CALVIN COX, Jr.,

Grievant,

v. **DOCKET NO. 05-CORR-165**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Calvin Cox filed this grievance on May 17, 2005,challenging his termination from employment at Anthony Correctional Center (ACC). He seeks “[r]einstatement, back pay, costs and Attorney's fees.” A level four hearing was held in the Grievance Board's Beckley office on January 18, 2006. Grievant was self-represented and Respondent was represented by John H. Boothroyd, Assistant Attorney General. The matter became mature for decision February 24, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Mr. Cox claims his termination was based on an invalid order, that Respondent failed to follow its own policies, and that the action was retaliation for his prior grievances and claims of a hostile work environment. Respondent asserted that Grievant's termination was the final step of a progressive disciplinary process based on efforts to curb Grievant's over- familiarity with female inmates and Grievant's failure to follow a direct order. Respondent further asserted that any challenge to the validity of that final order is untimely. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent at Anthony Correctional Center (ACC) as a Correctional Officer 3 (Corporal) until his termination from employment on May 5, 2005.

2. Grievant was terminated for “[f]ailure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or

procedure," in violation of ACC Policy Directive 129.00 § G(5). The termination was the culmination of a long history of discipline for failure to follow orders relating to Grievant's inappropriate contact with female inmates. The letter informing Grievant of his dismissal stated:

> You continually disregarded direct orders from your immediate supervisor. This disregard to orders, along with your comments and attitude, have not represented the ideals of a good supervisor and leader. You are to be an example to your subordinate staff as well as other staff as you are in a ranking position.

3. Grievant had been suspended twice in 2003 for conduct similar to that for which he was dismissed, once for 10 days and once for 15 days. He had also received a written reprimand. He grieved these disciplinary actions, and received a Grievance Board ruling denying his grievances. (See footnote 1) These suspensions followed a series of lesser punishments, as well as counseling, intended to correct the same misconduct, dating back to 2001. 4. After Grievant served his suspension and had returned to work, his immediate supervisor, Associate Warden for Security Wayne White, spoke with Grievant on February 9, 2005, regarding reports he had received that Grievant was spending too much time talking with female inmates, and White cautioned Grievant that he could talk to them, but only if his transportation unit job duties required it.

5. Grievant was subsequently seen spending extended lengths of time, between one and two hours, talking to a female inmate, Shannon Johnson. On March 10, 2005, Grievant called the officer in charge of Ms. Johnson's dorm and asked if she could be sent to work with him in the Intake area. He was also seen talking with her in the yard the next day.

6. Mr. White issued Grievant a written order dated March 14, 2005. This letter noted that Mr. White had spoken several times to Grievant, and that Grievant had been advised to only have contact with female inmates when it was required in the performance of his duties, and specifically to avoid unnecessary contact with inmates Shannon Johnson and Nicole Cox. The Order stated specifically:

> Effective this date, I am issuing you a direct order that you are to have no contact with the Female [sic] population at Anthony Correctional Center unless it involves your Job Duties as Transportation Coordinator or as long as you are assigned to the Transportation Unit. Also, if your Job Duties require you to have contact with female offenders at Anthony Correctional Center you are to consult either myself or my designee prior to the contact.

7. Grievant continued to engage in the same behavior for which he was previously disciplined -- over-familiarity with female inmates, in contravention of a direct order. Grievant admitted to the conduct for which he was disciplined. Specifically:

a. On April 19, 2005, Grievant volunteered to work in Dorm 3, which is a female-only dormitory. Grievant had been asked if one of his subordinates could be used for that post, but Grievant volunteered to do it himself. When he was told he could not work in Dorm 3, Grievant stated “I'm tired of this shit, and it's time it came to a head.”

b. On April 21, 2005, Grievant was seen conversing with Inmate Shannon Johnson in the center yard. The topic of the conversation and the amount of time the pair spent together is unknown.

c. On April 22, 2005, Grievant sat down at a table in the dining hall with three female inmates, and remained there in conversation with them for an extended period. Several staff members observed this conduct, which extended for twenty to thirty minutes, and reported it to Mr. White. Staff have a separate dining hall where they can eat apart from the inmate population.

8. Mr. White met with Grievant to ask him about the reports of his contact with female inmates, and Grievant either admitted that his discussions had nothing to do with his job duties, or declined to offer a justification. Grievant informed Mr. White that he considered being asked about his apparent violation of the direct order to be harassment.

9. On May 5, 2005, Warden Scott Patterson met with Grievant and informed him that he was considering dismissal for the conduct related above. Grievant did not deny any of his conduct, but claimed he was being held to a different standard with regard to female inmate contact than other employees are. Because Grievant had not convinced Warden Patterson that his conduct was excusable, at the end of the meeting, Warden Patterson gave Grievant the prepared letter notifying him of his immediate dismissal. 10. ACC is a secure facility, run on a para-military basis with a defined command structure and rigid discipline. As such, Grievant and other employees are expected to follow orders whether written or oral, and to observe the proper chain of command. Obedience to orders is important as many situations require an immediate response and a clear understanding of each officer's role. The failure to follow orders can result in a breach of security.

11. Division of Corrections Policy Directive 129.24 governs staff/inmate interaction. This Policy directs that:

A. All correctional staff, regardless of job assignment, is responsible for providing proper care and supervision for the inmate population. In order to accomplish this, all correctional staff shall maintain a professional and business like manner, while interacting with the inmate population and/or parolees.

1. Correctional staff shall not become over-familiar with inmates or parolees by discussing their personal life, the personal life of another corrections staff member nor [sic] another inmate/parolee, with any inmate/parolee, to include their families and/or acquaintances.

. . .

C. All Staff shall abide by any additional procedures regarding staff and inmate/parolee contact as prescribed by the Warden/Administrator for their respective unit.

12. On April 18, 2005, Grievant was issued a Certificate of Commendation by the Commissioner for the Division of Corrections, citing “Exceptional performance of duty from 1 June 1999 to 21 January 2003, 11 February 2003 to 6 March 2003 and 5 April 2003 to 31 December 2004. You have demonstrated a 'can-do' attitude in every endeavor and every task assigned to you.” He received this certificate the same day he received his termination letter.

Discussion

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. (See footnote 2) Grievant was dismissed for continual over-familiarity with female inmates, in violation of the advice and direct orders of his superior officer. Grievant has a long history of this type of conduct, and his prior discipline for the conduct has been determined to have been justified and appropriate. Aside from Grievant's tendency to spend too much time in intimate conversation with certain female offenders, his work record is untarnished. Grievant asserts he is being treated differently than other staff who have not been given such explicit orders, and his supervisor's monitoring of the situation is harassment.

Respondent has a clear written policy in place, to which all employees are bound to conform their conduct. In addition, Grievant has been given personal advice, directions and written orders narrowing the scope of his interaction with inmates even further. Grievant cannot gainsay his employer's expectations in this regard, given the long-term history of progressive discipline. Nevertheless, Grievant is repeatedly seen and even admits to violating these orders. His only apparent defenses are that other employees have not been given similarly-restrictive orders (discrimination), or that his written order goes against written policy, or that his termination was retaliation for filing prior grievances. Of the specific instances cited by Warden Patterson in the

termination letter, all were supported by the evidence and Grievant's admissions. (See footnote 3) However, one of the instances does not appear to be a violation of Grievant's orders. At the time he volunteered to work in the female dorm, he was acting properly within the scope of his duties, and in the end he did not actually go there. He was ordered to have no extraneous contact with the female population outside the needs of his duties, so even if he had worked there, most contact he would have had would have been within the scope. However, this episode aptly characterizes Grievant's defiance of his orders and his tendency to challenge the authority of his superiors. Grievant knew he was treading the line closely, and even called attention to the fact with his comment about it being "time it came to a head." While this episode does not enhance Respondent's basis for the termination because it was not violative of the order or Respondent's policy, it does lend credence to the conclusion that Grievant's conduct is beyond rehabilitation. As Warden Patterson pointed out, Grievant appears to believe he is entitled to personal interaction with the female inmates, but that is simply not a perquisite of the occupation.

Grievant's claim his interactions are restricted more than other correctional officers' comprises his discrimination argument. "'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." (See footnote 4) In order to successfully prove that given acts of an employer are discriminatory under this definition, Grievant must showhe has been treated differently from other, similarly-situated employees. (See footnote 5) "The crux of such claims is that the complainant was treated differently than similarly situated employees[.]" (See footnote 6) However, Grievant is in a singular situation _ he has provided no evidence of other employees with any history of over-familiarity with female inmates, let alone any other employees who have been repeatedly instructed and disciplined over a span of years for such conduct. Grievant has therefore not met his burden of proving discrimination.

Grievant's challenge to the lawfulness of the written order of March 14, 2005, is similarly specious. Respondent has in place a valid written policy that clearly and unambiguously explains to employees the types of interactions with inmates that are unacceptable, and why. The policy concludes with the statement, "All Staff shall abide by any additional procedures regarding staff and inmate/parolee contact as prescribed by the Warden/Administrator for their respective unit." This provision unarguably gives the warden the authority to issue additional direction regarding inmate

contact. Mr. White is an associate warden, and his written order is in complete conformity with the policy directive and is clearly designed and intended to enhance the security of ACC. Grievant has unsuccessfully challenged disciplinary measures based on the same type of personalized orders and directives in the past.

Respondent further asserts any challenge to the written order is untimely, as it was not grieved when issued. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievanceis based. . . ." (See footnote 7) If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. (See footnote 8) The facts of this point are clear, in that the Order was issued March 14, 2005, but this grievance was not initiated until May 17, 2005, significantly more than ten days later. This late challenge to the validity of the order obviates the necessity of inquiring further into the matter. This is but another reason why the Order should be presumed valid.

Grievant's next affirmative defense to his termination, yet another claim that has nothing to do with the merits, is that he was denied his procedural due process before he was issued the termination letter. In particular, he claims he was given no pre-termination hearing. Respondent characterizes the meeting Grievant had with Warden Patterson on May 5, 2005, as a pre-termination hearing, but Grievant points out that Warden Patterson had already written the termination letter before the hearing, and simply handed it to him afterwards without considered thought about Grievant's discussion of the charges. In other words, Grievant argues, even if the meeting met the requirements of a predetermination meeting as required by Respondent's policy, it was a sham proceeding in which Grievant was afforded no actual recourse to the proposed action nor opportunity to respond.

The Administrative Rule of the Division of Personnel and Respondent's disciplinary policy, provide a measure of due process ro employees facing serious disciplinary action that will deprive them of the property interest they hold in their employment:

> Prior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, anexplanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

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.

It has been Corrections' practice to state the specific factual events upon which discipline was

based in its letters suspending and dismissing employees. (See footnote 9) 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. (See footnote 10) Dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention. (See footnote 11)

Respondent met its burden of proving Grievant's repeated misconduct, and his otherwise meritorious conduct as an employee is irrelevant to the issue, as the misconduct for which Grievant was cited was identified expressly and specifically. Grievant provided no authority mandating the predetermination conference that he alleges he is entitled to, but it is well settled that Grievant was entitled to notice of the charges against him and an opportunity to be heard. He was given both, and squandered his opportunity to be heardbefore Warden Patterson by failing to respond to the charges in a meaningful way, or by actually admitting them. In addition, Grievant's access to the grievance process was unrestricted. Whether or not Warden Patterson had prepared the termination letter beforehand is immaterial, and given Grievant's disciplinary history and the Warden's experience with him, it was logical foresight.

Grievant further claims this personnel action was retaliatory, based on his prior grievance activity. In addition to the prior grievance cited above, Grievant filed at least two others challenging the same suspensions. West Virginia Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing: (See footnote 12)

1 1. that he engaged in protected activity, e.g., filing a grievance;

2 2. that he was subsequently treated in an adverse manner by the employer or an agent;

3 3. that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

4 4. that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Grievant has not met his burden of proving reprisal. While it is clear he had engaged in protected activities, he has shown no causal connection between those activities and his dismissal. Respondent's proof of Grievant's misconduct remains unimpeached, and itsactions to correct and finally end that conduct are consistent and continuous, extending to times before Grievant's protected activities were initiated. While grievant may feel singled out and persecuted for his behavior, he is the only person in control of that behavior, and Respondent's attempts to control it are justified and proper.

Lastly, Grievant claims his supervisor's attempts to reign in his over-familiarity with female inmates is harassment. This issue was also addressed in the previous grievance, where, on the analogous facts in evidence in that case, the administrative law judge stated, “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.” That statement is equally applicable to the facts in this case, where the actions Respondent has taken are the logical extension of the disciplinary measures begun and addressed in the prior grievance. “'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” (See footnote 13) Quite to the contrary of the definition, Respondent's actions are exactly what Grievant should have expected. Just because Grievant did not like the information he received, does not mean it was inappropriate or constituted harassment. (See footnote 14)

The following conclusions of law support this discussion:

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W. Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *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 fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "'W. Va. Code 29-6-15 [1977], requires that dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention.' Syl. Pt. 1*, Oakes v. West Virginia Department of Finance and Administration*, 164 W. Va. 384, 264 S.E.2d 151 (1980)." *W. Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159; 313 S.E.2d 436 (1984).

3. Respondent has proven Grievant engaged in uncorrectable conduct of a substantial nature that directly affected the security of the facility, that he engaged in such conduct knowingly and in defiance of a direct order, and that such continued misconduct merited dismissal.

4. "'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). 5. Grievant failed to meet his burden of proving he was treated in a discriminatory fashion.

6. "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." 143 CSR § 12.3. 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 v. W. Va. Div. of Corrections*, Docket No. 97-CORR-267 (August 25, 1997).

7. "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)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supp. 228 (W. Va. 1968). *See, Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.,* Docket No. 89-02-234 (Nov. 28, 1989). *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sept. 30, 1999).

8. Grievant was provided the notice and opportunity to respond that was required prior to his termination.

9. W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

> (1) that he engaged in protected activity, e.g., filing a grievance;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (Sept. 19, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

10. Grievant did not establish that his termination was reprisal for engaging in protected activities.

10. “'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” W. Va.

Code § 29-6A-2(l).

11. Grievant did not prove Respondent's disciplinary measures were harassment.

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 grievance occurred, and such appeal must be filed within thirty 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 andshould 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.

March 17, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Cox v Div. of Corrections/Anthony Correctional Center, Docket No. 03-CORR-144 (Jan 13, 2004).

Footnote: 2

W. Va. Code § 29-6A-6; Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

Footnote: 3

In Grievant's post-hearing proposed findings of fact, he states he now recalls he was not at the center on one of the days in question, but did not assert this alibi at the time of the hearing.

Footnote: 4

W. Va. Code § 29-6A-2(d).

Footnote: 5

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242 , 605 S.E.2d 814 (2004); Frymier v. Glenville State

College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 6

White, supra.

Footnote: 7

W. Va. Code § 29-6A-4(a).

Footnote: 8

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

Footnote: 9

See DOC Policy 400, Section 4.03; 143 C.S.R. § 12.3; Cox, supra.

Footnote: 10

Hickman v. Div. of Corrections, Docket No. 99-CORR-375 (June 29, 2000).

Footnote: 11

West Va. Dep't of Corrections v. Lemasters, 173 W. Va. 159; 313 S.E.2d 436 (1984).

Footnote: 12

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Footnote: 13

W. Va. Code § 29-6A-2(l).

Footnote: 14

Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000).