MICHAEL ANDERSON,

Grievant,

v.

Docket No. 05-DJS-223

DIVISION OF JUVENILE SERVICES/GENE SPADARO JUVENILE CENTER,

Respondent.

DECISION

The grievant, Michael Anderson ("Anderson"), grieves the action of his employer, respondent Division of Juvenile Services ("DJS"), in removing Internet access from Youth Specialists at the Gene Spadaro Juvenile Center ("Spadaro"), where Anderson is assigned. For relief, Anderson wants DJS to "reinstate Internet access to all Youth Specialists at the Gene Spadaro Juvenile Center." Despite the manner in which he phrased his request for relief, Anderson is the sole grievant in this case.

Anderson initiated this grievance on May 17, 2005. It was brought to Level IV on June 29, 2005, after being denied at all lower levels. (See footnote 1) A Level IV hearing was conducted before the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on August 17, 2005, in the Grievance Board's hearing room in Beckley. Anderson represented himself at the Level IV hearing. DJS was represented by attorney Steven R. Compton. This grievance matured for decision at the conclusion of the Level IV hearing. After careful review of the entire record, the

undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Anderson is employed by DJS as a Correctional Officer I. He is assigned to Spadaro, where Anderson's work title is Youth Specialist I. Tr.3.

2 2. Spadaro is a staff-secured facility, meaning that the inmates or residents are permitted to move about freely within the facility.

3 3. Through a mistake or oversight, the Fortres program was not installed on certain computers at Spadaro. The Fortres program provides protection against hacking and can be used, among other things, to block access to the Internet. Tr.5.

4 4. According to Jeff Mead ("Coordinator Mead"), Information Systems Coordinator for the Information Technology Department, it is DJS's "standard operating procedure to put Fortres on all in-take computers and control computers." Tr.4. This is because more than one person needs to be able to access those computers under one password. Tr.4 and Level IV testimony of Coordinator Mead.

5 5. Because certain of the computers at Spadaro were not properly equipped with Fortres, Youth Specialists were inadvertently afforded access to the Internet.

6 6. The fact that the Youth Specialists were receiving Internet access came to light when an icon labeled "Erotic Stories" appeared on the intake computer. The resulting investigation by Coordinator Mead revealed the mistaken omission of Fortres from the intake and control computers, which had given Youth Specialists unintended access to the Internet. Coordinator Mead then corrected the omission.

7 7. Once Fortres was installed, Anderson and the other Youth Specialists at Spadaro no longer had direct access to the Internet. This occurred in or about late April 2005.

8 8. Anderson and the other Youth Specialists do have access to an e-mail account.

9 9. Anderson complains that he needs access to the Internet in order to assist Counselors with "groups," by which he means little educational seminars or recreational activities that are conducted for the benefit of Spadaro's residents.

10 10. DJS has made a commitment to provide Internet access to its employees, including

Youth Specialists, whenever such access is needed for training purposes.

11 11. By memorandum, dated May 31, 2005, the director of Spadaro, Ralph Terry ("Director Terry") notified the Youth Specialists that it had come to his "attention that Youth Specialist[s] are having difficulty in obtaining material to conduct groups/activities." As a result, Director Terry ordered "Treatment Staff [to] aid in helping obtain this material as Youth Specialist[s] no longer have access to the internet." Gr.Exh.7 at IV.

12 12. DJS has a facility in Barboursville, the Robert Shell Juvenile Center, that is comparable to Spadaro. The Youth Specialists at the Robert Shell Juvenile Center do not have access to the Internet.

Discussion

Anderson asserts that the Youth Specialists at Spadaro are suffering discrimination because their access to the Internet has been removed. He is, however, the only grievant and is not appearing in a representative capacity for all of the Youth Specialists at Spadaro. Because this is not a disciplinary matter, Anderson bears the burden of provinghis allegations of discrimination by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

West Virginia Code section 29-6A-2 defines discrimination as "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." This same definition is found in the statutes relating to education employees. W. Va. Code 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

All of the Youth Specialists at Spadaro are being treated the same with respect to Internet access. They are also being treated the same as the Youth Specialists at the sister facility, Robert Shell Juvenile Center. Anderson has failed to identify any employees to whom he is similarly situated who have DJS-provided Internet service. Therefore, Anderson is unable to meet the threshold requirement for proving a case of discrimination, within the meaning of West Virginia Code section

29-6A-2.

Anderson has a misperception that his access to the Internet was removed as punishment for the actions of whichever employee or employees accessed pornography on the intake computer. The pornography incident merely brought to light the fact that thecomputers that happen to be used by the Youth Specialists had not been equipped with Fortres, as they should have been. Installation of Fortres, and the consequent removal of Internet access, was in compliance with DJS practices. These actions were not directed at Anderson and were not punitive in nature.

It is clear that Anderson takes issue with the DJS administration's determination that Youth Specialists do not need direct access to the Internet. Unfortunately for Anderson, his displeasure with this type of management decision does not provide a predicate for relief through the grievance process. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96- DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999) (additional citations omitted). Anderson has failed to demonstrate a violation of any law, rule, regulation, or policy upon which to predicate this grievance.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Anderson bears the burden of proof. W. Va. Code St. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2. Anderson must prove his allegations by a preponderance of the evidence. W. Va. Code St. R. § 156-1-4.21 (2004). "The preponderance standard generally requiresproof 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

4. Discrimination is defined as "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).

5. The crux of a discrimination claim “is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

6. Anderson failed to prove that he was treated differently from any similarly situated employees in that none of the Youth Specialists are permitted direct access to the Internet.

1.7 7. Anderson has failed to prove a violation of any law, rule, regulation or policy

upon which to base his challenge to DJS's management decision that Anderson's duties as a Youth Specialist, *i.e.*, Correctional Officer 1, do not require direct access to the Internet.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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 29, 2005

_____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The Level III hearing transcript was incorporated into the record. References to pages in that transcript shall appear herein as “Tr.__.”