**ROGER CHANNELL,**

**Grievant,**

**v.** **Docket No. 00-CORR-350**

**DIVISION OF CORRECTIONS/**
**HUTTONSVILLE CORRECTIONAL**
**CENTER,**

**Respondent.**

## DECISION

Roger Channell ("Grievant") initiated this proceeding on August 23, 2000, challenging a verbal reprimand he received on August 15, 2000. He seeks as relief to have the "letter of warning" destroyed and to not have it used against him in the future. The grievance was denied at level one on August 25, 2000, and at level two on September 8, 2000. A level three hearing was held on October 19, 2000, followed by a written decision, denying the grievance, dated October 24, 2000. Grievant appealed to level four on November 3, 2000. After several continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on June 18, 2001. Grievant represented himself, and Respondent was represented by counsel, Jendonnae Houdyschell. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 28, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievant is employed by Respondent at Huttonsville Correctional Center ("HCC") as a unit manager.

2. Grievant is in charge of two units and has two offices, located at opposite ends of that particular section of the building. His offices are left open, and numerous employees have access to these rooms.

3. “Incident reports” are filled out by employees at HCC to report various occurrences, including misconduct by inmates or employees. These reports are posted daily in the unit manager's office for all employees to view, and there are numerous reports every day.

4. An incident report dated May 15, 2000, was taped to the refrigerator in one of Grievant's offices by Correctional Counselor Matthew Currence, who was charged with the responsibility of posting these reports on the unit. Mr. Currence posted this particular incident report on or about May 23, 2000.

5. Some time after the incident report was posted in Grievant's office, an unknown person defaced it by drawing a picture of a rat and cheese on it, supposedly to indicate that the employee who filed the report was a “tattletale.” (See footnote 1)

6. Grievant began extended medical leave on May 23, 2000, and returned to work on August 14, 2000.

7. At Warden Haines' direction, Grievant's immediate supervisor, Associate Warden Clinton Semmler, issued documentation of a verbal counseling session withGrievant, dated August 15, 2000. The memorandum stated, in pertinent part:

> [The defacing of the incident report] is unacceptable because it is unprofessional, childish and immature. As the Unit Manager it is your responsibility to see that this type of behavior does not occur. It is also your responsibility as a Unit Manager to establish camaraderie among all employees, not to allow incidents to occur which tend to alienate employees.
>
> This letter constitutes documentation of a verbal counseling which was conducted 14 August 2000 and will be placed in your personnel file. If your duty performance is good, you may, after one year petition the Warden to have this document removed from your file.

8. Mr. Semmler did not place the memorandum in Grievant's personnel file, but placed it in a separate file, to be held in his (Mr. Semmler's) office.

9. There was no investigation regarding the defacing of the incident report, and the person who did it has not been identified.

## Discussion

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of

the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. In the instant case, Respondent insists that the documentation of Grievant's verbal counseling was not intended to be disciplinary and did not have that effect. However, although Mr. Semmler testified that he meant the counseling session to be of a “coaching” nature, rather than disciplinary, he admitted that the documentation of the incident could be used against Grievant if further infractions occurred. Moreover, Respondent's Policy Directive 129.00, entitled “Progressive Discipline,” provides for a continuum of disciplinary tools, beginning with a verbal reprimand/warning, and culminating in dismissal. The policy states that any documentation of a verbal warning may be retained only in an administrative file separate from the employee's personnel file, and the documentation may be destroyed after twelve months, if no further deficiencies occur. This is exactly what occurred in the instant case.

This Grievance Board has held that a letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is therefore a disciplinary action. Runyon v. Dep't of Corrections, Docket No. 95-CORR-414 (Jan. 31, 1996). If Respondent had not intended to discipline Grievant for this incident and had merely meant to “coach” him, it should not have been documented as a verbal counseling session. In addition, Respondent should not have retained the documentation to be used against Grievant if further infractions occurred within twelve months. Accordingly, this was unquestionably a disciplinary measure taken against Grievant, and Respondent bears the burden of proof regarding these charges.

As stated in Mr. Semmler's memorandum to Grievant, Respondent contends that counseling was necessary, because the incident which occurred fell within Grievant's responsibilities. However, Policy Directive 129.00 states that “[t]he goal of discipline is tocorrect behavior,” and that, in order to correct their behavior, employees need to be told what they did wrong and what should have been

done. Respondent has failed to prove by a preponderance of the evidence how Grievant was informed that he could have conducted himself differently, or for that matter, what conduct he engaged in which warranted discipline. No evidence has been introduced indicating that Grievant has failed to properly instruct or manage the employees under his supervision regarding issues of professional conduct, nor is there any evidence as to whom the perpetrator of this incident was. The undisputed evidence was that numerous employees, and even inmates, have access to Grievant's office, and any one of those people could have defaced this particular incident report.

Moreover, although disputed by Respondent, Grievant provided credible testimony by Mr. Currence that he posted this incident report on, or just prior to, the last day Grievant worked before his medical leave. Mr. Currence stated that he recalled it was one of the last things he did just before going on vacation that week, and he also explained that it is normal procedure for incident reports to not reach him for posting until they are a week old. This only supports Grievant's contention that he never saw the defaced report in his office, so he had no opportunity to deal with it himself. Absent evidence that Grievant acted improperly, or that his conduct or management contributed to the incident, the undersigned finds that Respondent has failed to prove any misconduct for which discipline was appropriate.

It is understandable that Respondent was concerned that an employee behaved in such a childish manner by defacing an official document. However, if any discipline were to result from such an incident, it most certainly should have been taken against theemployee who committed the act. In this case, the matter was not even investigated to determine who that employee may have been, or if it was even an employee who did it. Instead, Respondent chose to discipline Grievant, without even attempting to ascertain whether his own behavior or conduct in any way caused or contributed to the incident. While it is true that Grievant is responsible for training his employees to behave professionally, it is unfair to punish him for the conduct of one bad employee, without evidence of wrongdoing on his own part, let alone any instruction as to how Grievant could have prevented the conduct which occurred.

The following conclusions of law support the decision reached.

## Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving the charges by a

preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. A letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is therefore a disciplinary action. Runyon v. Dep't of Corrections, Docket No. 95-CORR-414 (Jan. 31, 1996).

3. Respondent's Policy Directive 129.00 provides for a continuum of disciplinary action, ranging from a least severe verbal warning to the most severe penalty of dismissal. Documentation of a verbal warning is to be kept in an administrative file, separate from the employee's personnel file, and may be destroyed upon the employee's request, if no further infractions occur in a twelve-month period. 4. The memorandum documenting Associate Warden Semmler's counseling session with Grievant on August 14, 2000, was a disciplinary action.

5. Respondent has failed to prove by a preponderance of the evidence that Grievant engaged in any misconduct for which discipline was warranted, with regard to the defacing of an incident report in May of 2000.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to destroy all references to Grievant's August 14, 2000, counseling session, and refrain from using this incident against him with regard to any future disciplinary actions.

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, and 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

**Date: August 8, 2001** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1*

*The incident described in the report was that, on a particular date and time, there was no unit management staff assigned to Unit C (Grievant's unit), and another employee had to cover the unit.*