JOSEPH VALENTINE,

Grievant,

v.

DOCKET NO. 97-CORR-048

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Joseph Valentine, filed this grievance on December 2, 1995, protesting a three-day suspension without pay issued by Deputy Warden Howard Painter of the West Virginia Division of Corrections ("Corrections") on December 1, 1995. A level two hearing was conducted on December 21, 1995, and a decision denying the grievance was issued on January 5, 1996. Grievant appealed directly to level four from that decision, and an Order remanding the grievance for a level three hearing was issued by Administrative Law Judge Jerry Wright on August 6, 1996. Thereafter, a level three hearing was held on December 10, 1996, and a decision denying the grievance was issued on January 9, 1997. Grievant appealed again to level four on January 22, 1997. The matter was assigned to Administrative Law Judge Janis Reynolds and the parties agreed to submit the grievance on the record on March 4, 1997. This matter became mature on June 12, 1997, the deadline for submission of proposed findings of fact and conclusions of law, at which time this case was reassigned to the undersigned. A review of the level three transcriptrevealed deficiencies in the transcription, and after many requests, a corrected level three transcript was forwarded to the Grievance Board on December 23, 1998. (See footnote 1) At level three, Corrections was represented by the Warden's designee, Jamie Webb, and Grievant was represented by Elaine Harris, CWA representative. At level four, Corrections was represented by Leslie Kiser, Esq., Assistant Attorney

General, and Grievant was represented by George P. Surmaitis, Esq., Crandall, Pyles, Haviland & Turner.

SUMMARY OF EVIDENCE

Corrections' Exhibits

Ex. 1 -

May 6, 1995 Incident Report

Ex. 2 -

Individual Training Record for Joseph Valentine

Ex. 3 -

Certificate of Understanding for Policy Directive 400.00 of Joseph Valentine, dated December 15, 1994

Ex. 4 -

May 20, 1994 from Joseph Valentine to Rita Albury

Ex. 5 -

May 2, 1995 handwritten watch report

Ex. 6 -

May 3-4, 1995 handwritten watch report

Ex. 7 -

May 4-5, 1995 handwritten watch report

Ex. 8 -

May 3, 1995 memorandum from Joseph Wood to all medical/mental health unit officers re: recreation call

Ex. 9 -

Transcript of Magistrate Court hearing

Ex. 10 -

May 6, 1995 Incident Report

Ex. 11 -

May 8, 1995 Investigative Report of Joseph Valentine by Captain Rick Nottingham

Ex. 12 -

Operational Procedure 3.05: Operational Schedule - Mainline Population, dated April 17, 1995

Ex. 13 -

MOCC Operational Procedure 3.05, April 17, 1995, revised May 30, 1995

Grievant's Exhibits

Ex. 1 -

December 1, 1995 letter to Joseph Valentine from Deputy Warden Howard Painter

Ex. 2 -

Staffing Pattern MOCCEx. 3 -
Martin v. Dept. of Corr., Docket No. CORR-88-020 (Dec. 30, 1988)

Testimony

Corrections offered the testimony of Cindy Largent, Captain Mike Millhollin, and Michael Coleman. Grievant testified in his own behalf.

FINDINGS OF FACT

1, Grievant has been employed as a Correctional Officer I since November 1, 1994, and at all times relevant to this grievance was assigned to the Mt. Olive Correctional Complex in Moundsville, West Virginia. LIII Tr., p. 39.

2. On May 6, 1995, Grievant was working the midnight shift, and was assigned to the SPU or mental health unit, which is designated as a super maximum security, or “supermax”, unit.

3. There was a shortage of correctional officers that night, and because Grievant had worked the mental health unit once or twice before, he was assigned to that unit. LIII Tr., p. 39.

4. The mental health unit differs from the mainline population units in several significant factors. There are two doors into the mental health unit, creating a secure area into the officer's area, and between the officer's desk area and the inmates' cells. The cells are equipped with showers and toilet facilities, so that the inmates do not have to come out of their cells to shower. The cells can be viewed from the officer's desk area, although an officer would have to look through the door hole to see the showers.

5. One officer was assigned to the mental health unit on May 6, 1995. This was not an unusual practice at the time. 6. Correctional officers use a “pass down book” to record incidents and information which will be helpful to the next shift. On May 2, 1995, the pass down book in the mental health unit included a notation which read:

> Inmate Cox is acting a little paranoid, keep an eye on him Cox believes that he is being treated unfairly. Cox wants to come out to make a phone call and what(sic) T.V. where he can listen to it.

Grievant did not read the pass down book when he came on duty on May 6, 1995. LIII Corr. Exs. 5-7; LIII Tr., p. 42.

7. Corrections, from time to time, posts various memoranda at the officer's desk concerning pertinent information. On May 3, 1995, a memorandum was posted regarding recreation of inmates, and noted that several inmates were considered assaultive, and only one of those inmates was to be allowed out for recreation at a time. Inmate Cox was identified as one these assaultive inmates. LIII Corr. Ex. 8. Grievant did not read this memorandum.

8. While on duty on May 6, 1995, Inmate Cox called Grievant to his cell. Inmate Cox had his towel and shampoo in his hand and asked Grievant if he could come out to shower. LIII Tr., p. 40.

9. Grievant did not know that Inmate Cox's cell was equipped with a shower. Grievant opened the two security doors to Inmate Cox's cell to let him out for a shower. Inmate Cox came out into the officer's area and ordered Grievant to give him his hand-held radio and keys, and assaulted and injured Grievant. Inmate Cox used Grievant's radio to broadcast a “mayday”. The keys Inmate Cox took from Grievant could be used to exit the unit and/or to open other cells. 10. Captains Michael Millhollin and Hunter (the off-going shift commander) were first to respond to the “mayday”

call. They found Inmate Cox at the officer's desk, with Grievant locked inside the unit. Several officers and members of the C.E.R.T. responded soon after, and Inmate Cox left Grievant and locked himself inside the television room. After unlocking the door to the officer's area with an emergency key, Grievant was escorted to the medical unit, and from there, to the hospital by ambulance.

11. Inmate Cox, after much persuasion, removed the key from the inside of the television room door, allowing the C.E.R.T. to gain entry, at which time they subdued and locked up Inmate Cox.

12. Captain Millhollin completed an incident report on this situation on May 6, 1995. LIII Corr. Ex. 1.

13. Grievant returned to work on May 8, 1995. A criminal investigation was instituted and a magistrate court hearing was concluded on charges against Inmate Cox on or about May 17, 1995. Grievant testified in magistrate court (LIII Corr. Ex. 9) and gave a statement to Captain Rick Nottingham, Corrections' investigator on May 8, 1995. LIII Corr. Ex. 11. Grievant also completed an incident report on May 8, 1995. LIII Corr. Ex. 10.

14. Following his return to work, no mention was made to Grievant about the incident until he met with Deputy Warden Howard Painter on November 30, 1995, nearly seven months later.

15. Grievant assumed the meeting was about the criminal charges against Inmate Cox. LIII Tr., p. 43.

16. On December 1, 1995, Grievant received a letter from Deputy Warden Painter suspending him for three (3) days for a major security breach. LIII G. Ex. 1.

DISCUSSION

In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). Dismissal or suspension of a civil service employee must be for “good cause,” which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code § 29-6-11(12); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980).

Corrections asserts that Grievant failed to adhere to Policy 400, “Employee Standards of Conduct”, by allowing Inmate Cox to exit his cell to shower, thus leading to the assault. Specifically, it

asserts that Grievant should have been aware that there was a shower in Inmate Cox's cell, and further, that he should have know that his particular inmate was assaultive. Grievant argues there was no just cause for the suspension, offering improper training and experience as an excuse for letting Inmate Cox out of his maximum security cell.

Grievant does not deny that he opened Inmate Cox's cell with the intent of letting him out of the cell to go take a shower. Grievant merely asserts that he did not know Inmate Cox was considered assaultive, that he did not know that Inmate Cox was not to be released from his cell without prior authority, and that he did not know there was a shower in Inmate Cox's cell. Grievant had worked in the mental health unit on one or two prior occasions. He testified that the cells of the inmates generally do not have their ownshowers, and that in his experience, supermax (high security) cells generally do not have their own showers.

However, Grievant also admits that he did not read the memoranda posted on the bulletin board at the officer's desk, that he did not read the passdown book, and that he did not ask anybody with authority whether Inmate Cox should be allowed out of his cell to take a shower. Clearly, had Grievant read the bulletin board, he would have see the May 3, 1995, memoranda identifying Inmate Cox as assaultive. Had Grievant read the pass down book he would have seen the entry indicating that Inmate Cox was “a little paranoid.” Presumably, had he seen these warnings, Grievant would have proceeded differently when Inmate Cox asked to be let out of his cell, as evidenced by Grievant's answer to the question whether he had seen the May 3, 1995 memorandum, that “I wish I had.” LIII Tr., p. 42.

Corrections followed practice and procedure with regard to passing down information on the mental health unit, and Grievant has not proven there was another or other ways which Corrections normally followed in disseminating information. It was Grievant who failed to acquaint himself with his environment. Thus, Corrections was justified in issuing Grievant a three-day suspension for the security breach. Not only did Grievant sustain injuries himself, but he placed the entire unit in jeopardy when Inmate Cox took his keys and radio, and exited his cellblock, with Grievant locked inside. A three-day suspension is not too severe to get Grievant's attention that he must be more careful and take all precautions to inform himself of his environment in the future.

Grievant, however, raises the affirmative defense that Corrections violated its own policies and procedures when it waited seven (7) months following the incident to imposeany sort of discipline.

The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). An administrator's authority in disciplinary matters must be exercised reasonably, not arbitrarily or capriciously. Eisenhauer v. Dept. of Corr., Docket No. CORR-88-008 (Nov. 15, 1988). Department of Corrections Policy Directive No. 400 §3.01 requires that supervisors immediately correct the unsatisfactory behavior of employees through counseling, issuance of written notice or other formal disciplinary action, depending on the severity of the situation. Policy Directive No. 400 §§ 5.01, 5.02, and 5.03B(1) require that a written notice for Class A, B, or C offenses be issued as soon as practicable. Martin v. Dept. of Corr., Docket No. CORR-88_020 (Dec. 30, 1988). It is incumbent upon the Respondent to present a rational explanation for its failure to promptly act on the formal complaint of a grievant's offensive behavior, as per its own regulations, or the discipline will be deemed patently unreasonable. Martin, supra.

A review of Martin does not offer any insight into the rationale behind the administrative law judge's decision in that case that the delay in imposing discipline on the grievant was “patently unreasonable.” Generally, an analysis of whether discipline should be reversed due to the “staleness” of the charges includes balancing the interests of the employer against whether the employee has been prejudiced in any way by the delay. See Shaw v. USPS, 697 F.2d 1078 (Fed. Cir. 1983); Heffron v. U.S., 405 F.2d 1307 (Ct. Cl. 1969). In this instant case, Grievant has not demonstrated how he was prejudiced by the lateness of the charges, and has not shown that the presentation of his defense has been adversely affected by the time delay. There is some, although scant, evidence that Corrections was conducting a criminal, as well as internal investigation, into the events ofMay 6, 1995. Although it was not shown that these investigations were on-going until the time the charges were brought against Grievant, it is certainly within Corrections' bests interests to thoroughly complete its investigations before bringing disciplinary charges against its employees. Thus, I find that Grievant has not proven by a preponderance of the evidence that Corrections' delay in disciplining him for the May 6, 1995, incident caused him any severe or substantial prejudice or harm.

CONCLUSIONS OF LAW

1. In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). Dismissal or suspension of a civil service employee must be for

"good cause," which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code § 29-6-11(12); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980).

2. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

3. An administrator's authority in disciplinary matters must be exercised reasonably, not arbitrarily or capriciously. Eisenhauer v. Dept. of Corr., Docket No. CORR- 88-008 (Nov. 15, 1988).

4. Department of Corrections Policy Directive No. 400 §3.01 requires that supervisors immediately correct the unsatisfactory behavior of employees through counseling, issuance of written notice or other formal disciplinary action, depending on theseverity of the situation. Policy Directive No. 400 §§ 5.01, 5.02, and 5.03B(1) require that a written notice for Class A, B, or C offenses be issued as soon as practicable. Martin v. Dept. of Corr., Docket No. CORR-88_020 (Dec. 30, 1988).

5. It is incumbent upon the Respondent to present a rational explanation for its failure to promptly act on the formal complaint of a grievant's offensive behavior, as per its own regulations, or the discipline will be deemed patently unreasonable. Martin, supra.

6. Generally, an analysis of whether discipline should be reversed due to the "staleness" of the charges includes balancing the interests of the employer against whether the employee has been prejudiced in any way by the delay. See Shaw v. USPS, 697 F.2d 1078 (Fed. Cir. 1983); Heffron v. U.S., 405 F.2d 1307 (Ct. Cl. 1969).

7. Grievant has failed to show how Corrections' delay in disciplining him for the May 6, 1995, incident has prejudiced or harmed him in any way.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 13, 1999

Footnote: 1 *The record consists of the level two decision, and the level three transcript, decision, and exhibits. References to the transcript and exhibits will be "Tr., p. ," and Corr. or G. Ex. ", respectively.*