JOHN BONFANTINO,

Grievant,

v. **Docket No. 02-CORR-347**

DIVISION OF CORRECTIONS/
PRUNTYTOWN CORRECTIONAL
CENTER,

Respondent.

DECISION

John Bonfantino ("Grievant") initiated this proceeding on September 16, 2002, challenging a verbal reprimand. He seeks as relief to have the reprimand removed from his record. The grievance was denied at level one on September 23, 2002, and at level two on September 27, 2002. A level three hearing was conducted on October 17, 2002, followed by a written decision, denying the grievance, issued on October 18, 2002. Grievant appealed to level four on October 25, 2002. After the grievance was set for hearing and continued, the parties agreed to submit this matter for a decision based upon the lower level record. Grievant was represented at level four by Jack Ferrell, Communications Workers of America, and the Division of Corrections ("DOC") was represented by counsel, Charles Houdyschell Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 25, 2003.

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

Findings of Fact

1. Grievant is employed at the Pruntytown Correctional Center ("PCC") as a Corrections Unit Manager. Unit Managers are responsible for supervising a multi- disciplinary team of staff assigned to work in a resident unit.

2. Grievant is the immediate supervisor of Joe Cunningham, a Corrections Counselor.

3. On August 24, 2002, Grievant was off duty and exercising in the staff gymnasium at PCC.

Mr. Cunningham entered the gymnasium carrying a puppy, and a casual conversation took place regarding how the puppy had been acquired by Mr. Cunningham. Toward the end of the conversation, Mr. Cunningham volunteered the information that he had purchased the puppy from the friend of an inmate. He asked Grievant's advice on how to complete the purchase (a check had been refused by the seller, who wanted cash), and Grievant responded: “I don't have anything in this, you need to go see the shift commander.”

4. Mr. Cunningham went to see the shift commander on duty, Captain James Reed, shortly after having the above discussion with Grievant. Captain Reed immediately phoned Grievant, inquiring whether Grievant had “approved” the purchase. Grievant informed him that he had not approved it, stating that he considered Captain Reed to be “in charge” of the situation and that it was Captain Reed's decision.

5. DOC Policy Directive 129.24 prohibits correctional staff from becoming “over- familiar” with inmates/parolees and their families and/or acquaintances. It also prohibits staff from giving or receiving anything in the nature of a gift, favor or bribe from an inmate or parolee. 6. DOC Policy Directive 129.00, “Progressive Discipline,” lists offenses for which discipline may be imposed, including “[g]iving, offering or accepting any unauthorized article, favor or service to/from any inmate/parolee, ex-inmate, their families or friends.”

7. By memorandum dated November 30, 2000, Warden J.N. Liller reminded all PCC staff that they are “strictly prohibited from giving, offering or accepting any gift, favor, service or any unauthorized article to an inmate, their families or friends.” The memo also reminded employees that there are no exceptions, even if the item is harmless or insignificant, unless the Warden or his designee approves the item in advance.

8. On September 9, 2002, Grievant received a verbal reprimand, (See footnote 1) which stated, in part:

> As a mid-level manager, when a subordinate comes to you with issues or questions, you should make the decision, not send it to the Shift Commander. In this case, as any other, if you were not sure of the answer you should have met with Captain Reed to make a decision together.
>
> I am informing you by this writing that your conduct in this matter is unsatisfactory and unacceptable. Any further infractions of this nature will result in more severe disciplinary action up to dismissal in accordance with Policy Directive 129.00.

9. At the time Mr. Cunningham told Grievant where he had acquired the puppy, Grievant knew the purchase was against DOC policy, but he did not believe he should be held responsible, since he was off duty at the time. The day after the discussion, August 25, 2002, Grievant prepared incident reports reflecting the information set forth above.

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.

Respondent contends that Grievant's refusal to immediately inform an officer that his conduct was against policy was worthy of discipline. Grievant's failure to exercise supervisory authority over a subordinate, even when off duty, was not excusable. Moreover, knowing that the transaction was prohibited, Grievant stated he “had nothing in this,” and tried to pass the responsibility onto the shift commander, again exhibiting Grievant's knowing refusal to exercise his supervisory responsibility. Grievant contends he did nothing wrong and violated no policy, and believes that sending the officer to the shift commander was the appropriate action to take in this situation.

The West Virginia Supreme Court of Appeals has recognized that public employees are not ordinarily chargeable with the acts of their subordinates unless they participate in such acts or otherwise sanction them. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). The Oakes Court also noted that employees can be held responsible for subordinates' actions if they have been negligent in supervising such subordinates. Further it was recognized in that case that a public employee cannot escape responsibility for a subordinate's misfeasance by simply ignoring it. Id. at 387. In the instant case, the undersigned finds that Grievant clearly knew Mr. Cunningham's actions were in violation of policy, and he had a responsibility to take action to prevent or report the infraction. Grievant contends that he did, in fact, call Captain Reed immediately to inform him of the prohibited purchase and completed an incident report the following day. However,

the incident report itself reveals that it was actually Captain Reed who called Grievant, and, in his own words, Grievant stated in the report that he considered the situation Captain Reed's responsibility and told him so. Clearly, Grievant attempted to “pass the buck,” and discipline in this instance could easily have been avoided if he had merely informed the officer that he could not purchase the puppy and completed an incident report reflecting that information. As was recently recognized by this Grievance Board, supervisory employees are responsible for reporting DOC policy violations, regardless of whether they are on duty or not, and discipline in such cases is warranted. See Scott v. Div. of Corrections, Docket No. 02-CORR-186 (Jan. 29, 2003).

Respondent has proven by a preponderance of the evidence that Grievant's failure to exercise his supervisory responsibility when he knew a policy violation was being committed warranted a verbal reprimand. 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 apreponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990).

2. Public employees may be disciplined for misconduct of subordinates if they participate in such acts or otherwise sanction them, or if they attempt to ignore a subordinate's misconduct. See Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. DOC Policy Directives 129.00 and 129.24 prohibit employees from giving or receiving gifts, favors, or services from inmates or their families and/or friends.

4. Respondent has proven by a preponderance of the evidence that Grievant failed to exercise supervisory authority over an employee who was in clear violation of policy, warranting a verbal reprimand.

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 EmployeesGrievance 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: April 14, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In accordance with Policy 129.00, the letter memorializing the reprimand was placed in an administrative file separate from Grievant's personnel file, and this was stated in the letter.