

11-0191

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
BUREAU FOR BEHAVIORAL HEALTH
AND HEALTH FACILITIES/MILDRED
MITCHELL-BATEMAN HOSPITAL

Petitioner,

WILLIAM WATSON, JR.,

Respondent.

Civil Action: 10-AA-34
Circuit Judge: Stucky

2010 DEC 30 PM 1:32
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

FILED

FINAL ORDER

This matter came before this Court on West Virginia Department of Health and Human Resources' (hereinafter "WVDHHR") Petition For Appeal. WVDHHR appeals the West Virginia Public Employees Grievance Board's (hereinafter "Grievance Board") Decision granting William Watson, Jr.'s (hereinafter "Respondent") grievance. The Court has studied the briefs, the pleadings, the record, and has reviewed pertinent legal authorities. After careful consideration, this Court **REVERSES** the Decision.

STANDARD OF REVIEW

A circuit court may reverse, vacate or modify the administrative law judge's decision if the circuit court determines the decision

- (1) is contrary to law or lawfully adopted rule or written policy of the employer;
- (2) exceeds the administrative law judge's statutory authority;
- (3) is the result of fraud or deceit;
- (4) is clearly wrong in view of the reliable, probative and substantial evidence on the whole record;
- or (5) is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 6C-2-5 (formerly W. Va. Code § 18-29-7).¹ The West Virginia Supreme Court of Appeals held that

[g]rievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.

Syl. pt. 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 177-78, 539 S.E.2d 437, 437-38 (2000); see also *Watts v. Department of Health and Human Resources*, 195 W. Va. 430, 434, 465 S.E.2d 887, 891 (1995) (internal citations omitted).

FACTS AND DISCUSSION

Respondent was accused and found not guilty of either knowing about or having participated in the copper theft at the Mildred Mitchell-Bateman Hospital (hereinafter "Hospital"). After this determination was made, he was moved from a security guard position to a position in Dietary on day shift because he had admitted during an interview that he "dozed off" during night shifts and spoke to other employees during the investigation when he was directed to have no contact with anyone employed there. Respondent filed a grievance against his employer, WVDHHR, on or about October 23, 2008, after he was suspended for five days and transferred. He sought reinstatement as a security guard and expungement of any allegations or notes in regard to the copper theft.

The grievance was denied at Level I by decision dated February 17, 2009. A Level II mediation was held on July 23, 2009. A Level III hearing was held on September 30, 2009 at the Grievance Board's Charleston, West Virginia, office. The Administrative Law Judge (hereinafter "ALJ") found the no-contact directive as overly broad and that it encroached upon Respondent's fundamental right to freedom of association and his right to privacy. The ALJ found it void and

¹ West Virginia Code § 18-29-7 was recodified effective July 1, 2007, without substantive change at West Virginia Code § 6C-2-5. Case law interpreting the old provision is applicable herein.

found that Respondent should not have been disciplined for his contacts. The ALJ also found the punishment of five days suspension and transfer was disproportionate to the offense of dozing off because the admission was general and unrelated to any particular incident.

State employees enjoy the right to intimate association and a common-law right to privacy, however, these rights may be overridden by the government's interest as an employer. The West Virginia Supreme Court has held that "the burden is properly placed on the public employee to show that conduct is constitutionally protected," and it must be spoken as a citizen on a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 441, 675 S.E.2d 907, 917 (2009). Here, Respondent contacted three co-workers. The topics discussed did not rise to level of public concern. Respondent does not have a claim of a violation of his First Amendment rights.

Respondent's right to freedom of association is not at issue in this case. This is not a case about "association." It is about preserving the integrity of the investigation and protecting those who may have accused the Respondent. Here, he was given a letter with instructions to not have contact with any co-workers until the investigation was complete. Similarly, a parallel action is taken in Criminal cases: the accused defendants are told not to have contact with witnesses and victims. This case does not depict an freedom of association issue. It is about protecting witnesses from harassment and maintaining the integrity of the investigation.

Further, Respondent was insubordinate when he made contact with fellow employees after being told not to do so. Insubordination is 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); *Web v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). To establish insubordination, three elements must be present: (a) an employee must refuse to obey an order; (b) refusal must be willful; and (c) the order must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). Here, Respondent was given an order not to contact fellow

employees at the Hospital until the investigation was concluded. This order was reasonable and valid. Respondent willfully contacted three co-workers after receiving the letter.

As for the five-day suspension and transfer of the Respondent in regard to his "dozing off" while at work and making contact with co-workers, the ALJ determined that this discipline was disproportionate to Respondent's offense. Mitigating an employer's punishment is an 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. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Deference is given to the employer's assessment of the improper conduct. *Id.* "Whether 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) (internal citations omitted).

Given the totality of the evidence, Respondent did not establish by a preponderance of the evidence that his discipline was so disproportionate to his offense that the Hospital abused its discretion by its issuance. There was testimony at the Level III hearing that two other security officers had been terminated for sleeping on the job. The Hospital did not discipline Respondent in a disproportionate manner. A security guard sleeping on duty in a high-crime area is a serious matter. His past employment record was taken into consideration; therefore, he was transferred to a new position in the same pay grade and at the same rate of pay on a day shift. At the time of his transfer, there was a need for employees in the dietary department.

The ALJ was clearly wrong in view of the reliable, probative and substantial evidence on the whole record in his findings.

RULING

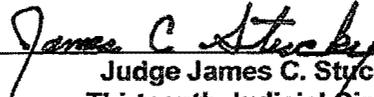
Accordingly, this Court Orders the following:

The Final Order of the West Virginia Public Employees Grievance Board is **REVERSED** and Respondent's grievance is **DENIED**. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to all counsel of record:

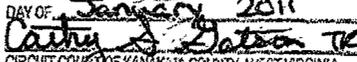
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Enter this Order the 30 day of December, 2010.



Judge James C. Stucky
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. RATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE OF WEST VIRGINIA CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COUNTY
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5th
DAY OF January 2011


CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

1-4-11
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