WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES J. LUCAS,
Grievant,

v. **Docket No. 2011-0163-MAPS**

DIVISION OF JUVENILE SERVICES/
ROBERT SHELL JUVENILE CENTER,
Respondent.

DECISION

This grievance was filed by Grievant, James J. Lucas, on August 12, 2010, against Respondent, Division of Juvenile Services. Grievant challenges his suspension without pay for allegedly saying "shit" in front of a resident of the Respondent facility. As relief, Grievant seeks back pay for his loss of income during the suspension and/or a downgrade of suspension to a written warning.

Because this grievance was contesting a suspension without pay, Grievant was able to waive levels one and two and proceed directly to level three of the grievance procedure.[1] A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on May 2, 2011. Grievant was represented by B. Luke Styer, Esq., and Respondent was represented by Steven R. Compton, Senior Assistant Attorney General. This matter became mature for decision on June 7, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

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[1]W.VA. CODE § 6C-2-4(a)(4)

Synopsis

Grievant was suspended from work without pay for allegedly saying "shit" in front of a resident of the Respondent facility. Respondent alleges that Grievant was overheard using profane language while talking on the phone loudly in the counselor's office with the door open. Respondent argues that Grievant told a resident that he was "not in the mood for his shit." Grievant asserts that Respondent failed to meet its burden of proof to justify a disciplinary action. Respondent did not prove by a preponderance of the evidence that Grievant used profane language in front of a resident of the Respondent facility. Consequently, the grievance is granted.

Findings of Fact

1. Grievant is employed as a Youth Specialist II for Respondent.

2 On July 14, 2010, Grievant used the phone in the Counselor's office to speak with an attorney.

3. Candace Duffer, Youth Specialist I for Respondent, submitted an incident report claiming she heard Grievant on the phone in the Counselor's office on July 14, 2010, tell A.M.[2], a resident of the Respondent facility that had approached Grievant while on the phone, "I'm not in the mood for your shit."

4. A pre-determination hearing was held on July 16, 2010, by Cpl. Juan McCabe and Case Manager Kevin Richardson, both employees for Respondent, and Grievant. The pre-determination hearing was regarding the alleged incident of Grievant using profanity in front of a resident.

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[2]To protect the identity of the juvenile resident, the undersigned will refer to him in this decision by his initials, A.M.

5. The West Virginia Division of Juvenile Service's Policy No. 138.00 subsection 2.d. lists instances of disrespectful conduct or the use of insulting, abusive or obscene language to or about others, as an activity warranting discipline.

6. Grievant was notified by letter[3] dated August 9, 2010, that following the pre-determination hearing, he was found in violation of West Virginia Division of Juvenile Service's Policy 138.00 for allegedly using profanity in front of a resident of the Respondent facility.

7. Grievant was suspended without pay on August 18 and 19, 2010, for 10 hour shifts each day, and on August 20, 2010, for four hours.

8. Candace Duffer testified at the level three hearing that she could not remember now if Grievant had used profanity on July 14, 2010.

9. Jana Calhoun, Counselor for Respondent, testified to hearing Grievant talk loudly on the phone on July 14, 2010, but she could not remember exactly what Grievant said.

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-

[3]Respondent's Exhibit No. 1.

HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant was suspended without pay for allegedly using profane language in front of a resident. At the level three hearing, Respondent presented an incident report filed by Candace Duffer, Youth Specialist I for Respondent, on July 14, 2010. In the Incident Report, Ms. Duffer claimed she heard Grievant tell resident A.M, "I'm not in the mood for your shit." Grievant allegedly said this to A.M. when A.M. approached Grievant in the Counselor's office while Grievant was on the phone with an attorney. However, Ms. Duffer testified at the level three hearing that she could not remember exactly what Grievant had said on July 14, 2010. After reviewing the Incident Report during the level three hearing[4], Ms. Duffer stated that the Incident Report was probably more accurate than her memory now as to what she heard because she filed the report right after the incident. Ms. Duffer testified that she does not remember now if Grievant used profanity.

Jana Calhoun, Counselor for Respondent, testified at the level three hearing that she heard Grievant speak in a loud and angry tone on the phone on July 14, 2010. Ms. Calhoun testified that she heard Grievant use profanity but that she could not recall exactly what Grievant said.

Respondent argues that Grievant "basically" admitted to using profane language in front of a resident when he wrote on his grievance form under relief sought, that "saying the word 'shit' hardly warrants a $300 dollar penalty in the workplace setting." Grievant's August 12, 2010, grievance form states in the statement of grievance that he was

[4]Because Ms. Duffer testified via telephone, Respondent's counsel read the Incident Report to her.

"accused" of using profane language. During the pre-determination hearing on July 16, 2010, Grievant stated that he did not recall cussing on July 14, 2010, and that he did not think he would cuss while on the phone with an attorney.[5] Grievant testified at the level three hearing that he did not recall cussing. A.M., the resident who allegedly heard Grievant use the profane language, was not called as a witness; therefore, there is no evidence as to what A.M. heard Grievant say.

Respondent carries the burden of proving the reason for the discipline by a preponderance of the evidence. In light of all the evidence, the undersigned is not convinced that the grievance form statement of relief sought, which asserts that the penalty of suspension without pay is too harsh for saying the word "shit", is an admission to saying the word "shit". Furthermore, the witness testimony was insufficient to prove that Grievant used profane language in front of A.M., a resident of the Respondent facility. Accordingly, this grievance is GRANTED.

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

[5] *See* Respondent's Exhibits No. 1 and 3.

has not met its burden. *Id.*

2. Respondent did not prove by a preponderance of the evidence that Grievant used profane language in front of a resident of the Respondent facility.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to remove the August 18, 19 and 20, 2010, suspension from Grievant's personnel file, to pay him for the days he was suspended without pay[6], and to restore any benefits he lost as a result of this suspension.

Any party 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: June 22, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge

[6]Two 10 hour shifts and one 4 hour shift.