ROSEMARIE COHENOUR,

Grievant,

v. **DOCKET NO. 03-CORR-055**

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Rosemarie Cohenour filed this grievance against Division of Corrections/St. Marys Correctional Center, Respondent, on February 21, 2003, stating: “Due to a medical condition, that St. Marys Correctional Center was aware of, I believe the suspension violated my civil rights (1964 Title IV [sic]) and I was discriminated against.” Grievant stated the relief sought as: “Removal of suspension from my personnel file, back pay for time missed and otherwise made whole.”

A level four hearing was held in the Grievance Board's Charleston office on September 2, 2003. Grievant was represented by coworker Sandra Shultz, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. This matter became mature for decision on October 3, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1) Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Correctional Officer II at St. Marys Correctional Center.

2. On an unknown date, Grievant had stored a sandwich and drink in the inmates' refrigerator on her unit. When she went to retrieve the food, it was missing. Grievant recalled seeing an inmate throw away a wrapper, and saw that the wrapper looked like the one on her missing sandwich.

Grievant did not see the inmate take or eat the sandwich.

3. On a later date, Grievant purchased a similar sandwich. Grievant mixed five or six crushed ExLax laxative tablets into some mayonnaise, and put it on the sandwich. Grievant then placed the sandwich in the same inmate refrigerator her sandwich had previously been stolen from. Staff are not permitted to store things in the inmate refrigerator.

4. Later, she discovered the adulterated sandwich was missing. The same inmate she had suspected of taking her first sandwich approached her complaining of a stomach ailment, to which Grievant replied, “what is the matter, was it something you ate?” Grievant did not refer the inmate to the medical unit.

5. Grievant related these events to two other correctional officers, Sergeant Brandon Jones and Corporal Thomas Weiner, on November 16, 2002. Sergeant Jones instructed Corporal Weiner to write a report of the incident, and both officers submitted written reports to Joe Hill, Associate Warden of Security, who commenced an investigation. 6. Corporal Jones related that Grievant said that since her unit manager, Pat Mirandy, would not let her write up the inmate because she did not actually see him take or eat the sandwich, "she decided to take care of it her self." Respondent's Exhibit No. 3. He also stated Grievant told him she made a request to Captain James Greathouse to work that shift on the unit in which the inmate was housed, made sure the inmates saw her place the sandwich in the inmates' refrigerator, and took a long break from her post so the inmate in question could get the sandwich.

7. As part of the investigation, Investigator Charles B. Hudson interviewed Grievant and asked her about the incident. The interview was recorded. During the interview, Grievant admitted the incidents occurred. Respondent's Exhibit No. 2.

8. In response to Mr. Hudson's question, “Did you try to pay [the inmate] back?” Grievant stated, “I put another sandwich in the refrigerator and he ate it.” Grievant stated in the interview she had a bowel condition, and had put the laxative in the sandwich for her own use. She further stated, “I didn't do it particularly for him, I did it for me and if he ate it, that was just icing on the cake.”

9. Correctional Officer Jarad Collins received a ten-day suspension because he closed the smoke-yard down without reason. Mr. Collins admitted he had done so inappropriately, because he was “having a bad day,” and did not contest the punishment.

10. Correctional Officer James Chapman was suspended for fifteen days for

horseplay/physical abuse of an inmate. Mr. Chapman had been “messing” with an inmate showing him a martial-arts-type move, and accidentally kicked the inmate in the chest, bruising him. Mr. Chapman admitted he had “screwed up.” Mr. Chapman had previously been verbally reprimanded and counseled for other incidents. 11. On February 18, 2003, Grievant was informed by Warden William Fox that she would be suspended for 30 days for a violation of Policy Directive 129.00, section J, Item 35, Physical Abuse of an Inmate, due to her actions. The letter further stated:

> In essence, you introduced a drug to the inmate population within the unit with the implicit knowledge that the consumption of your sandwich could possibly cause the inmate who consumed it discomfort. Your failure to observe personal precautions and your exercising extremely poor judgement in dealing with inmates under your supervision necessitates your suspension. The conduct you have displayed in this matter is extremely unprofessional and is not consistent with the Division of Corrections philosophy of offering inmates a safe environment while providing humane treatment to the inmates in our custody.

12. Division of Corrections Policy Directive 129.00 states that a suspension may be "issued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs." The policy also lists a number of possible offenses, such as "disruptive behavior," "physical abuse of an inmate," or "acts of physical violence, fighting or dangerous horseplay." The policy further states, "an offense, which, in the judgment of the Chief Administrator, although not listed below, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this policy." Respondent's Exhibit No. 5.

13. The inmate did not file a grievance complaining of the incident.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is morelikely true than not." Leichliter v. W. Va. Dep't of Health and 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.

Grievant was suspended for 30 days for placing a laxative-laced sandwich in the inmate refrigerator on her unit, in order to exact revenge on an inmate for stealing her food on a previous date. Grievant contends Respondent failed to prove its charge, and that the punishment was disproportionate to the offense when compared to discipline of other correctional officers.

Respondent has overwhelmingly met its burden of proof. Grievant admitted her actions, not only to the investigator but to her coworkers. While she attempts to justify her actions by reference to her medical condition, she clearly intended to “pay back” the inmate who had earlier stolen her sandwich. Although Grievant correctly points out there was no way she could have been certain the inmate would have taken the bait, she clearly expected him to do so, and made it possible. Had Grievant truly meant the doctored sandwich to treat her medical condition, she would not have placed it in the inmate refrigerator, a place she knew she was not permitted to store her own food and a place she knew from experience an inmate was likely to get it.

Grievant did not elaborate on her Civil Rights Act of 1964 claim, and Title IV, which she cites, deals with desegregation of public education. Most likely, she meant to claim a violation of Title VII, Equal Employment Opportunity (Pub. L. 88-352). Nevertheless, Grievant presented no argument or evidence suggesting or illustrating how she was discriminated against due to her race, color, religion, sex, or national origin, the areas addressed by the Civil Rights Act. She did claim in her Statement of Grievance that she was discriminated against "due to a medical condition," apparently a reference to the factthat she did have a disorder for which she claimed to be treating herself with the laxative she placed in her sandwich.

Grievant was not punished for her medical condition, nor for the simple act of bringing medication into the facility. She was punished for intentionally attempting to harm an inmate in her care, someone to whom she owed a duty of humane and respectful care. Grievant does point out that other correctional officers were given lesser punishments for infractions she deemed to be comparable.

“'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant compared herself to two other officers who has recently been disciplined. James Chapman and Jarad Collins received lesser suspensions, one for closing the smoke yard down without permission, and one for accidentally injuring an inmate during horseplay. Neither incident is comparable. Mr. Chapman's horseplay incident comes closest, given that both he and Grievant injured an inmate, but there was no evidence Mr. Chapman did so intentionally, while Grievant deliberately targeted an inmate for what amounted to a low-grade poisoning. Mr. Chapman was contrite, and admitted his wrongdoing, while Grievant avoided taking responsibility for her own actions. Grievant has not established a *prima facie* discrimination claim.

Grievant also argued at the hearing that mitigating circumstances should have decreased her punishment. She did not identify these circumstances, other than her good work record and lack of previous discipline. "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). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work

performance. Pingley v. Div. of Corrections, Docket No. 95- CORR-252 (July 23, 1996).

The evidence shows Respondent did mitigate its penalty. Grievant was described as a low-maintenance, good employee by her shift commander. She was given a chance to explain her actions. Given the seriousness of her offense, which Grievant still fails to grasp, she could have been facing termination. Grievant presented no evidence ofconditions which support a reduction in the level of discipline in the interest of fairness and objectivity.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and 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.

2. Respondent met its burden of proving Grievant placed a sandwich laced with laxatives in the inmate refrigerator on her unit, with the intent that a particular inmate would take it and eat it.

3. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."W. Va. Code § 29-6A-2(d).

4. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant failed to establish a *prima facie* claim of discrimination.

6. "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). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

7. Grievant did not present any evidence of mitigating circumstances that would warrant lessening her discipline.

For the foregoing reasons, this grievance is hereby **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 grievanceoccurred, 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: October 23, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant submitted a number of documents with her brief describing her medical condition, and cited several facts in her brief that were not adduced at the hearing. This extraneous information will not be considered, as it is not in evidence.