SHANE WILEY,

Grievant,

v. **Docket No. 05-CORR-423**

WEST VIRGINIA DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant, Shane Wiley, filed a grievance on October 11, 2005, following a five day suspension for consuming alcohol while attending the West Virginia Corrections Academy ("Academy"). He claims he consumed alcohol while "in civilian attire, off the clock and away from state property." He also claims the punishment was disproportionate to the offense, and Respondent did not follow progressive discipline. Grievant's relief requested is to have the incident expunged from his record and be reimbursed for time lost as a result of the suspension. The grievance was denied at all lower levels. A Level IV hearing was held on February 27, 2006, in the Grievance Board's Charleston office. (See footnote 1) Grievant appeared *pro se*, and Respondent was represented by Charles Houdyschell, Jr., SeniorAssistant Attorney General. The grievance became mature on March 15, 2006, the due date for filing proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Argument

Grievant argues he was not on state property and was not on duty at the time he consumed the alcoholic beverage. He asserts in his statement of grievance that if he had not been forced to return to the Academy until check-in at 10:50 p.m., no alcohol would have been in his system. At the Level IV hearing, he argued drinking alcohol does not mean it is in his system. Grievant argues there was no specific blood alcohol level established. (See footnote 3)

Grievant also argues the discipline applied in this case was disproportionate to the offense, and Respondent should have utilized progressive discipline as set forth in Policy Directive 129.00. He also cites to Staff Notice 144.00 which encourages progressive discipline.

Respondent contends Grievant violated the rules of the Academy. Staff Notice 0013 states there is to be no possession or consumption of alcoholic beverages or any other drug from check-in on Monday at noon until weekend dismissal, Friday at noon. Respondent asserts this directive was received by Grievant, and Grievant knew and understood the rule. Respondent also argues Grievant had not been dismissed for the weekend and therefore was prohibited from drinking alcoholic beverages. In addition, theDivision of Corrections Policy 137.00 prohibits the consumption of alcohol while employees are assigned to the Academy.

Respondent asserts suspension is the appropriate disciplinary action. The Academy left the appropriate discipline to the discretion of Mt. Olive Correctional Complex ("MOCC"), and a week's suspension is the typical disciplinary action taken by that institution when an employee has been drinking while working or prior to coming on to his/her shift.

Based on a preponderance of the evidence adduced at Level IV, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed as a Corrections Officer ("CO") at MOCC.

2. On August 17,2005, he was attending the Academy located on the campus of the West Virginia University Institute of Technology in Montgomery, West Virginia. This academy is operated by the West Virginia Division of Corrections, a state agency.

3. On August 17, 2005, a vehicle in which Grievant was a passenger was seen squealing tires, and as a result, was stopped by campus security.

4. At the traffic stop, Sgt. Tim Moses of the campus security smelled alcohol, but did not smell it from one specific person.

5. The three officers who were in the car were taken to the Academy by Sgt. Moses, and while there a portable breath test was offered to each one. Grievant refused, but did admit to drinking an alcoholic beverage with his meal.

6. Corrections Academy Staff Notice 0013 prohibits the consumption of alcoholic beverages from check in at noon on Monday until check out at noon on Friday. 7. Grievant received a copy of Staff Notice 0013 when he entered the Academy. On July 11, 2005, he signed acknowledging he had received the rules and agreed to abide by them.

8. Division of Corrections Policy 137.00 prohibits the consumption of alcohol while employees

are assigned to the Academy.

9. After the incident, Grievant and the other two officers were removed from the Academy and sent back to their facilities, as is the usual practice in this situation. Because they had completed most of the program, they were allowed to come back, test and graduate.

10. Discipline was left to the facility where the individuals were stationed.

11. Grievant was suspended 40 hours, as is the normal discipline at MOCC when an employee has consumed alcohol and come to work. (See footnote 4)

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. Dep't 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. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.* Grievant admitted to Sgt. Moses that he drank an alcoholic beverage on August 17, 2005. This is a violation of the Staff Notice 0013, which clearly states officers enrolled in the Academy cannot partake of alcoholic beverages from the time they check-in on Monday at noon until check-out, Friday at noon. It has also been shown that Grievant was aware of that rule and agreed to abide by it on July 11, 2005, when he signed the acknowledgment form.

Division of Corrections Policy Directive 137.00 also prohibits consumption of alcoholic beverages by those officers attending the Academy. It states:

Violation of this Policy Directive will lead to appropriate personnel actions. Disciplinary action may range from a reprimand to dismissal, and employees may be required to participate in a Substance Abuse Rehabilitation Program or an assistance program.

In instances such as this where an employee has come to work after drinking alcohol, MOCC has consistently proceeded in the same manner.

It is irrelevant that there is no specific blood alcohol level. The rules prohibit ingesting alcoholic beverages while attending the Academy. It is clear Grievant knew and understood that policy.

Grievant argues the punishment was disproportionate to the offense. “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects

for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999);*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). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

It is clear from the various policies that Respondent could suspend Grievant for the violation. Specifically, Division of Corrections Policy 137.00 states, in an instance such as this, disciplinary action can range from reprimand to dismissal. A one week suspension is typical at MOCC when an employee has been drinking. Grievant has failed to meet his burden. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. Dep't 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. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.* 2. Staff Notice 0013 prohibits the ingestion of alcoholic beverages from check- in, Monday at noon until check-out, Friday at noon. In addition, Division of Corrections Policy 137.00 also prohibits drinking while at the Academy, and specifies that disciplinary action ranging from reprimand to dismissal maybe taken when the policy is violated.

3. Grievant violated the policies prohibiting drinking while at the Academy.

4. Considerable deference is afforded the employer's assessment of the seriousness of the

employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *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).

5. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94- 01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. Grievant failed to meet his burden of proof.

Accordingly, this grievance is **DENIED**. Any party 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 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.

DATE: April 17, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

This case was originally assigned to ALJ Reynolds, but due to administrative reasons, the case was transferred to the undersigned who conducted the Level IV hearing and reviewed the lower level record.

Footnote: 2

Respondent submitted proposed findings of fact and conclusions of law, but none were received from Grievant.

Footnote: 3

Campus security procured a portable breath test machine and offered it to Grievant, but he refused to submit to such test.

Footnote: 4

The original suspension was for 50 hours but was revised to 40 hours.