THEODORE HOSAFLOOK,

Grievant,

v. Docket No. 97-CORR-430

WEST VIRGINIA DIVISION OF CORRECTIONS

PRUNTYTOWN CORRECTIONAL CENTER,

Respondent.

DECISION

Theodore Hosaflook, Grievant, filed this grievance against Respondent, West Virginia Division of Corrections\Pruntytown Correctional Center (PCC) challenging his twenty-one day suspension. Grievant, on a Level IV grievance form, alleges:

> I was suspended for 21 days without pay for a class A-4 violation due to an incident that occur[r]ed on August 5, 1997[,] while I was off duty and in civilian clothes[,] and off Pruntytown Property. I was verbally slandered by an individual while I was on Route 250 walking to my car.

In accordance with W. Va. Code §29-6A-4(e), Grievant filed his grievance directly at Level IV, and it was received by the Grievance Board on September 29, 1997. At Level IV, this grievance was scheduled for an evidentiary hearing on October 30, 1997, but the hearing was continued for good cause shown by Respondent. The Level IV evidentiary hearing was rescheduled[,] and held on December 2, 1997, at the Grievance Board's office in Elkins, West Virginia. The case became mature for decision on January 26, 1998, with receipt of the parties' post-hearing submissions.

At the beginning of the Level IV evidentiary hearing, Grievant, pro se, was allowed to amend his grievance statement. He asserted: (1) that Respondent has no authority to suspend him for an incident that occurred off Respondent's property, while he was off duty, and in civilian clothes,

(2) that Respondent waited too long (approximately six weeks) to suspend him, and

(3) that his suspension letter was too vague because it did not tell him specifically what part of Policy Directive 400 he violated. See Level IV, Tr. at 4-5. (See footnote 1)

Grievant's counsel (See footnote 2) alleged in his post-hearing submission new issues which Grievant failed to assert during the Level IV hearing. To allow Grievant to advance new legal

theories, at such a late date in these proceedings, and without Respondent having the opportunity to respond, would not be proper and would be manifestly unfair. These issues, therefore, will not be addressed. McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996); Crites v. Webster County Bd. of Educ., Docket No. 95-51-313

(Feb. 26, 1996). See W. Va. Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

The following findings of fact were derived from the record, and were proved by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a Correctional Officer (CO) I at PCC.

2. The compound of PCC consists of property on both sides of U.S. Route 250. The PCC Gymnasium (Gym) is located approximately seventy-five feet from U.S. Route 250.

3. On August 5, 1997, at approximately 5:00 p.m., Grievant parked his vehicle in an on-street parking space on U.S. Route 250, and approached Recreational Supervisor William F. Shahan (who was standing outside of the gym). Grievant was off duty, and in civilian clothes.

4. Grievant “got-in” Mr. Shahan's “face”, was loud, agitated, and distressed because the lock on the gym staff room had been changed, and Grievant did not have a key or the combination.

5. Mr. Shahan did not want a “scene” outside on the compound, invited Grievant inside, and explained why the lock had been changed.

6. Approximately five minutes later Grievant exited the building in an abrupt manner and began walking to his vehicle. At this time, Mr. Josh Schoolie, a civilian, drove up and parked his vehicle approximately twenty feet away from Grievant's vehicle.

7. Mr. Schoolie was playing music in his vehicle rather loudly, and Grievant walked to the driver's side of Mr. Schoolie'svehicle and told him, in a loud tone of voice, to “turn that shit down”. Grievant then moved in front of Mr. Schoolie's vehicle and was yelling and waving his arms at him. Grievant used derogatory and foul language and said “Do you want a f---ing piece of me, come on big man, I'm standing right here. What are you f---ing waiting for.” Level IV, R. Ex. 1. Grievant also admitted to calling Mr. Schoolie an a--hole. Level IV, R. Ex. 3, at 2, and 4.

8. When Ms. Melissa Carr, PCC Recreational Assistant, told Grievant to leave, he replied (in a loud tone of voice) for her to stay out of it. Grievant left after she told him to leave a second time.

9. The area where the August 5, 1997, incident occurred is within the confines and boundaries of PCC.

10. After the incident, Mr. Shahan and Ms. Carr filed separate incident reports concerning the episode. See Level IV, R. Exs. 1 and 2.

11. By letter dated September 16, 1996, Grievant was suspended for twenty-one working days, beginning on October 1, 1997, through October 29, 1997, under West Virginia "Division of Corrections Policy Directive 400.00, Section 7.00, Class A Offense A-4, 'Disrespectful Conduct, Use of Insulting, Abusive or Obscene Language To or About Others'". Level IV, R. Ex. 4.

DISCUSSION

Pursuant to W. Va. Code §29-6A-6, "[t]he burden of proof shall rest with the employer in disciplinary matters." Kuthy v. W. Va.Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993). In this case, Respondent proved by a preponderance of the evidence that Grievant acted in an unprofessional manner, showed disrespectful conduct to other staff members (Mr. Shahan and Ms. Carr), and used insulting, abusive and obscene language when speaking to Mr. Schoolie on August 5, 1997, while on the grounds of PCC, as set forth in the above findings of fact.

Grievant asserted three affirmative defenses. The party asserting an affirmative defense has the burden of proving that affirmative defense by a preponderance of the evidence. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96- BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

Grievant's first affirmative defense is that Respondent has no authority to suspend him for an incident that occurred off Respondent's property, while he was off duty, and in civilian clothes. West Virginia "Division of Corrections Policy Directive 400.00, Section 1(B)(3) provides that the standards of this policy serve to:

> Limit corrective action to employee conduct occurring only when employees are at work or when otherwise representing the State of West Virginia in an official or work-related capacity unless otherwise specifically provided for in this procedure.

Grievant was “at work” (at PCC) even though he was not working (on duty) at the time the incident occurred. Grievant failed toprove by a preponderance of the evidence that Respondent violated the above section of Policy Directive 400, or that it was otherwise unlawful for Respondent to suspend him merely because he off duty and in civilian clothes.

Second, Grievant asserts that Respondent waited too long (approximately six weeks) to suspend him. During the Level IV hearing, Grievant asserted that since he had only ten days to file a grievance (apparently a reference to W. Va. Code §29-6A-3, which gives state employees only ten days to file a grievance) that Respondent should also have only a limited time period to suspend him. Level IV, Tr. at 5. However, neither W. Va. Code §29-6A-3, nor any other Code Section of which the undersigned is aware, specifies a time frame by which Respondent must take disciplinary action against an employee.

Grievant's counsel, in his proposed finding of fact #4, asserts that “Policy Directive 400 requires timely written notice of policy violations which are to be relied upon in imposing discipline.” However, Grievant failed to prove by a preponderance of the evidence that Respondent did not timely inform him of policy violations, or that Respondent violated Policy Directive 400 in this regard.

Last, Grievant asserted that his suspension letter was too vague because it did not tell him specifically what part of Policy Directive 400 he violated. The undersigned finds the suspension letter, addressed in Finding of Fact #11, clearly identified the section of Policy Directive 400 upon which Respondent was relyingto suspend him. Again, Grievant failed to meet his burden of proof on this, his final, affirmative defense. Therefore, his grievance is denied.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code §29-6A-6, “[t]he burden of proof shall rest with the employer in disciplinary matters.” Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993).

2. Respondent proved by a preponderance of the evidence that Grievant acted in an unprofessional manner, showed disrespectful conduct to other staff members (Mr. Shahan and Ms. Carr), and used insulting, abusive and obscene language when speaking to Mr. Schoolie on August 5, 1997, while on the grounds of PCC, as set forth in the above findings of fact, in violation of Section 7.00 of Policy Directive 400.00.

3. The party asserting an affirmative defense has the burden of proving that affirmative defense by a preponderance of the evidence. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

4. Grievant failed to prove by a preponderance of the evidence any of the affirmative defenses he asserted.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: February 20, 1998 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant had the hearing transcribed and certified, and provided the undersigned with a copy.

Footnote: 2

Although Grievant represented himself at the Level IV hearing, an attorney filed proposed findings of fact and conclusions of law on Grievant's behalf after the Level IV hearing.