THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DARYL ROSS WARD,
Grievant,

v. **Docket No. 2009-0408-MAPS**

DIVISION OF CORRECTIONS/
DENMAR CORRECTIONAL CENTER,
Respondent.

DECISION

Daryl Ross Ward ("Grievant") filed this grievance on September 19, 2008 challenging his five-day suspension for repeated policy violations. Grievant seeks as relief, "to have the suspension dismissed and to be paid back for the time I was off, loss of wages and benefits. I would like to have the personnel file cleared of all paper work in relation to the suspension."[1] This grievance was filed directly to level three.

A hearing was conducted before the undersigned Administrative Law Judge on April 10, 2009 at the Grievance Board's Office in Elkins, West Virginia. Due to a laptop computer malfunction, the file containing the majority of the recording of that proceeding was corrupted and lost. The undersigned convened a phone conference with the parties on April 20, 2009 to discuss available options following this most unfortunate event. The undersigned and the parties agreed the best course of action was to reconvene the level three hearing and re-record the testimony of the fact witnesses in the matter. Accordingly,

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[1]Grievant asserts in his Statement of Grievance a misapplication of the Progressive Discipline Policy of Respondent; however, this was not argued at level three. Accordingly, this assertion need not be addressed further. The undersigned would note that the evidence in the grievance does demonstrate that Respondent followed proper procedure in the implementation of the suspension.

the level three hearing was convened once again on May 7, 2009 at the Grievance Board's Office in Elkins, West Virginia. Grievant represented himself, and the Respondent appeared by John H. Boothroyd, Assistant Attorney General. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 12, 2009.

Synopsis

Grievant is employed as a Correctional Officer 2 at the Denmar Correctional Center. Respondent suspended Grievant for five-days for three instances of inadequate or unsatisfactory work performance. In particular, Grievant spent time researching prison tattoos in the nurse's office instead of supervising inmates lined up outside the medical unit, Grievant failed to acknowledge attempts to contact him by radio and phone, and Grievant engaged in "horseplay" or unprofessional conduct with an inmate. Grievant acknowledges the incidents, with explanations in mitigation, suggesting the penalty was too harsh. Respondent demonstrated that the conduct violated their policy and that the length of the suspension was not so disproportionate to the employee's offense that mitigation is appropriate. 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 employed by Respondent at the Denmar Correctional Center as a Correctional Officer 2. Grievant has been employed with the West Virginia Division of Corrections since March 16, 2001.

2. Grievant was counseled on May 1, 2002 for being less than attentive on a security post; on June 23, 2002 for possibly sleeping on a security post; on November 5, 2002 for failing to report off for work; and on April 29, 2003 for unsatisfactory participation in a mandatory apprenticeship program. Grievant was suspended from duty for two days on April 28, 2006 for accepting unauthorized material from an inmate when he was found with a Playboy magazine given to him by an inmate.

3. On August 25, 2008 Grievant was suspended for five days for three instances of unsatisfactory job performance. The specific conduct cited in the letter of suspension from Warden Mark A. Williamson was as follows:

> On 17 July 2008, Lt. Workman was on your housing unit for approximately six to eight minutes and could not locate you on your security post. He later found you in the Medical Department on their computer.
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> On 19 July 2008, another Officer tried to contact you via radio approximately five times and twice by telephone and was unable to reach you. This Officer then had to obtain permission from Control to leave his housing unit to go to your assigned housing unit to announce "Pill Call." You apparently were on a personal telephone call and chose not to answer the Officer.
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> Also on 19 July 2008, you were horseplaying with an inmate. You indicated that you were "just acting stupid" to Cpl. Peacock and that you were "just fooling around" to Lt. Workman. However you denied that you were horseplaying with an inmate when we met on 07 August 2008. Based upon

your statements to Cpl. Peacock and Lt. Workman, I believe you were horseplaying with an inmate.

4. On July 17, 2008 Lieutenant Jason Workman conducted a security check of the housing units at Denmar. He came onto the third floor housing unit via the stairwell located by the medical unit. Lieutenant Workman found the officer's desk, which was located in the area of the medical unit, vacated. Lieutenant Workman noted that there were unsupervised inmates waiting outside of the medical unit.

5. Lieutenant Workman searched for the officer on duty for the third floor, which was the Grievant. When Lieutenant Workman did not find Grievant in the library or education wing, he made his way back to the officer's desk, went past to the end of the hallway, and then returned to the medical unit area. Lieutenant Workman eventually located Grievant in the head nurse's office sitting at the nurse's computer. Grievant explained that he was looking up web sites on prison tattoos for the nurse. A number of inmates waiting outside of the medical unit were left unsupervised for almost ten minutes. Sitting at a nurse's computer and looking up prison tattoo web sites is not a specific or necessary duty of a correctional officer working on the third floor housing unit.

6. On July 19, 2008, at approximately 11:00 a.m., Correctional Officer Robert McCoy attempted to contact the officer on duty for the fourth floor housing unit to inform him that the medical unit was ready for "pill call" for the fourth floor inmates.[2] The officer on duty for the fourth floor at that time was Grievant. Officer McCoy attempted to notify

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[2]"Pill call" is the period of time (ten minutes) that inmates have to respond for obtaining prescribed medication from the medical unit on the third floor of the center. At the end of the ten minutes, the movement for that call is over. General orders instruct the correctional officers that all calls are to be made loud and clear so that all inmates are able to hear it throughout the unit.

Grievant by radio three times and received no response. Officer McCoy then unsuccessfully attempted to reach Grievant by phone. Officer McCoy noted that the fourth floor phone indicated that it was on another call. Officer McCoy then again attempted to reach Grievant by both radio and phone, but was unsuccessful.

7. Officer McCoy then contacted Corporal David Peacock informing him that there was no response from the fourth floor duty officer, and requested permission to go to the fourth floor to make certain nothing was afoul. Permission was granted. Upon arriving on the fourth floor housing unit, Officer McCoy found Grievant at the officer's desk reading a newspaper. Officer McCoy quickly announced pill call and returned to his post.

8. When a correctional officer is on a personal phone call, which is not a policy violation, they are still expected to be attentive to their duties.

9. On July 19, 2008, the same date as the pill call incident, Corporal Peacock was monitoring the video surveillance cameras for Denmar. Corporal Peacock noticed on one of the video monitoring screens of the second floor housing unit that Grievant had called back an inmate, Chris Wehrle, from the exit/stairwell. Grievant and the inmate began pushing each other around for a few seconds in what can be described as horseplay. Grievant explained that it was a contraband search.

10. Inmate Wehrle gave a statement that, "he had said something joking like, I guess he was talking about my shirt hanging out of my pants and I was like contraband and when I seen [sic] what it was, I fixed the problem and everything and I said something and went downstairs. I can't remember what I said." Respondent's Exhibit 10.

11. The horseplay incident was captured on a video recording. The video images of the incident were not consistent with a correctional officer maintaining appropriate

distance from an inmate or with an officer conducting any sort of contraband search. Grievant was shoulder to shoulder with the inmate, and it appears that Grievant made a gesture as if to hit the inmate in the crotch area.

12. Based upon the three incidents, Lieutenant Workman and Associate Warden David Cox recommended to Warden Williamson disciplinary action against Grievant, and that such disciplinary action take into consideration that Grievant had received discipline for past instances of poor work performance.

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 basically undisputed. Grievant acknowledged that he was on the head nurse's computer looking up web sites on prison tattoos on July 17, 2008. While Grievant was on the computer there were unsupervised inmates lined up outside of the medical unit. The time frame of lack of supervision for the inmates was approximately ten minutes. Grievant could have briefly addressed the nurse's question

concerning prison tattoos and returned to his duties. Post orders for Denmar require a correctional officer to closely observe the pill lineup if possible. Grievant abandoned, for a significant amount of time, a primary duty to supervise the inmates gathered outside of the medical unit.

Regarding the July 19, 2008 “pill call” incident, Grievant admitted to having heard two phone calls, to which he did not respond, before Officer McCoy came up from his post and announced pill call. Grievant admitted to Lieutenant Workman that he felt pill call could wait until he finished his personal phone call. Officer McCoy indicated that he observed Grievant reading a newspaper when he came up to the fourth floor. Officer McCoy quickly announced pill call and returned to his post. As the floor officer, this was one of Grievant’s duties pursuant to the general orders of Denmar. In addition, it was a violation of general orders for Grievant to read a newspaper while at the duty post.

The video of the July 19, 2008 horseplay incident clearly shows Grievant involved in conduct with an inmate which is a violation of appropriate practices when interacting with inmates. To the undersigned, this is the most troubling aspect of the charges. The video evidence shows Grievant and inmate with their shoulders together and moving one to two feet with their shoulders together in the same position. While face-to-face, the video shows the inmate bending down and grabbing his crotch while at the same time Grievant has his clenched hand out in front of the inmate’s crotch. If the observer did not know differently, one would guess they were viewing the antics of grade school children in the school play ground. The prohibition against horseplay is not just a prohibition against potential harmful contact against an inmate, but also a prohibition against over familiarity with inmates. This is a total break down of acceptable boundaries, and presents a potentially dangerous

breach of security. Horseplay is not tolerated for these very reasons. Respondent has clearly demonstrated that Grievant engaged in horseplay with an inmate.

Grievant asserts that the punishment is too harsh and should be mitigated. 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 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 offenses committed. Grievant received, in part, a five-day suspension because previous attempts to correct similar behavior had failed. In addition, the five-day suspension is supported by the concept of progressive discipline as Grievant had previously been suspended for being in possession of a Playboy magazine given to him by an inmate.

Horseplay with an inmate cannot be tolerated by Respondent. Unfortunately, most horseplay is intended to be innocent but can present a potentially dangerous breach of security. The undersigned agrees with Warden Williamson's assessment that Respondent is correct to expect its employees to perform their duties in a manner in which public safety and the safety of others is not compromised. As a result, the suspension is warranted in the attempt to impress upon Grievant the importance of not engaging in horseplay with inmates. 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 his 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 five-day suspension is denied.

Accordingly, the 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 included so 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: July 21, 2009

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Ronald L. Reece
Administrative Law Judge