THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DALE MUNDAY,

Grievant,

v. **Docket No. 06-CORR-478**

Sue Keller

Senior Administrative Law Judge

DIVISION OF CORRECTIONS/

ST. MARY'S CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

___Dale Munday ("Grievant"), employed by the Division of Corrections ("DOC") as a Correctional Officer at St. Mary's Correctional Center, filed a level one grievance on September 1, 2006, after he was subject to a counseling session on August 18, 2006. Grievant asserts the action to be arbitrary and capricious, and reprisal for representing another officer in a level two grievance hearing. For relief, Grievant requests that his record be expunged of all references to the disciplinary action, those employees involved in the retaliatory action be subject to discipline, that there be no further violation of his Constitutional rights, attorney fees and costs, and to be made whole. The grievance was denied at all lower levels. Appeal to level four was made on December 22, 2006. Grievant, appearing *pro se*, and DOC counsel Charles Houdyschell, Jr., Senior Assistant Attorney General, agreed to submit the grievance for decision on the record. Briefs were submitted by both parties on February 21, 2007. The grievance was subsequently transferred to the undersigned on March 15, 2007.

___The following facts have been derived from a preponderance of the credible evidence made part of the level three record.

Findings of Fact

1. Grievant has been employed by DOC as a Correctional Officer at St. Mary's Correctional Center at all times pertinent to this grievance.

2. On July 14, 2006, COIII Brian Moler filed an incident report in which he stated that On Thursday 13 July 2006, at approximately 1815 hours, various staff members were tasked to conduct searches on all incoming and outgoing 1900 hour shift employees. Operations officer Lt. Dale Munday entered the visitation room and began making unprofessional comments directed to Cpl. Pamela Taylor and myself (Cpl. Brian Moler). These comments were stated in a manner where other subordinate staff was able to hear. The following statements are not quotation, and only general ideas on what was said. He believed we (the search team in general) were violating constitutional rights and this was an unjust search. He stated there was documentation being made about these actions. He also stated to Cpl. Taylor the last time we did the search, favoritism was shown in regard to canine scans. He also made reference to canine having to follow unlawful orders. His overall demeanor was negative and__ **(See footnote 1)**

___3. Cpl. Moler and Cpl. Taylor delivered the document to Associate Warden Robert Hall as an "informational report." The report did not include a case number.

4. Several weeks later, Associate Warden Hall directed Captain James Greathouse to conduct a counseling session with Grievant regarding the report.

5. Captain Greathouse conducted the counseling session with Grievant on the evening of August 18, 2006.

6. The delay of nearly five weeks between the filing of the report and the counseling session is attributed to annual leave time taken by Associate Warden Hill and Captain Greathouse. 7. Grievant had acted as representative for a coworker in a level two hearing on the morning of August 18, 2006.

8. DOC does not document counselings or otherwise note their occurrence in an employee's personnel file. Counseling is not considered a step in the progressive disciplinary process used by DOC. _

Discussion

Grievant first raises the issue of which party must bear the burden of proof in this case. He argues that because he was subject to discipline, DOC must prove that the counseling was proper. DOC asserts that counseling is not a part of the progressive discipline process, and that Grievant must prove the allegation of reprisal. Although the designation "counseling" carries the connotation of

formal discipline, it is only an informal discussion regarding an action before it becomes a problem. There was no disciplinary action taken, and no notation of the counseling in Grievant's personnel file. Therefore, Grievant has the burden of proving this grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. "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).

The first issue to be addressed is whether the counseling was arbitrary and capricious. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of theproblem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant opined, both on July 13, 2006, and at hearing, that the searches were being improperly conducted. However, the expression of his concern on July 13 was perceived as unprofessional and offensive by the officers assigned to conduct the searches. Certainly, it would have been more appropriate for Grievant to have reported his concerns to higher administrative officers. A reminder to Grievant that subordinate employees must be treated respectfully, and that his concerns should be stated to his supervisors, was not arbitrary and capricious.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." Todemonstrate a *prima facie* case of reprisal a

grievant must establish by a preponderance of the evidence the following elements:

1) that he engaged in protected activity, e.g. filing or participating in 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;

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

5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

Grievant has established that he engaged in a protected activity when he acted as a representative for a co-worker on August 18, 2006, and that DOC had actual knowledge of the activity. However, while Grievant believes that he was unjustly and untimely chastised for certain actions, he was not treated in an adverse manner which would constitute reprisal or retaliation. The time delay was fully explained and verified by DOC administrators. While Captain Greathouse testified that the counseling was not conducted in his typical fashion, he also explained that the variation was due to some concern expressed by his supervisors regarding his own prior actions, leading him to explicitly follow Mr. Hill's directive to counsel Grievant. Because counseling is informal, and undocumented, there was no adverse action and no reprisal. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving this grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

3. *W. Va. Code* § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." 4. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he engaged in protected activity, e.g. filing or participating in 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;

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

5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

5. Grievant failed to prove that the counseling was arbitrary and capricious or was an act of reprisal.

Accordingly, the 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: APRIL 10, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *The second page of the report was not included in the record.*