THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STEPHEN HILL,
Grievant,

v. **DOCKET NO. 2010-0113-MAPS**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Stephen Hill, on July 31, 2009, after he was suspended for three days without pay. His statement of grievance reads, "[g]rieving my three day suspension." The relief sought by Grievant is "[r]ecord cleared and to make whole."

A level three hearing was held before the undersigned Administrative Law Judge on November 16, 2009, in Elkins, West Virginia. Grievant was represented by Todd Scheller, and Respondent was represented by Charles P. Houdyschell, Jr., Senior Assistant Attorney General. This matter became mature for decision on December 16, 2009, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for three days without pay for refusing to work mandatory overtime on June 24, 2009. Grievant did not dispute the charges, but argued he should have been excused from being required to work overtime on this date because he was too

tired to work past his shift, and it would have been dangerous for him to work a second shift. Respondent's policies on mandatory overtime advise the employee that he is subject to being required to work overtime to cover staff shortages, and do not excuse the employee from mandatory overtime when he is tired. Grievant did not demonstrate that he should not have been punished for refusing to work overtime. Grievant's argument that he was denied a witness at the predetermination meeting was not proven, as he did not ask to have a witness present.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant is employed by the Division of Corrections ("DOC"), at Huttonsville Correctional Center ("HCC"), as a Correctional Officer II. He has been an employee of HCC since October 16, 1988.

2. HCC houses maximum security prisoners, and minimum security prisoners. It is essential that the facility be properly staffed at all times.

3. HCC has an Institutional Operational Procedure in place which addresses mandatory overtime, Number 1.29-2. Employees of HCC are aware that they are subject to being required to work mandatory overtime in order to assure that the facility is properly staffed, and that they are subject to discipline for refusing to work mandatory overtime.

4. When HCC needs to fill shift vacancies, it first asks for volunteers. If all vacancies are not filled through volunteers, the shift commander goes down the list of employees who have reported to work and fills the vacancies for the next shift. This is

referred to as the “freeze list,” as employees who must stay and work a second shift are said to be “frozen over.”

5. On June 24, 2009, Grievant reported to work on his regular shift. He was next on the list to work mandatory overtime, and HCC needed to fill vacancies on the following shift. When he was told he would be required to work another shift, Grievant refused, stating he did not feel good, and was too tired to work. Grievant did not work a second shift on June 24, 2009.

6. Grievant had taken sick leave on June 23, 2009.

7. Grievant had been frozen over to work a second shift on June 22, 2009, and worked 16 hours that day.

8. Grievant was suspended for three days without pay for refusing to work mandatory overtime on June 24, 2009, which is the usual penalty imposed by HCC for this offense.

9. As an incentive for its employees, HCC employees earn a “freeze pass” when they do not use any sick leave during the previous month, or if they volunteer to work on a scheduled day off. This pass may be used to decline to work mandatory overtime one time.

10. Grievant did not have a freeze pass on June 24, 2009.

11. Grievant’s supervisor, Captain Michael Currence, met with Grievant on June 25, 2009, to discuss the consequences of his refusal to work mandatory overtime. Also present was HCC employee Lieutenant Thomas Harlan. Grievant asked why Lieutenant Harlan was present and was told it was customary to have two officers present, and he was there as a witness. Grievant asked where his witness was, and was told to go on in the

room. Grievant did not ask that he have a witness or a representative present, and Respondent did not deny him any right of representation.

12. Grievant responded in writing at the predetermination meeting stating, “I did refuse. Once a week is too much and then you want to further wear the employees out that do show up for work, by working them to death. I do good to be able to work an 8 hour shift and then I’m penalized because the institution can’t keep enough employees to cover the posts. I wish I was 20 years old again.”

13. Grievant had previously been suspended for three days without pay on October 10, 2005, for failure to follow his supervisor’s instructions.

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. *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 and 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 received a three day suspension for refusing to work mandatory overtime on June 24, 2009. Institutional Operational Procedure Number 1.29-2, entitled Mandatory Overtime for Correctional Officers, states that when a staffing shortage occurs, and “adequate staffing by reassignment is not possible or feasible,” it may be necessary for

Correctional Officers to “work in excess of their regularly scheduled shift.” This Operational Procedure states at VI(A)(4): “[r]efusal to accept reassignment or to work in excess of a scheduled shift as directed will be grounds for disciplinary action in accordance with Policy directive 129.00.” A three day suspension is the usual discipline imposed by HCC for refusal to work mandatory overtime.

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). Refusal to work mandatory overtime, when directed to do so,

constitutes insubordination. *Arbogast v. Div. of Corrections*, Docket No. 2008-1758-CONS (Jan. 30, 2009). Respondent met its burden of proof in this case.

Grievant argued he should not have been punished because a Correctional Officer is taught not to work if he is too tired to do so, as he would be putting himself and everyone around him at risk. While Grievant also pointed to the fact that he had been ill the previous day, he did not mention this in his written statement given at the predetermination meeting, nor did he tell his supervisor that he was sick and needed to go home. Respondent argued Grievant knew he was subject to being required to work mandatory overtime, and it was his responsibility to see that he received sufficient rest.

"The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "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 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 shall not substitute her judgement 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)." *Meadows, supra.*

Grievant did not demonstrate that he should have been excused from working mandatory overtime, without penalty, because he felt he was too tired. Grievant pointed to a document from the West Virginia Corrections Academy which lists Ten Fatal Errors, arguing that it was a fatal error to work when he was too tired. However, the error pointed to by Grievant is labeled, "NOT ENOUGH REST." As Respondent pointed out, it is up to the employee to assure that he gets enough rest to be able to do his job. While one might sympathize with Grievant's situation, Grievant was aware of the mandatory overtime requirements, and HCC has an obligation to properly staff the facility. Respondent did not abuse its discretion.

Grievant also argued he was denied the right to a witness at the predetermination meeting, which is a right of union members, citing *National Labor Relations Board v. J. Weingarten, Inc.,* 420 U.S. 251 (1975) and *Knight v. Department of Health and Human Resources*, Docket No. 2008-0981-DHHR (August 6, 2009). Grievant's reliance on *Weingarten* is misplaced. As was stated in the cited *Knight* decision, "[t]he Weingarten

Doctrine is not applicable to West Virginia state employees. *Swiger v. Civil Serv. Comm'r*, 179 W. Va. 133, 365 S.E.2d 797 (1988)." However, that decision did go on to state that, "W. VA. CODE § 6C-2-3(g)[, the] statute addressing representation, and [sic] states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

This new Code Section gives employees the right to representation during pre-disciplinary conferences." *Knight, supra.*

In order to be denied a right, however, one must invoke the right. The evidence does not establish that Grievant did, in fact, request a witness, and he clearly did not "designate a representative." Grievant made a passing remark as he was going into the predetermination meeting. This does not amount to a request for a witness, and it clearly does not amount to a request for a representative. Grievant was not denied the right to representation.

Finally, Grievant pointed out that Grievant's start date was completely wrong on the suspension letter. Deborah Phillips, HCC's Human Resources Director, testified that she drafts suspension letters from a form letter, and the mistake in the start date was a typographical error which she did not catch. This error in the suspension letter is of no significance. The letter clearly states the facts leading to the suspension, and the time period for the suspension, and that is what is required.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. Refusal to work mandatory overtime, when directed to do so, constitutes insubordination. *Arbogast v. Div. of Corrections*, Docket No. 2008-1758-CONS (Jan. 30, 2009).

4. Respondent demonstrated that Grievant was insubordinate.

5. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No.

95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "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 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).

6. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement 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)." *Meadows, supra.*

7. Grievant did not demonstrate that Respondent violated its substantial discretion in determining that the customary penalty of a three day suspension should be applied in these circumstances.

8. "The Weingarten Doctrine is not applicable to West Virginia state employees. *Swiger v. Civil Serv. Comm'r*, 179 W. Va. 133, 365 S.E.2d 797 (1988)." *Knight v. Department of Health and Human Resources*, Docket No. 2008-0981-DHHR (August 6, 2009).

9. "W. VA. CODE § 6C-2-3(g)[, the] statute addressing representation, and [sic] states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with

the employee for the purpose of discussing or considering disciplinary action. This new Code Section gives employees the right to representation during pre-disciplinary conferences." *Knight, supra.*

10. Grievant was not denied the right to representation.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: January 6, 2010