WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK DILLON,
Grievant,

v. **Docket No. 2011-0205-MAPS**

DIVISION OF CORRECTIONS/
MT. OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

This grievance was filed by Grievant, Mark Dillon, on August 23, 2010, against his employer, the West Virginia Division of Corrections/Mount Olive Correctional Complex ("Respondent"). Grievant challenges his dismissal from employment effective August 18, 2010 for unsatisfactory work performance. As relief, Grievant seeks "Immediate reinstatement to full duty. Full compensation for all work missed due to dismissal. Record expunged of this incident with no future mention or reference, due to fear of retribution."

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W.VA. CODE § 6C-2-4(a)(4). A level three hearing was held on November 4, 2010 at the Grievance Board's Charleston office. Grievant was represented by Jack Ferrell, Communications Workers of America Local 2055, and Respondent was represented by John H. Boothroyd, Esq., Assistant Attorney General. This matter became mature for decision on December 15, 2010, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant for unsatisfactory work performance, specifically, due to repeated deviations from his established work schedule without prior written approval from his supervisor during a two-month improvement period. Grievant asserts that the penalty imposed was excessive and that Grievant's work performance is excellent. Respondent has met its burden of proof in this matter. This grievance is DENIED.

Findings of Fact

1. Grievant was employed by Respondent from November of 1994 to August of 2010.

2. Grievant has held the position of Correctional Officer I, Correctional Officer II, and, as of October 1999, Correctional Counselor I.

3. Respondent is a maximum security prison for the State of West Virginia. For the safety of the staff and inmates, the facility must be adequately staffed at all times.

4. Throughout Grievant's employment with Respondent, he has had problems with work attendance and tardiness resulting in several written reprimands[1], suspensions and improvement periods.

5. On July 19, 1998, Grievant received a written reprimand due to his failure to answer at "roll call" for his shift.

6. On February 9, 2001, Grievant received a written reprimand for violation of *State of West Virginia Division of Corrections Policy Directive 129.00*[2]*, Section V, J.2.*

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[1]Respondent's Exhibit No. 7. (Written Reprimands for Grievant)

[2]Respondent's Exhibit No. 11. (Disciplinary Policy 129.00)

Unsatisfactory attendance, excessive tardiness or failure to follow established procedures for reporting off work. Specifically, the written reprimand was for routine excessive tardiness after Grievant had been given a verbal reprimand for unsatisfactory attendance.

7. On March 20, 2001, Grievant was suspended for three days for violation of *State of West Virginia Division of Corrections Policy Directive 129.00, Section V, J.2. Unsatisfactory attendance, excessive tardiness or failure to follow established procedures for reporting off work*. Specifically, the suspension was for arriving three and a half hours late for work on February 21, 2001, twelve days after he had received the February 9, 2001 written reprimand.

8. On July 15, 2003, Grievant received a written reprimand for violations of *State of West Virginia Division of Corrections Policy Directive 129.00, Section V, J.2. Unsatisfactory attendance, excessive tardiness or failure to follow established procedures for reporting off work*; *Section V, J.19 Failure to report to work as scheduled without proper notification*; and, Respondent's *Operational Procedure #1.21*[3] *governing Attendance and Authorized Leave*. Specifically, Grievant did not follow established procedures for taking sick and annual leave and for deviating from his established work schedule.

9. The July 15, 2003 letter of reprimand stated, "if you continue this unacceptable behavior, more stringent disciplinary action, up to and including dismissal will result"[4].

10. On July 24, 2004, Grievant was suspended for three days for violations of

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[3]Respondent's Exhibit No. 3. (Operational Procedure # 1.21)

[4]*See* Respondent's Exhibit No. 7. (Written Reprimands for Grievant)

State of West Virginia Division of Corrections Policy Directive 129.00, Section V, J.2. Unsatisfactory attendance, *excessive tardiness or failure to follow established procedures for reporting off work* and *Section V, J.19. Failure to report to work as scheduled without proper notification*. The suspension letter noted that Grievant had recently been placed on a two month improvement period on January 22, 2004 due to his attendance problems.

11. The July 24, 2004 letter of suspension from Acting Warden Michael V. Coleman stated:

> I am directing you to have a physician's statement for each absence you have. Pursuant to the Division of Personnel Administrative Rule, section 14.5, I am hereby directing you that your continued violation of attendance and use of time renders your service unpredictable. *Effective upon the issuance date of this notice, I am directing that you shall be required to provide the Payroll Supervisor, Mr. Hamlin and the Shift Commander with written substantiation from a licensed physician or practitioner for all absences regardless of the number of days involved.* This will continue until such a time that your presence can be counted upon for departmental scheduling. Failure to provide appropriate substantiation of all absences may be reason for disciplinary action, including dismissal from employment. (Emphasis in the original letter)

12. On October 24, 2005, Grievant was suspended for five days for violations of *State of West Virginia Division of Corrections Policy Directive 129.00, Section V, J.2. Unsatisfactory attendance, excessive tardiness or failure to follow established procedures for reporting off work* and *Section V, J.19. Failure to report to work as scheduled without proper notification*. Specifically, Grievant had failed to provide a physician's statement when taking sick leave, as required following the July 24, 2004 suspension letter.

13. In March of 2008, Grievant informed Jane West, Human Resources Manager, that he suffers from the medical condition of sleep apnea and that was often the reason for

his tardiness. Grievant supplied Ms. West with documentation[5] from a physician verifying Grievant's diagnosis of sleep apnea.

14. Sleep apnea is a potentially serious sleep disorder in which breathing repeatedly stops and starts. One of the possible symptoms of sleep apnea, according to the Mayo Foundation for Medical Education and Research ("Mayo Clinic"), is excessive daytime sleepiness, also known as hypersomnia.[6]

15. Grievant typically works from 8:00 a.m. to 4:00 p.m. or from 7:00 a.m. to 3:00 p.m., with one late shift per week. A late shift is from 12:00 p.m. to 8:00 p.m.

16. Ms. West suggested that regularly working a 12:00 p.m. to 8:00 p.m. late shift might be more accommodating to Grievant due to his sleep apnea. However, Grievant declined because he did not want to work strictly from 12:00 p.m. to 8:00 p.m.

17. On April 8, 2009, Grievant was suspended for ten days for violations of *State of West Virginia Division of Corrections Policy Directive 129.00, Section V, J.1. Failure to comply with Policy Directives*, *Operational Procedures, or Post Orders*; *Section V, J.2. Unsatisfactory attendance, excessive tardiness or failure to follow established procedures for reporting off work*; *Section V, J.19. Failure to report to work as scheduled without proper notification*; and, Respondent's *Operational Procedure #1.21 governing Attendance and Authorized Leave*.

18. The April 8, 2009 suspension letter stated, "In following 129.00-Progressive

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[5]Grievant's Exhibit No. 2. (Patient medical records) Grievant's Exhibit No. 2 contains personal medical information which renders the exhibit Confidential and requires that it be kept in the hearing file under seal.

[6]Respondent's Exhibit No. 12. (Mayo Clinic definition of sleep apnea)

Discipline, future disciplin[e] will result in further disciplinary action to include dismissal from the Mount Olive Correctional Complex."

19. In May of 2009, Grievant met with Jason Collins, Associate Warden of Programs, Ms. West and William Kincaid, Grievant's unit manager. Grievant was informed that he was being given a "clean slate" at that time, however, any future disciplinary action taken would result in his dismissal from employment[7].

20. Grievant's attendance improved for several months. However, a review of time clock records from January 1, 2010 through March 22, 2010 revealed that Grievant had been tardy for work on numerous occasions[8]. As a result, Grievant was placed on a sixty-day improvement period from April 6, 2010 through June 5, 2010. The terms of the improvement period were "[d]uring this 60 day period, you are not to deviate from the approved work schedule, without prior permission from your supervisor."[9]

21. Respondent asserts that during the improvement period, Grievant deviated from his established schedule without prior written approval. Instances included:

- On April 20, 2010, Grievant was scheduled to work from 8:00 a.m. to 4:00 p.m., and worked from 8:30 a.m. to 4:00 p.m.

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[7]*See* Respondent's Exhibit No. 9. (Memo from Ms. Jane West dated May 11, 2009, regarding Grievant's unauthorized leave.)

[8]Respondent asserts that Grievant was late to work during the period of review, twenty-two times. *See* Respondent's Exhibit No. 2. (Grievant's EPA with attached time clock records from 1/04/2010 to 3/22/2010.) Grievant argues he was only tardy five times during the review period. Regardless of whether Grievant was in fact tardy five times or twenty-two times, a single occurrence following the May 2009 meeting would have justified further disciplinary action.

[9]Respondent's Exhibit No. 2. (Grievant's EPA with attached time clock records from 1/04/2010 to 3/22/2010.)

- On April 25, 2010, Grievant was scheduled to work from 7:00 a.m. to 3:00 p.m., and worked from 8:00 a.m. to 4:00 p.m.
- On June 24, 2010, Grievant was scheduled to work from 8:00 a.m. to 4:00 p.m., and worked from 10:30 a.m. to 4:00 p.m.
- On June 26, 2010, Grievant was scheduled to work from 7:00 a.m. to 3:00 p.m., and worked from 9:00 a.m. to 7:30 p.m.
- On June 27, 2010, Grievant was scheduled to work from 7:00 a.m. to 3:00 p.m., and worked from 9:00 a.m. to 6:00 p.m.
- On June 28, 2010, Grievant was scheduled to work from 8:00 a.m. to 4:00 p.m., and worked from 1:30 p.m. to 8:00 p.m.

22. Respondent asserts that during the improvement period, Grievant arrived late to work or left early in conjunction with sick or annual leave without prior written approval. Instances included:

- Grievant was scheduled to work on May 20, 2010 from 8:00 a.m. to 4:00 p.m. On May 18, 2010, Grievant received written approval to take annual leave from 1:00 p.m. to 4:00 p.m. on May 20, 2010. On May 20, 2010, Grievant worked from 8:00 a.m. to 12:00 p.m. The prior approved annual leave did not cover Grievant's absence from work from 12:00 p.m. to 1:00 p.m.
- Grievant was scheduled to work on May 28, 2010 from 8:00 a.m. to 4:00 p.m. Grievant did not work that day. On June 1, 2010, Grievant applied for sick leave to be applied to May 28, 2010 from 8:00 a.m. to 2:00 p.m. Grievant provided a physician's statement with his application for sick leave. The sick leave was approved. However, the approved sick leave did not cover

Grievant's absence from work from 2:00 p.m. to 4:00 p.m. on May 28, 2010.

- Grievant was scheduled to work on June 2, 2010 from 8:00 a.m. to 4:00 p.m. On June 1, 2010, Grievant received written approval to take sick leave from 8:00 a.m. to 2:00 p.m. on June 2, 2010. Grievant did not work on June 2, 2010. The prior approved sick leave did not cover Grievant's absence from work from 2:00 p.m. to 4:00 p.m.

23. On August 3, 2010, a predetermination meeting was held with Grievant. At the meeting, Warden David Ballard reviewed Grievant's work schedule and time clock records, and discussed Grievants deviation from his assigned schedule during his improvement period. Grievant asserted that he was only late five times without an excuse.[10] Grievant pointed out that he suffers from sleep apnea and had given documentation to Human Resources. Grievant stated that he is a good employee.

24. Grievant was terminated by letter dated August 3, 2010. The letter cited Grievant's history of unsatisfactory attendance, excessive tardiness, failure to follow established procedures for reporting off work, and deviation from work schedule as grounds for termination.

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-

[10]Grievant's assertion that he was only late five times during the improvement period relies heavily upon a 15 minute grace period for tardiness. Grievant did not provide justification for the occasions when he arrived late to work or left early in conjunction with sick or annual leave without prior written approval.

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.*

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W.Va. Dep't of Finance & Admin.*, 164 W.Va. 384, 264 S.E. 2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W.Va. 461, 141 S.E.2d 364 (1965). The issue is whether Grievant's termination was appropriate and for good cause or was excessive. For the majority of 16 years, Grievant was routinely tardy, failed to follow established procedures for reporting off work, and deviated from his work schedule.

Grievant did provide Respondent's Human Resources with a physician's statement diagnosing him with sleep apnea. Sleep apnea is a potentially serious sleep disorder in which breathing repeatedly stops and starts. One of the possible symptoms of sleep apnea, according to the Mayo Foundation for Medical Education and Research ("Mayo Clinic"), is excessive daytime sleepiness, also known as hypersomnia. Grievant testified that he has trouble sleeping and waking up in the mornings due to his sleep apnea. Upon learning that Grievant suffers from sleep apnea, Respondent suggested a fixed work schedule where Grievant could work later in the day, from 12:00 p.m. to 8:00 p.m. Grievant, however,

declined.[11] Testimony was provided at the level three hearing that Grievant was a good employee, when he was present. Respondent is a maximum security prison for the State of West Virginia. For the safety of the staff and inmates, the facility must be adequately staffed at all times.

Under Respondent's *Operational Procedure #1.21 (Attendance and Authorized Leave), Section V, K*, "[e]xcessive absenteeism will be grounds for disciplinary action up to and including dismissal." The operational rule also states that chronic tardiness is unacceptable and that continued chronic tardiness is grounds for discipline. The *State of West Virginia Division of Corrections Policy Directive 129.00, Section V, G4*, states that dismissal "[m]ay be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction."

Grievant's attendance was not reliable. Respondent believes ample opportunity for correction was given, over the course of sixteen years. Respondent also believes consideration was given to Grievant's sleep apnea related possible side effects by suggesting a work schedule from 12:00 p.m. to 8:00 p.m. Respondent has met its burden of proof regarding Grievant's routine tardiness, failure to follow established procedures for reporting off work, and deviation from his work schedule.

Grievant asserts that termination was an excessive disciplinary action given that there is no dispute that Grievant's work performance was good. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise

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[11]Grievant testified that in March 2008 he asked to be allowed to work strictly from 10:00 a.m. to 6:00 p.m. Respondent does not offer a permanent shift from 10:00 a.m. to 6:00 p.m. Respondent stated a shift from 10:00 a.m. to 6:00 p.m. would leave the facility inadequately staffed from 6:00 p.m. to 8:00 p.m.

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). 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 Resources/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 judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (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).

Grievant’s work performance was good, however, it was only good when he was present. "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 22, 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). Grievant has been excessively tardy, routinely absent, and regularly amiss from his work schedule over the course of sixteen years. For the reasons set out above, termination was not an excessive penalty given the length of time Grievant's conduct was routinely committed and the amount of opportunities provided to Grievant for correction. Grievant has failed to meet his burden of proving the termination was excessive.

Respondent has met its burden in this matter, and Grievant has failed to prove any grounds for mitigation of penalty. Therefore, this grievance is DENIED.

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. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W.Va. Dep't of Finance & Admin.*, 164 W.Va. 384, 264 S.E. 2d 151 (1980); *Guine v. Civil Serv.*

Comm'n, 149 W.Va. 461, 141 S.E.2d 364 (1965).

3. Respondent has met its burden of proof regarding Grievant's routine tardiness, failure to follow established procedures for reporting off work, and deviation from his work schedule.

4. 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). 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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (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).

6. "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 22, 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)

7. Grievant has failed to meet his burden of proving the termination was excessive.

Accordingly, this grievance must be DENIED.

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: JANUARY 25, 2011

Jennifer Lea Stollings-Parr
Administrative Law Judge