forgot she had the beer in her bag, and made a poor judgment call when she failed to report the beer after discovering it at lunchtime. She claims there was never any danger of any resident gaining access to the employees' lounge and the beer, and because she had no intention of bringing the beer into the facility, her dismissal should be reversed, and her punishment mitigated.

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to

the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employeris extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dept. of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

DJS has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgment for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997). Although reasonable people might differ over whether termination was an unduly harsh penalty given the circumstances in this case, the undersigned Administrative Law Judge is unable to conclude that DJS abused its substantial discretion in designating the penalty in question. The Drug-Free Work Place Policy, Work Place Security Policy, and DJS' Policy Directive 4.01, taken in conjunction, create a zero-tolerance policy for drugs or alcohol in the work place. As a resident home for juveniles in the criminal system, DJS in general, and the IHY in particular, must have complete trust in the individuals charged with the care and welfare of these residents. Grievant brought an intoxicant onto a juvenile detention facility, and this is "misconduct of a substantial nature directly affecting the rights and interest of the public." Oakes, supra.

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

CONCLUSIONS OF LAW

1. Employees of the Division of Juvenile Services are classified-exempt employees. W. Va. Code § 49-5E-5a; Hacker v. Div. of Juvenile Services, Docket No. 01- DJS-543 (Oct. 28, 2002); Bennett v. Div. of Juvenile Services, Docket No. 01-DJS-127 (Aug. 17, 2001).

2. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).

3. At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995).

4. At at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

5. Grievant has not alleged her dismissal contravened any substantial public policy.

6. DJS has proven by a preponderance of the evidence that Grievant brought an intoxicant into the IHY in violation of DJS Policy Directive 4.01, the West Virginia Drug- Free Work Place Policy, and the West Virginia Work Place Security Policy.

7. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of theemployee's conduct and the prospects for rehabilitation." Overbee v. Dept. of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

8. Grievant has failed to prove DJS abused its discretion, or that its decision to terminate her employment was arbitrary and capricious.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: November 12, 2002

Footnote: 1

DJS' counsel moved to strike Grievant's Brief on the ground that it was filed past the stated deadline, specifically October 11, 2002. The Grievance Board file shows Grievant's Brief was mailed on October 9, 2002, and received in this office on October 10, 2002. Therefore, DJS' motion is denied.