WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BILLIE JO GAY,

Grievant,

v.

Docket No. 2008-1706-MAPS

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Billie Jo Gay filed this grievance on May 3, 2008, challenging her three-day suspension resulting from a series of occurrences in which Grievant misplaced her keys. Grievant seeks to have the suspension rescinded and have her pay reinstated. This grievance was filed directly to level three. A hearing was conducted before the undersigned Administrative Law Judge on September 9, 2008, at the Grievance Board's Beckley location. Grievant appeared *pro se*. The West Virginia Division of Corrections/Anthony Correctional Center appeared by Charles P. Houdyschell, Jr., Senior Assistant Attorney General. The matter became mature for decision on October 15, 2008, the cut off date for the parties' proposed findings of fact and conclusions of law. The undersigned is in receipt of the Respondent's proposals, however, Grievant did not file any proposals.

Synopsis

Grievant is employed as a Recreation Director at the Anthony Correctional Center. Despite repeated counseling by the administration of the Anthony Correctional Center, Grievant had the unfortunate tendency of misplacing and/or losing her keys. The resulting searches involved multiple hours of employees' time and cost to the Center. In addition,these actions compromised security at

the facility by giving inmates potential access to the keys. This pattern of Grievant's failure to adhere to the Center's key control rules led the Warden to suspend Grievant for three working days. Grievant does not dispute that she mishandled her keys. 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 three-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 has been employed as a Recreation Director at the Anthony Correctional Center for the past seven years. Grievant has no record of any prior disciplinary actions taken against her.

2. The Anthony Correctional Center is a facility housing the youthful offender program, in which young adult inmates between the ages of eighteen and twenty-three can be sentenced by a circuit court judge upon conviction of a felony.

3. The Anthony Correctional Center adheres to the Division of Corrections' Operational Procedure #309 concerning the control, access, and use of keys. This procedure mandates that keys are to be carried on the employee's person or secured in a system referred to as Key Watcher III at all times. This is a centralized key control storage system located adjacent to Central Control. This system contains all daily issue keys, restricted issue keys, rotating issue keys, and vehicle keys when not in use. Inaddition, keys are not to be left lying about or otherwise left unattended or unsecured. (Resp. Ex. 2).

4. On August 22, 2007, Grievant failed to keep her keys on her, and left them unattended when she locked her keys in her office.

5. Again, on November 3, 2007, Grievant failed to keep her keys on her, and left them unattended when she locked her keys in her office.

6. Thereafter, Grievant was counseled by Associate Warden Marvin Plumley on the need to follow the key control policy. This counseling session attempted to impress upon Grievant the importance of not leaving keys unsecured, and not leaving her keys on her desk with inmates present.

7. However, on February 1, 2008, Grievant was witnessed having a set of keys on her desk in

plain view with two inmates present. Captain Jeff Brown witnessed this occurrence in Grievant's office. Captain Brown remained in Grievant's office and situated himself between the inmates and the keys laid out on the desk. Once the inmates left the office, he informed Grievant that she needed to keep her keys on her person at all times to avoid a repeat of this scenario. This would also end her habit of locking the keys in her office, and prevent offenders from picking up an unsecured set of keys.

8. Once again, on February 7, 2008, Grievant locked herself out of her office.

9. Between March 21, 2008, and March 22, 2008, recreation keys previously issued to Grievant were missing, and required a search of the facility. The search involved many hours of the staff's time and resulted in additional cost to the facility. The search also involved a significant disruption to the operation of the facility. The keys were eventually found hanging on a coat hook on the back of the door in the women's lockerroom. Grievant acknowledged that she had left the keys there by mistake after using the locker room.

10. On March 26, 2008, a few days following this incident, Grievant again locked her keys in her office.

11. A pre-determination conference was held with Grievant by Warden Teresa McCourt on May 9, 2008, to discuss the key control policy violations. Grievant was suspended for three working days effective May 15, 2008, for continued violation of established key control policy and procedures.

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 grievance are undisputed. Grievant has been a dedicated, hard- working employee of the Anthony Correctional Center for the past seven years. As mentioned before, Grievant has no prior reprimands or suspensions. However, it is clearthat Grievant has failed to

adhere to the requirement that her keys to the facility be kept on her person and not left lying unattended or unsecured. This is apparent in Grievant's repeated acts of locking herself out of her office. On at least one occasion, Grievant's keys came up missing and completely unaccounted for. The ensuing search was costly to the Division of Corrections in terms of employees' time, and led to disruptions in the operations of the facility. In particular, the inmates were placed on lock-down, and a complete search of the inmates and the facility had to be undertaken. Also troubling is the occurrence of Grievant leaving her keys lying on her desk when inmates are present. This leads to the obvious risk that an inmate could come into possession of the keys.

The record of this matter reflects that, in the event missing keys are not located, there is the potential that the Center would be required to re-key the locks. Once again, this careless handling of keys exposes the Division of Corrections to substantial expense and disruption of operations. In the interest of public, staff, and inmate safety, inmates cannot be given access to staff keys. Nevertheless, despite warnings and counseling from staff, Grievant did not follow this instruction. As a result, Warden McCourt deemed it necessary to issue a suspension to further impress upon Grievant the need to adhere to these very basic rules. The Division of Corrections has met its burden in proving the charges supporting the three-day suspension by a preponderance of the evidence.

Mitigation of this punishment was addressed neither by Grievant at level three nor in any subsequent proposals. However, Grievant did seek a “revocation” of the suspension in her initial grievance. 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 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).

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 forrehabilitation." *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. Despite counseling and instruction, Grievant repeatedly demonstrated an inability to properly manage her keys. The undersigned agrees with Warden McCourt that the concern for public, staff and inmate safety are not served by Grievant's careless handling of her keys. As a result, the suspension is warranted in the attempt to impress upon Grievant the importance of adhering to the key control policy. 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. The requested mitigation of the three-day suspension is denied.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order 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 19, 2008

_____

Ronald L. Reece

Administrative Law Judge