WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CAROL SUE VEST,

Grievant,

v.

Docket No. 2009-0024-MAPS

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant Carol Sue Vest filed this grievance on July 16, 2008, challenging her five- day suspension after it was discovered that she and a co-worker viewed a pornographic DVD at her workplace. Grievant seeks to be made whole as her relief. This grievance was filed directly to level three. A hearing was conducted before the undersigned Administrative Law Judge on October 16, 2008, at the Grievance Board's Charleston location. Grievant appeared in person, and by her representative, Jack Ferrell, Communications Workers of America. The West Virginia Division of Corrections/Mount Olive Correctional Complex appeared by Charles P. Houdyschell, Jr., Senior Assistant Attorney General. The matter became mature for decision on November 17, 2008, the cut off date for the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a Supervisor 1 at the Mount Olive Correctional Complex. On April 24, 2008, Grievant was working in the State Shop of the facility with a subordinate employee, Arietta King. A contraband DVD containing pornographic images was brought to the State Shop from the prison Magistrates' office for destruction. Instead of destroying the DVD, Ms. King and Grievant

utilized a PlayStation to view the DVD. Grievantacknowledged that she was aware of policies concerning appropriate conduct which prohibits the viewing of pornographic material at the workplace. Respondent proved the charges against Grievant by a preponderance of the evidence. Grievant failed to make the necessary showing that the disciplinary measure was so clearly disproportionate to the employee's offense that it indicated an abuse of discretion. The requested mitigation of the five-day suspension is denied. The grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1. Grievant is currently employed as a Supervisor 1 at the Mount Olive Correctional Complex. Grievant has been an employee of the Division of Corrections since September 2004.

2. On April 24, 2008, Grievant was working in the State Shop of the facility with a subordinate employee, Arietta King. Unfortunately, the record was not developed at level three on the exact purpose of the State Shop, and the duties of employees assigned to the State Shop.

3. On April 24, 2008, a contraband DVD containing pornographic material was brought to the State Shop to be destroyed. This DVD was brought to the State Shop from the Magistrates' office with an order for it to be destroyed after it was released from the court's evidence locker.

4. Grievant and Ms. King understood the process for destroying the DVD. This could be accomplished by either breaking the DVD into pieces or scratching it to render it unplayable and placing the item in the trash. 5. Instead of destroying the DVD, Grievant and Ms. King used a PlayStation to view the pornographic material.

6. The DVD was played for several minutes while several other employees joined in the viewing. At one point, Ms. King left the room, leaving Grievant in the room with the DVD playing. Grievant admitted that she should have intervened and stopped the playing of the DVD.

7. Grievant was aware of policies concerning appropriate conduct preventing the viewing of pornographic material in the workplace.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008);

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 & 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.*

The facts in this case are undisputed. On April 25, 2008, Grievant allowed a subordinate, Arietta King, to play a DVD containing pornographic material in an office located within the State Shop of the Mount Olive Correctional Complex. Grievant admitted watching portions of the DVD, and allowing other subordinate employees to view portionsof the DVD. As a supervisor, Grievant had the authority to instruct Ms. King to turn off the playing of the DVD, or Grievant could have turned off the PlayStation unit. The viewing of this DVD by Grievant, her subordinates, or any other employee was not part of any of their responsibilities as an employee of the facility.

Grievant's conduct was inappropriate, unprofessional, and violated the basic principles under which Division of Corrections' employees are expected to comport their conduct. (See footnote 1) The viewing of pornographic material in the workplace is an unacceptable activity. In addition, supervisors have an inherent responsibility to prevent this type of activity. In the instant case, Grievant not only condoned the activity, but was an active participant in viewing the pornographic material. Grievant's failure as a supervisor to take immediate action to stop the viewing demonstrated a total lack of judgment and lack of supervisory skills. As a result of this incident, Warden David Ballard deemed it necessary to issue a suspension to further impress upon Grievant the need to comport her conduct accordingly. The Division of Corrections has met its burden in proving the charges supporting the five-day suspension by a preponderance of the evidence.

Grievant seeks mitigation or reduction of this five-day suspension. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be consideredinclude 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 Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the discipline imposed was disproportionate to the offense committed. The undersigned agrees with Respondent that Warden Ballard's disciplinary action was appropriate to impress upon Grievant the need to properly use work time and not to allow employees to view pornographic material. Grievant is classified as a supervisor, as such she is responsible for the performance of the employees that she supervises. Although Grievant claimed that the fact she had been working in the State Shop for a short period of time supported her claim for mitigation, the record demonstrates that Grievant had been a supervisor for a much longer period of time. As a supervisor, this incident clearly demonstrated unsatisfactory performance and a misuse of work time. Accordingly, Grievant's request for a reduction of the penalty imposed is denied.

The following Conclusions of Law support the Decision reached.

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.

Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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 & 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. "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).

3. Respondent West Virginia Division of Corrections has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to her suspension.

4. Grievant failed to make the necessary showing that the disciplinary measure was so clearly disproportionate to the employee's offense that it indicated an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be includedso that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: November 25, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1 *Division of Corrections Policy Directive Number 129. Resp. Ex. 3.*