THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL DAVID SMITH,
Grievant,

v. **DOCKET NO. 2013-0177-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL
Respondent.

DECISION

This grievance was filed directly at Level Three of the grievance procedure by Grievant, Paul David Smith, on August 9, 2012, challenging his dismissal by Respondent, West Virginia Regional Jail and Correctional Facility Authority, from his position as a Correctional Officer II at the Southwestern Regional Jail. Grievant is asserting that he was wrongfully terminated because there is no credible evidence that he was sleeping on duty as alleged. In the alternative, Grievant argues that termination of employment is an excessive penalty for an employee who has maintained a favorable work record during his eight years with the agency. As relief, Grievant seeks reinstatement to his position at the Southwestern Regional Jail with full back pay, benefits and seniority.

An evidentiary hearing was held at Level Three before the undersigned Administrative Law Judge on November 13, 2012, at this Grievance Board's office in Charleston, West Virginia. Grievant was represented by attorney Katherine L. Dooley with the Dooley Law Firm and Respondent was represented by its General Counsel,

Travis E. Ellison, III. This matter became mature for decision on December 18, 2012, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent presented the testimony of two co-workers who separately and independently observed Grievant sleeping on multiple occasions while on duty at the Southwestern Regional Jail. Grievant denied sleeping on the job at any time and presented testimony from another co-worker who had been fired for sleeping and who asserted that one of the witnesses who testified against Grievant had made similar false allegations against him. Several co-workers testified that they had worked with Grievant for several years, and that they had never observed him sleeping or otherwise doing anything improper. Grievant's efforts to impeach the credibility of his accusers were ineffective while Grievant's testimony asserting his innocence was unconvincing. A jail guard who is sleeping while his co-workers are in harm's way involves a serious infraction. Thus, the penalty of termination was not unreasonable and this grievance must be denied.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant was employed by the West Virginia Regional Jail and Correctional Authority ("RJA") as a Correctional Officer II at the Southwestern Regional Jail.

2. Grievant began his employment with RJA in November 2003 and transferred to the Southwestern Regional Jail in 2005.

3. Michael Ray Whitt has been employed by RJA for approximately two years. He is currently employed as a Correctional Officer II at the Southwestern Regional Jail.

4. In April 2012, Officer Whitt began working on the 12:00 AM to 8:00 AM "midnight shift" for the first time since his employment commenced. While on the midnight shift, Officer Whitt was assigned to work with Grievant on multiple occasions. Prior to being assigned to the midnight shift, Officer Whitt had not previously worked with Grievant at any time.

5. During the time frame between April and early June 2012, Grievant was often assigned to work in one of the facility's three towers while Officer Whitt worked at the ground level beneath that tower performing duties that are referred to as a "rover." Generally, the two officers assigned to tower and rover duty are expected to work in tandem where the tower officer monitors the rover's activities to ensure the rover's safety.

6. Beginning on the first day Officer Whitt began working with Grievant, he observed Grievant sleeping on the job, and thereafter on additional occasions when he and Grievant were working together.

7. Officer Whitt estimated that Grievant was sleeping on the job on at least 15 occasions, up to as many as 20 occasions, on unspecified dates between early April

and early June 2012. Officer Whitt also estimated that Grievant would sleep for as long as six hours at a time when he slept in the tower.

8. Officer Whitt never complained to Grievant about Grievant's sleeping on the job. Officer Whitt did not report Grievant's conduct to their immediate supervisor, Sergeant Chadd Martin, because he had been told by Officers Pennington and Cooper that they had reported Grievant sleeping to Sergeant Martin and nothing had been done.

9. Officer Whitt observed Sergeant Martin conducting his mandatory post checks without physically entering the tower, allowing Officer Whitt to retrieve the tower log book so Sergeant Martin could view the log and make the required entry. The Night Shift Supervisor is required to perform a post check during each shift. These post checks are not performed at any particular time, but are performed at random times during each eight hour shift.

10. Officer Whitt, on at least one occasion, carried the tower keys on his person to access the sections where the prisoners were housed, because Grievant would not answer the intercom or the radio while he was sleeping. Ordinarily, these keys should only be taken out of the tower for use during an emergency.

11. Generally, Grievant left a key in the door at the base of the tower thereby permitting Officer Whitt to access the tower without waking Grievant. RJA policy prohibits leaving a key in the door, because this allows access into the tower without action being taken by the tower officer. Grievant admitted that he "occasionally" left the key in the tower door as described by Officer Whitt.

12. An officer assigned to work in the tower can ordinarily hear the trustees who are cleaning and buffing floors, inmates yelling for sundry reasons, intercom calls from inmates, occasional telephone calls from other RJA personnel, and infrequent emergency radio transmissions from other officers. However, in the absence of a medical emergency, there are times during the midnight shift when there is minimal activity, other than the trusties cleaning floors and taking out the trash.

13. Officer Whitt did not report Grievant sleeping until he was questioned by Lieutenant Slater, who represented to him that other officers had previously reported Grievant sleeping. Officer Whitt was concerned that failure to provide a truthful report would result in disciplinary action, but he was not coerced into making any statement adverse to Grievant.

14. On June 15, 2012, when the investigation into Grievant's conduct was in progress, Grievant asked Officer Whitt: "Do you have our backs?" Officer Whitt understood Grievant to be referring to himself and Officer Elkins. Officer Whitt told Grievant that he would simply be telling the truth. Grievant also stated: "If you have our backs then we'll have yours. If not, we won't have yours."

15. Johnny W. Cooper has been employed by RJA as a Correctional Officer II at the Southwestern Regional Jail since February 26, 2012.

16. Between March and June 2012, Officer Cooper observed Grievant sleeping on duty in the tower on approximately three unspecified occasions.

17. Officer Cooper complained about this activity to their supervisor, Sergeant Martin. Sergeant Martin essentially told Officer Cooper that he would take care of it and

not to elevate the complaint any further. Subsequent to this conversation, Officer Cooper was referred to as a “rat” by Grievant, Officer Elkins, and other unidentified officers.

18. Officer Cooper likewise observed that Grievant slept up to six hours or more on the occasions when he slept. Officer Cooper was also able to enter the tower because Grievant left the key in the lock on the inside, allowing anyone to open the door by turning the handle from the outside.

19. Corporal Michael Bryant and Corporal Charles C. Napier, co-workers at the Southwestern Regional Jail, worked with Grievant for several years and never observed him sleeping on the job. Neither of these officers had worked with Grievant on midnight shift in the tower during the previous three years.

20. Correctional Officer Anthony Elkins, who had been employed by Respondent for eight years, testified that he had never observed Grievant sleeping on the job when they worked together. Officer Elkins was also terminated by Respondent for allegedly sleeping on the job based upon a report by Officer Cooper.

21. Southwestern Regional Jail Administrator David Farmer, Officer Elkins, Officer Carlos B. Turner, Corporal Napier and Grievant generally agreed that sleeping on the job in the tower constitutes a serious offense because it involves a security risk to the rover working in the pod below.

22. Grievant received an above average job performance evaluation in 2010 covering the period from November 24, 2008 through November 24, 2009. *See* G Ex 1.

23. In June of 2011, Grievant received a written reprimand for refusing to perform a "razor pass"[1] while working as a rover. Grievant acknowledged that he simply refused to do what he was told by his supervisor on that particular occasion.

24. During the times when Grievant was sleeping on duty, there were no significant events that took place in the jail, such as an attempted escape, an attack by one or more inmates against one or more other inmates, or an attack against any correctional personnel.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial

[1] Inmates are provided a single safety razor while in their cells by a guard who returns and collects the razors later in the shift. Each of these potential weapons must be strictly accounted for as part of the facility's security procedures.

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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

Certain critical facts surrounding this grievance are in dispute. In such situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Massey, supra*.

The factual basis for Grievant's dismissal rests upon the sworn testimony of Correctional Officers Michael Whitt and John Cooper, who separately described how Grievant was sleeping on duty on multiple occasions while working in one of the three

towers at the Southwestern Regional Jail. Grievant and another Correctional Officer, Elkins, who was similarly terminated for sleeping on duty based upon a statement by Officer Cooper, both denied that they were sleeping on duty at any time as alleged.

Officer Whitt's testimony was generally credible in regard to the most important facts. He readily admitted that he did not know the dates of any of the occasions when he observed Grievant sleeping in the tower, but this activity occurred whenever he worked with Grievant between April and early June 2012, on approximately 15-20 days when he was paired with Grievant as a rover while Grievant was in the tower. He did not report Grievant's misconduct to their supervisor because he had been told that another officer had reported Grievant's sleeping to Sergeant Chadd Martin and nothing had been done. This statement was consistent with the testimony of Officer Cooper who reported Grievant's sleeping on duty in the tower to Sergeant Martin and was essentially told by Sergeant Martin not to "rock the boat." Grievant did not describe any inquiry or warning about sleeping on duty from Sergeant Martin.

Officer Whitt's testimony appeared candid and unrehearsed. Indeed, he was just as candid about routine matters that were peripheral to this grievance as the critical issues which necessarily determine the outcome of this grievance. Likewise, Officer Cooper's testimony was direct and forthright. He maintained the same attitude while responding to questions during direct and cross examination. Neither Officer Cooper nor Officer Whitt appeared to have any interest in the outcome of this matter. Officer Cooper was previously employed as a police officer. Thus, he appeared to be more poised as a witness than Officer Whitt.

Grievant attempted to impeach Officer Cooper's testimony on the basis of his reputation while serving in local law enforcement. Grievant's friend and co-worker, Anthony Elkins, stated that it was rumored that Officer Cooper was "suspected" of distributing illegal drugs while employed as a police officer. Grievant also testified that he had been told by an unidentified "Boone County Deputy Sheriff" that Cooper was "suspected of being dirty" when he was a municipal police officer. These self-serving hearsay statements were too vague and non-specific to be given any weight whatsoever. Further, given that Correctional Officers employed by RJA are required to successfully complete a criminal background investigation as a condition of employment, any serious contention that Officer Cooper was involved in illegal conduct before starting to work for the Respondent must necessarily be rejected as an unsubstantiated rumor.

Grievant presented evidence that he had been involved in identifying co-workers who were engaged in bringing drugs and illicit contraband into the jail. Grievant contends that an employee who was intent on engaging in drug trafficking in the jail would want Grievant out of the way. This is not a totally illogical or incredible motive. However, it is unpersuasive because there was no credible evidence that Officer Cooper or Officer Whitt had any plan or inclination to do anything at RJA other than their jobs as Correctional Officers.

Grievant's suggestion that Officer Cooper was somehow concerned that Grievant would report a relationship with a female officer to Officer Cooper's wife was similarly unsubstantiated. Grievant testified that in late May or early June, he saw

Officer Cooper come out of the tower with a female officer. Grievant asked Officer Cooper if he had "conducted a post check" while he was in the tower and Officer Cooper gave an affirmative response. Grievant and Officer Cooper had another conversation shortly thereafter wherein Grievant allegedly told Officer Cooper: "I know what you are doing."

Officer Cooper testified about this same discussion with Grievant, but indicated nothing about any reference to a female officer, or what Grievant believed they were doing. Grievant did not indicate that he ever threatened to speak with Officer Cooper's wife about a possible relationship with a female Corrections Officer. Perhaps there is some innuendo intended in regard to the term "performing a post check" because a bona fide post check would only be conducted by the shift supervisor, but whatever this inside joke was, Grievant never explained, even when challenged by Respondent's counsel that he did not understand what Grievant was claiming.

Ultimately, there was no credible evidence presented that there was any improper relationship between Officer Cooper and a female employee for Grievant to report to Mrs. Cooper or anyone else. Thus, there was no evidence of any improper motive for Officer Cooper to lie about what he saw Grievant doing. In addition, Officer Cooper's testimony was corroborated by the independent observations of Officer Whitt, who had even less of a purported motive to make up events to harm Grievant.

Grievant submitted an alternative argument that even if he was guilty of sleeping on duty, given his length of service and otherwise favorable work record, the penalty of termination was disproportionate or excessive. A contention that a particular

disciplinary action is excessive constitutes an affirmative defense, and Grievant bears the burden of demonstrating that 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. *See Witcher v. W. Va. Div. of Corrections*, Docket No. 2010-0817-MAPS (Aug. 3, 2010); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

Moreover, this Grievance Board has previously concluded that "[m]itigation of the punishment imposed by the 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 & Human Res*., Docket No. 96-HHR-183 (Oct. 3, 1996). Witnesses for both Respondent and Grievant established that sleeping on duty, particularly in the context of an officer assigned to work in the tower while another officer is roving near the jail cells below, constitutes a serious offense because it involves a risk to the officer performing the rover role. The fact that there were no untoward events while Grievant was sleeping is not significant. It should not require a funeral before a jail guard whose conduct endangers his fellow workers is terminated. In these circumstances, the agency's choice of the penalty of termination was neither arbitrary nor disproportionate to the nature of the offense committed.

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. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Non-probationary state employees in the classified service may 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. Respondent established by a preponderance of the evidence that Grievant was sleeping on duty while working as a Correctional Officer II at the Southwestern Regional Jail on multiple occasions during April and May 2012.

4. "Mitigation of the punishment imposed by the 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 & Human Res., Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. Termination of a Correctional Officer II for sleeping on duty on multiple occasions, thereby endangering the lives of his co-workers, notwithstanding nine years of satisfactory employment, was not a clearly excessive penalty, nor was such penalty imposed on an arbitrary and capricious basis. In the circumstances presented in this grievance, the penalty of termination was not shown to be disproportionate to the offense committed.

Accordingly, this grievance is **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 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).

DATE: January 3, 2013

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LEWIS G. BREWER
Administrative Law Judge