LENA SCOTT,

Grievant,

v. **Docket No. 02-CORR-186**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

Lena Scott ("Grievant") initiated this proceeding on April 30, 2002, challenging a three-day suspension. The grievance was denied at level one on May 6, 2002. Grievant appealed to level two, and the grievance was denied at that level on May 23, 2002. A level three hearing was held on June 4, 2002, followed by a decision denying the grievance dated June 5, 2002. Grievant appealed to level four on June 14, 2002. After several continuances were granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on December 6, 2002. Grievant was represented by counsel, Thomas M. Regan, and Respondent was represented by Assistant Attorney General Charles Houdyschell Jr. This matter became mature for consideration on January 24, 2003, the deadline for submission of the parties' fact/law proposals.

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

Findings of Fact

1. Grievant has been employed by the Huttonsville Correctional Center ("HCC") since 1993, most recently as a Correctional Officer IV, Sergeant, a supervisory position. 2. Grievant's sister, Nykeea Gum, is also employed at HCC as a Correctional Officer III, Corporal.

3. Grievant and her sister are assigned to different units, and Grievant does not supervise Ms. Gum.

4. Sometime in late 2001, Ms. Gum began receiving telephone calls and letters from Timothy Turner, a parolee of HCC, who was incarcerated at a Pennsylvania correctional facility. Ms. Gum received at least nine contacts from Mr. Turner, at times accepting the charges for collect phone calls.

5. At some point after receiving contact from Mr. Turner, Ms. Gum informed Grievant about the letters and calls. This conversation occurred at Grievant's home, when both were off duty.

6. Grievant advised Ms. Gum that the contact should be reported to HCC officials, but Ms. Gum did not report it.

7. Grievant assisted Ms. Gum in contacting officials at the Pennsylvania facility to request that Ms. Gum's number be removed from the list of telephone numbers Mr. Turner was allowed to call.

8. Grievant did not report Ms. Gum's contact with Mr. Turner to any HCC official.

9. In March of 2002, an investigation was conducted regarding Ms. Gum's contact with a parolee. After admitting knowledge of the contact and failing to report it, Grievant was suspended for three days without pay.

10. DOC policy prohibits personal contact between employees and inmates or parolees, due to security issues. If any such contact occurs, or an employee has personal knowledge of an inmate or his/her family, it is to be reported to facility officials. 11. Another correctional officer at HCC received one letter from Mr. Turner and threw it away, but did not report the incident. That employee received a reprimand.

12. Grievant had no prior disciplinary actions taken against her since employed by HCC, and her performance evaluations have been good to exceptional.

Discussion

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

In the instant case, Grievant does not dispute that she did engage in the conduct alleged, i.e. failure to report employee contact with a parolee. Rather, she contends that she did not have a duty to report the incident, because it was another employee, who was not her supervisee, who had the contact. She admits that she knew the contact had to be reported pursuant to DOC policy, but only by her sister. Since she did tell her sister to report it, and she contends she could not force Ms. Gum to act, she believes she did all that was possible under the circumstances.

DOC's Policy Directive 129.24 addresses staff and inmate interactions, providing that, if correctional staff receive written correspondence from an inmate/parolee, “the correctional staff shall immediately provide the Warden/Administrator of his/her unit writtennotification of the event.” Likewise, if unauthorized telephone contact occurs between a staff member and inmate or parolee, the policy provides that “the staff member involved shall provide his/her Warden/Administrator with written notification” of the contact. However, Grievant was actually suspended pursuant to DOC's progressive discipline policy for “inadequate or unsatisfactory job performance.”

While Grievant did not technically violate Policy Directive 129.24, it is clear that her failure to report her sister's contact with Mr. Turner at least violated the spirit and purpose of the policy. As explained by Lt. Tim Murphy, Associate Warden of Security, the purpose of prohibiting such contact with parolees is that many of these individuals are recidivists and may return to the facility. Another concern is that parolees may have continuing friendships with other inmates who remain incarcerated at the facility. Personal relationships between staff and such individuals can potentially provide the inmate with “blackmail” material to get the employee to assist in smuggling contraband or weapons into the facility, as well as other potential security breaches. Moreover, DOC's progressive discipline policy, along with providing for discipline for unsatisfactory job performance, allows an employee to be punished for “breach of facility security or failure to report any breach or possible breach of facility security,” which would certainly encompass the instant situation. Accordingly, the undersigned finds that Grievant did commit an offense for which discipline was warranted.

The remaining question to be decided is whether Grievant's punishment should have been less than a three-day suspension. This Grievance Board has determined that mitigation of the penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearlydisproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion, Hosaflook v. West Virginia Division of Corrections,

Docket Nos. 98-CORR-446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dep't of Health & Human Resources, Docket No.99-HHR-096 (Nov. 18, 1999). Lilly v. Dep't of Health & Human Resources, Docket No.00-HHR-093 (May 8, 2000). See Wilkerson v. Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000). Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects for rehabilitation. Overbee v. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Respondent maintains that, due to both Grievant's high-ranking position at HCC and the extensive number of contacts between Ms. Gum and the parolee, a three-day suspension was appropriate punishment. Certainly, like minds could differ regarding the appropriate penalty under the circumstances presented. Grievant was faced with the unique situation of reporting her own sister for misconduct which could potentially have jeopardized her sister's job, which is not something which most people would want to do. Nevertheless, Grievant's understanding of the seriousness of the situation is demonstrated by her actions, specifically her participation in contacting the Pennsylvania facility to get her sister's number removed from the inmate's call list. While the undersigned certainly understands why Grievant did not report her sister, the fact remains that her actions or lack thereof potentially compromised the security of the institution, and discipline was necessary. A three-day suspension does not seem obviously disproportionate, and it was within the discretion of HCC officials to determine the appropriate punishment. (See footnote 1) While Grievant has attempted to compare her situation to that of the other employee who received one letter from the same inmate and was only reprimanded, that situation clearly differs from Grievant's, who had knowledge of numerous, ongoing contacts. She even attempted to stop the contacts without informing HCC officials. Grievant has failed to demonstrate that the penalty imposed was excessive under the facts presented.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

2. Respondent has proven by a preponderance of the evidence that Grievant failed to report employee contact with a parolee, in violation of DOC policies.

3. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

4. A three-day suspension without pay was not disproportionate to the offense committed in this case.

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, 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: January 29, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

DOC's progressive discipline policy allows considerable discretion to administrators in deciding whether a single infraction is serious enough to warrant verbal warning, written reprimand, suspension, or dismissal.