CALVIN COX,

Grievant,

v.

DOCKET NO. 03-CORR-144

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Calvin Cox, filed three separate grievances against his employer, the West Virginia Division of Corrections/Anthony Correctional Facility ("Corrections"), protesting a written reprimand, a ten-day suspension, and a fifteen-day suspension. (See footnote 1) The grievances were denied at the lower levels of the grievance process, and following appeal to level four, a hearing was held in the Grievance Board's Beckley, West Virginia, office on October 23, 2003. Grievant was represented by Dennis Brackman, and Corrections was represented by Charles Houdyschell, Jr., Assistant Attorney General. The consolidated grievance became mature for decision on January 12, 2004, the deadline for the parties' proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Failure to Remove Written Reprimand

Level Three Corrections Exhibits

Ex. 1 -

Policy Directive 129.00 Progressive Discipline.

Ex. 2 -

February 4, 2002 letter from Scott Patterson to Calvin Cox.

Ex. 3 -

January 13, 2003 letter from Scott Patterson to Calvin Cox.

Level Three Testimony

Corrections presented the testimony of Scott Patterson. Grievant presented the testimony of Adrian Hoke.

10-Day Suspension

Level Three Grievant's Exhibits

Ex. 1 -

October 18, 2002 Violation Report.

Ex. 2 -

October 18, 2002 Incident Report.

Ex. 3 -

October 18, 2002 Use of Force and Restraints Report.

Ex. 4 -

January 13, 2003 letter from Scott Patterson to Calvin Cox.

Level Three Testimony

Corrections presented the testimony of Adrian Hoke and Kimberly Wiley. Grievant testified in his own behalf, and presented the testimony of Tammy Alderman, Scott Patterson, Adrian Hoke, and Wayne White.

Consolidated Grievances

Level Four Grievant's Exhibits

Ex. 1 -

March 3, 2003 letter from Jim Rubenstein to Calvin Cox with attachments.

Ex. 2 -

Tape recording of interview of Calvin Cox conducted by Kimberly Wiley.

Ex. 3 -

Tape recording of interview of Calvin Cox conducted by Mr. Mynuk. (See footnote 2)

Level Four Corrections' Exhibits

Ex. 1 -

February 4, 2002 letter from Scott Patterson to Calvin Cox.

Ex. 2 -

January 13, 2003 letter from Scott Patterson to Calvin Cox.

Ex. 3 -

February 27, 2003 letter from Scott Patterson to Calvin Cox.

Ex. 4 -

October 18, 2002 Use of Force and Restraints Report; October 18, 2002 Violation Report; October 18, 2002 Incident Report.

Ex. 5 -

October 18, 2002 Use of Force and Restraints Report; October 18, 2002 Incident Report; October 19, 2002 handwritten note.

Ex. 6 -

October 18, 2002 Incident Report by Alesha Livesay.

Ex. 7 -

November 6, 2002 Administrative Rights Warning.

Ex. 8 -

October 18, 2002 Incident Report by Lt. Harper.

Ex. 9 -

December 9, 2002 memorandum from Kimberly Wiley to Scott Patterson re: Investigation.

Testimony at Level Four

Corrections presented the testimony of Scott Patterson, Alesha Livesay, Harvey Kincaid, Jeff Brown, and Kim Wiley. Grievant presented no additional testimony.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed as a Correctional Officer, rank of Corporal, at the Anthony Correctional Facility ("Anthony").

2. The Anthony Correctional Facility houses youthful felons between the ages of 18 and 23, and incarcerates both male and female inmates.

3. Anthony provides a 6 month to 2 year program designed to render the inmate a suitable candidate to be placed upon probation by their sentencing court upon release.

4. In addition to housing youthful offenders, from early 2001 through February 2003, Anthony also housed adult female inmates pending the completion of construction of the Lakin Correctional Center. 5. This co-educational environment requires extra vigilance on the part of the staff, including, but not limited to, avoiding becoming "over-familiar" with inmates. Over- familiarity by staff with inmates is a "red flag" that can indicate an improper relationship exists between the inmate and the staff member.

6. Officers and counselors at Anthony are trained not to become overly familiar with the inmates, including but not limited to, sharing personal information, giving or taking things from inmates, and interacting on a first-name basis. Officers must at all times avoid any appearance of

impropriety when dealing with inmates.

7. In May 2001, Warden Scott Patterson received a report regarding Grievant and a female offender. Warden Patterson looked into the matter, and counseled Grievant not to call dorms to speak with inmates, relay messages through dorm officers, not to bring things to inmates or receive things from inmates, and not to touch any inmate. This report did not lead to any disciplinary action against Grievant.

8. On February 4, 2002, Warden Patterson issued Grievant an official written reprimand because he had allowed himself to become familiar with some Dorm 5 adult female inmates. While there was no finding of any violation of Policy Directive or Operational Procedure by Grievant, Warden Patterson believed Grievant chose not to adhere to his directions during counseling to avoid becoming overly familiar with the inmates. LIV R. Ex. 1.

9. On January 13, 2003, Warden Patterson issued Grievant a 10-day suspension letter following an investigation into an alleged incident between Grievant an adult female inmate which occurred on October 18, 2002. LIV R. Ex. 2. 10. The 10-day suspension resulted because an adult female inmate, Tracy Jividen, attempted to reach into Grievant's shirt pocket and pull out a cigar, and because Grievant grabbed her hands and moved them away. Warden Patterson viewed the fact that the inmate felt she could touch Grievant's person and retrieve the cigar from his pocket as an indication there was an over-familiarity between Grievant and the inmate. Additionally, Grievant's grabbing of the inmate's hands in a casual manner was not appropriate conduct by an officer.

11. Grievant reported the incident with the cigar to his supervisor, Lt. Harper, when it happened. Grievant told Lt. Harper he saw the cigar on a windowsill, and took it and placed it in his shirt pocket. Ms. Jividen tried to take the cigar from Grievant in a playful manner, and Grievant took her left hand and placed it in a hammer lock behind her back, also in a playful manner. LIV R. Ex. 8.

12. Lt. Harper advised Grievant that horseplay of this type was not permitted, and instructed him to complete an incident report.

13. Grievant submitted an incident report, a use of force and restraints report, and a violation report to Lt. Harper. LIV R. Ex. 4. The incident report did not match with what Grievant had verbally relayed to Lt. Harper, and Lt. Harper told Grievant to rewrite the incident report. Grievant rewrote the report indicating he had placed her left hand in a wrist lock. LIV R. Ex. 5.

14. Lt. Harper noted in his own incident report of the matter that Grievant's incident reports did not reflect the degree of horseplay that Grievant had discussed with him verbally. LIV R. Ex. 8. 15. Another officer working that same shift, Alesha Livesay, reported she had spoken with inmate Jividen after the incident, and Ms. Jividen indicated there was nothing serious about the incident; that she and Grievant were joking around. LIV R. Ex. 6.

16. Warden Patterson ordered an investigation of the Jividen incident. On November 6, 2002, Amy Hogan conducted a tape-recorded interview of Grievant. Prior to the start of the interview, Ms. Hogan gave Grievant an Administrative Rights Warning, which he understood and signed.

17. Subsequently, Ms. Kim Wiley took over the investigation, and conducted two additional tape-recorded interviews of Grievant, on November 15 and December 6, 2002.

18. Warden Patterson met with Grievant on January 10, 2003, to discuss the incident, allowing Grievant the opportunity to respond to the allegations. Grievant asked that his representative be present, and Warden Patterson denied his request. Following the meeting, Warden Patterson gave Grievant the 10-day suspension letter.

19. Prior to the 10-day suspension being served, another set of allegations arose against Grievant. Warden Patterson requested that someone from outside the institution conduct an investigation, because of the increasing number of incidents involving Grievant. These allegations were investigated by Associate Warden Dennis Mynuk and Lt. David Cox. No disciplinary action was brought against Grievant as a result of this investigation. (See footnote 3) 20. When Grievant returned from serving his 10-day suspension, Warden Patterson assigned him to a Central Control post in order to limit his ability to interact with residents.

21. The adult female inmates were scheduled to be shipped out of Anthony to Lakin on February 13, 2003.

22. On February 12, 2003, Grievant was working in Central Control. Grievant asked to go to lunch, and was specifically told by Lt. Jeff Brown not to have contact with the female inmates in the dining hall.

23. Grievant went to lunch, and while he was putting his tray up, Sergeant Harvey Kincaid saw Grievant stop and talk to a table of Dorm 5 adult female inmates. Sgt. Kincaid heard Lt. Brown tell Grievant not to have any contact with the female inmates, and he reported Grievant to Lt. Brown.

24. Upon returning to Central Control, Grievant told Lt. Brown he had talked to Dorm 5

inmates, and had probably disobeyed his order.

25. As a result of Grievant's conduct in the dining hall, Warden Patterson issued him a 15-day suspension letter on February 27, 2003, for failing to obey direct orders from his superiors regarding contact with female inmates. LIV R. Ex. 3.

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likelytrue than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

A.

10-Day Suspension.

Grievant's statement of grievance on the 10-day suspension is as follows:

> On January 14, 2003 I received a 10 day suspension which is unjustified and unfounded.
>
> Relief sought: I want to be returned to work in my present position as corporal, with all the duties and responsibilities with no restrictions. I want to be compensated with interest for the days I have served suspension not using my earned leave or holidays. I want to have this suspension removed from my record. I want to work in an environment free of harassment from the administration of the Anthony Correctional Center. I want a written letter of apology from Warden Scott Patterson. Contend extreme bad faith on the part of Anthony Correctional Center and particularly Warden Scott Patterson.

Warden Patterson issued Grievant a 10-day suspension without pay on January 13, 2003, for the following conduct:

> [B]latant disregard to orders to not become over personable with offenders and your patterned behavior of overfamiliarity with female offenders. This personnel action is in accordance with Policy Directive 129.00, Section G, 3. Suspension: Issued where

> minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs, and the West Virginia Division of Personnel Administrative Rule, Section 11.4.

LIV Corrections Ex. 2.

This suspension was based upon an investigation into the incident involving female offender Tracy Jividen set forth in Findings of Fact 10-18, supra, as well as the previous written warning Grievant had received in February 2002, which directed him not to become overly familiar with female offenders. See LIV Corrections Ex. 1. Grievant met withWarden Patterson and others on January 10, 2003, to discuss the incident, and Grievant was given the opportunity to respond to the charges set forth in the suspension letter. Grievant admitted the incident happened as described in his own Incident Report. Following the meeting, Warden Patterson issued the 10-day suspension.

Grievant had been issued a written reprimand in February 2002 relating to his interaction with inmates, including specific directions to avoid any appearance of impropriety or becoming overly familiar or comfortable with inmates. The next step in Corrections' Progressive Discipline Policy 129.00 is a suspension. See LIII Corrections Ex. 1. As Grievant admits the incident with inmate Jividen occurred as described, Corrections has met its burden of proving the charge, and the 10-day suspension was an appropriate action to take in accordance with the Progressive Discipline Policy.

Grievant argues in defense that he was denied his due process rights with respect to the 10-day suspension. Specifically, Grievant alleges he was denied the right to have a representative present during the investigation into the Jividen incident, and during the meeting with Warden Patterson on January 10, 2003, which Grievant refers to as his Weingarten rights. This doctrine, set forth in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), essentially holds that it is a violation of the National Labor Relations Act for a private sector employer to deny union representation when an employee, who could potentially be subjected to discipline, was being questioned, and when the employee requested representation.

Contrary to Grievant's assertions, however, the West Virginia Supreme Court of Appeals has held that Weingarten is not applicable to state correctional officers. See Swiger v. Civil Service Commissioner, 179 W. Va. 133, 365 S.E.2d 797 (1988). In Swiger,the Court ruled that Weingarten was irrelevant to state correctional officers. In so doing it held:

> Appellant would liken the facts of the present case to those in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). In Weingarten, during the course of an investigatory interview at which a private employee was being interrogated about reported thefts at the employer's store, the employee was denied the presence of her union representative at an interview. However, Weingarten is not controlling in the present case because it addressed the rights of a private sector employee who was compelled to appear at an investigatory interview. Furthermore, Weingarten is distinguishable from the present case because it dealt with the National Labor Relations Act as applied in the *private* sector. *Therefore, Weingarten is irrelevant* as the Civil Service Commission statutes are clearly different from the N.L.R.A.

Id. (emphasis added). In other words, because state employees enjoy certain due process protections under the state grievance statutes, W. Va. Code §§ 29-6A-1, *et seq*., that private sector employees do not, Weingarten is not applicable to state employees.

Thus, the analysis must turn to the due process protections afforded Grievant under the applicable laws, statutes, and policies. Grievant's due process argument is two-fold. First, he alleges he was denied the right to representation during the interviews with Hogan and Wiley concerning the Jividen incident, and during the January 10, 2003, meeting with the Warden. Second, Grievant alleges the January 10, 2003, meeting the Warden did not provide him with sufficient due process prior to being given the 10-day suspension.

As noted above, the West Virginia Supreme Court of Appeals has rejected the notion that public sector employees are entitled to representation during investigatory interviews. However, it is the practice of Corrections to give employees an Administrative Rights Warning prior to being interviewed, which spells out what rights they do have. See Amos v. W. Va. Div. of Corrections, Docket No. 98-CORR-389 (Dec. 28, 1998); Overbayv. W. Va. Div. of Corrections, Docket No. 97-CORR-429 (July 31, 1998). Grievant was given an Administrative Rights Warning by Ms. Hogan on November 6, 2002, the day of his first interview concerning the Jividen incident. LIV Corr. Ex. 7. The Administrative Rights Warning states, among other things:

> You are hereby advised that you are about to be questioned as a part of an official internal administrative investigation or inquiry of the West Virginia Department of Public Safety, Division of Corrections, Anthony Correctional Center.

> You are entitled to all the rights and privileges guaranteed by all of the laws and the Constitution of West Virginia and the United States, including the right not to be compelled to incriminate yourself relating to a criminal matter.

> You will be asked questions specifically directed and narrowly related to the official performance of your duties as a member of the Division, or your fitness for office.
>
> Your answers to any questions, as well as any evidence or other information gleamed from this investigation or inquiry cannot, by law, be used against you in any subsequent criminal proceedings; however, your answers, subsequent evidence, and information may be used against you in relation to Division administrative charges for violations of rules, regulations, policies and/or procedures promulgated by the Department of Public Safety, Division of Corrections and/or Anthony Correctional Center.
>
> Refusal to answer questions in relation to any official Division investigation or inquiry; answering questions untruthfully; or intimidating or attempting to intimidate any other person in relation to this investigation or inquiry may result in disciplinary action, up to and including dismissal from employment.

LIV Corrections Ex. 7.

Grievant signed and acknowledged the Administrative Rights Warning. Grievant cooperated during the interviews, and his statements were tape recorded by Ms. Hogan, and later by Ms. Wiley. This Grievance Board has previously addressed the issue of employee cooperation in an internal investigation, in Tolley v. W. Va. Div. of NaturalResources, Docket No. 94-DNR-629 (May 18, 1995). That case noted that in a line of cases following Garrity v. New Jersey, 385 U.S. 493 (1967), the United States Supreme Court

> has held a public employee may be compelled (i.e., the agency states that the employee must answer the questions on the pain of disciplinary action if he refuses) to answer questions if there is immunity from federal and state use of the compelled testimony or fruits of that testimony in connection with criminal proceedings against the person testifying. Gardner v. Broderick, 392 U.S. 273 (1968). The questions to the public employee must be specifically, directly, and narrowly related to the performance of official duties. Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 392 U.S. 280 (1968).

It is improper to require responses to these questions and at the same time require a waiver of immunity from prosecution. Only in a proper proceeding is an employer warranted in dismissing a public employee upon his refusal to answer questions. A "proper proceeding" means such proceedings in which the employee is asked only pertinent questions about the performance of his

duties and is duly advised of his options and the consequences of his choice. Id. More specifically, "given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." Lefkowitz v. Turley, 414 U.S. 70, 84 (1973).

In Tolley, the grievant had stated he wished to have an attorney present, and the interview had ended at that point. Tolley did not directly address the issue of whether an employee has the right to request the presence of an attorney, because it found the grievant could not be dismissed for failure to cooperate in an internal investigation when the agency had not advised him of his rights. Tolley, however, indirectly indicates that anemployee who has been properly advised that his statements or fruits thereof cannot be used in a criminal proceeding, cannot demand the presence of an attorney.

The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our State Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977). Thus, if an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney.

Following the guidance of the above cases, it is clear Grievant was afforded all the procedural due process rights to which he was entitled when he was given the Administrative Rights Warning prior to the beginning of the investigation into the Jividen incident. Grievant understood those rights, signed the document, and cooperated with the investigators. Moreover, there is no requirement, statutory or otherwise, that entitled Grievant to have representation during his meeting with Warden Patterson on January 10, 2003.

Grievant also alleges he was not afforded sufficient due process prior to being given his 10-day suspension, and that the Warden's decision had already been made prior to the January 10, 2003, meeting. Grievant, as a tenured state employee, has a property interest in his employment. Perry v. Sindermann, 408 U.S. 593 (1972), cited in Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July 28, 1993), aff'd, Civil Action Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr.

5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." Jones, supra. "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977).

The West Virginia Division of Personnel requires that a suspension be accompanied by a statement of the reasons for the suspension:

> Suspension - Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.

143 CSR § 12.3, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

This requirement is also reflected in CORR's policy. Policy 400, Section 4.03, provides:

> Prior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond. EXCEPTION: An employee may be immediately sent away from the work area when the employee's continued presence may be a threat to the welfare of the agency or fellow employees. In such cases, the employee shall be given notice of the charges and an explanation of the agency's evidence as soon as possible thereafter and shall then be given a reasonable opportunity to respond prior to being placed on suspension without pay or being removed.

This policy requires notice and an opportunity to respond to allegations and evidence, prior to the employee being deprived of either his pay or his job. Cassity, supra.

It has been Correction's practice to state the specific factual events upon which discipline was based it its letters suspending and dismissing employees. See Hosaflook v. W. Va. Div. of Corrections, Docket No. 98-CORR-446/447 (Jan. 20, 2000); Hundley v. W. Va. Div. of Corrections, Docket No.

97-CORR-197A (May 12, 1999); Frisenda v. W. Va. Div. of Corrections, Docket No. 97-CORR-373 (Mar. 24, 1998); Grishaber/Crist v. W. Va. Div. of Corrections, Docket No. 97-CORR-067/068 (Oct. 27, 1997); Cassity v. W. Va. Div. of Corrections, Docket No. 97-CORR-267 (August 25, 1997); Davidson v. W. Va. Div. of Corrections, Docket No. 96-CORR-133 (May 9, 1997); Pingley v. W. Va. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996); Pingley v. W. Va. Div. of Corrections, Docket No. 94-CORR-1122 (June 30, 1995); Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995).

The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural dueprocess protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension Waite, a civil service employee like Grievant, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

DOC Policy Directive 129.00 provides for a progressive discipline system, with a continuum of penalties, ranging from the least severe verbal warning to the most severe dismissal. While the policy lists a variety of offenses which may warrant discipline, it does not specify what penalty is to be imposed for each type of offense. Suspensions may be imposed after prior lesser disciplinary measures have been imposed, or for "a more serious singular incident." Demotions under the policy "shall be for cause and may be the final attempt at corrective action, prior to dismissal." Clearly demotion is an extremely serious punishment which should be reserved for serious offenses.

“Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke, supra (citing Syl. Pts. 4 and 5 ofSnyder v. Civil Serv. Comm'n, 238 S.E.2d 842 (W. Va.

1977)). This was not a dismissal, but even applying the dismissal standard to this case, the undersigned concludes that, considering all the facts, the event was sufficiently identified so that there was no reasonable doubt as to the identity of the accuser, and the incident being investigated. Grievant was given an opportunity to respond personally to the Warden, and he did so. This is all the due process to which he was entitled under the law prior to being given the 10-day suspension.

B.

15-Day Suspension.

Grievant's statement of grievance over the 15-day suspension is as follows:

> On 04 March 03, I received a 15 day suspension with is unjustified and unfounded.

> Relief sought: Relief sought: I want to be returned to work in my present position as corporal, with all the duties and responsibilities with no restrictions. I want to be compensated with interest for the days I have served suspension not using my earned leave or holidays. I want to have this suspension removed from my record. I want to work in an environment free of harassment from the administration of the Anthony Correctional Center. I want a written letter of apology from Warden Scott Patterson. Contend extreme bad faith on the part of Anthony Correctional Center and particularly Warden Scott Patterson.

Warden Scott Patterson issued Grievant the 15-day suspension by letter dated February 27, 2003, for failure to obey the directives of a superior, or, in essence, insubordination.

Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employermust demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va.

Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

The suspension came as a result of the incident described in Findings of Fact 20- 25, supra, where Grievant, who was under direct orders from his superior not to have any contact with the female adult inmates while in the dining hall, stopped and spoke to those very inmates, returned to his post, and told his superior he had “probably” disobeyed his order not to have contact with the women.

Grievant's superior reported the incident to Warden Patterson, and Warden Patterson met with Grievant on February 27, 2003, to discuss the matter. Grievant was given an opportunity to respond to the allegations, after which Warden Patterson issued the letter of suspension. Grievant's assertion that this suspension was unjustified and unfounded is without merit. Clearly, Grievant had received direct orders from his superior not to have any contact with the adult female inmates. Grievant deliberately did just the opposite when he stopped to talk to them in the dining hall. Grievant is guilty of disobeyinghis superior's orders and insubordination. Grievant has failed to prove any violation of policy or procedure occurred with respect to the issuance of the 15-day suspension.

C.

Harassment.

Finally, Grievant claims the actions taken against him by Warden Patterson constitute harassment. W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation,or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” While Grievant no doubt finds being disciplined disturbing, irritating, and annoying, the actions taken by the Warden were as a direct result of Grievant's own actions. Disciplinary measures, per se, do not constitute harassment, and Grievant has failed to prove this claim.

The above Findings of Fact and discussion are supplemented by the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The due process protections set forth in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), are not applicable to West Virginia state correctional officers. See Swiger v. Civil Serv. Comm., 179 W. Va. 133, 365 S.E.2d 797 (1988).

2. The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our state Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc.v. Pence, 240 S.E.2d 668 (W. Va. 1977). 3. If an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney. See Tolley v. W. Va. Div. of Natural Resources, Docket No. 94-DNR-629 (May 18, 1995).

4. Grievant, as a tenured state employee, has a property interest in his employment. Perry v. Sindermann, 408 U.S. 593 (1972)(cited in Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July 28, 1993)), aff'd, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." Jones, supra.

5. "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981)(citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977)).

6. The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). 7. Grievant received a letter outlining the charges in detail, received an opportunity to respond to the Warden, and did, before being placed on a 10-day suspension. This is all the due process to which Grievant is entitled.

8. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1,

1989).

9. Grievant was insubordinate to his superior when he deliberately disobeyed an order not to have any contact with the adult female inmates while in the dining room, resulting in the 15-day suspension.

10. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation,or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

11. Grievant failed to demonstrate that the disciplinary actions taken against him by Warden Patterson constituted harassment.

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. 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 appealingparty 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 13, 2004

Footnote: 1

Docket Nos. 03-CORR-144, 03-CORR-143, and 03-CORR-145, respectively. The three grievances were consolidated at level four for hearing and decision. Grievant withdrew Docket No. 03-CORR-143 dealing with the written reprimand issue, by letter dated January 9, 2004, and the remaining two issues have been redocketed as Docket No. 03-CORR-144.

Footnote: 2

Grievant complained that this tape recording had several blanks. The undersigned reviewed the original tape

recording along with the copy provided, and determined the blanks occurred during the original tape recording of the interview. No transcript was made of this tape, nor were any other recording instruments used during the interview. Therefore, the undersigned admits this tape recording as it exists as the best evidence of the interview conducted by Mr. Mynuk.

Footnote: 3

A tape recording was made of Mr. Mynuk's interview of Grievant during this investigation. The tape has several gaps on it, and a review of the original against copies which were made as part of discovery in this grievance revealed the gaps were on the original tape recording.