**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RICHARD ALLEN TOWNSEND, JR.,**

**Grievant,**

**v.** **DOCKET NO. 2008-1501-MAPS**

**WEST VIRGINIA DIVISION OF JUVENILE SERVICES,**

**Respondent.**

## DECISION

Richard Allen Townsend, Jr., ("Grievant") filed his grievance on or about April 25, 2008, challenging a three-day suspension imposed by his employer, West Virginia Industrial Home for Youth and West Virginia Division of Juvenile Services (jointly as "DJS" or "Respondent"). As relief, Grievant seeks "reimbursement in pay, letters to be removed, [and] no further disciplinary action."

This Grievance was denied at Level One. Level Two mediation was unsuccessful. After the Level Two mediation, the parties agreed to submit joint stipulations and separate proposed findings of fact and conclusions of law supporting their respective positions, in lieu of conducting a Level Three hearing. Grievant is represented by Jack Ferrell, Communication Workers of America, and DJS appears by and through its counsel, Steven R. Compton, Senior Assistant Attorney General.

This matter became mature for decision on or about February 27, 2009, upon receipt of the parties' agreed stipulations and proposed findings of fact and conclusions of law. The undersigned Administrative Law Judge ("ALJ") is in receipt of the parties stipulations and respective proposed findings of fact and conclusions of law.

## Synopsis

Grievant was suspended for three days after it was discovered that he was not conducting required fifteen (15) minute security checks on his assigned unit, yet entering log information indicating he actually completed the security checks. During the time period immediately after Grievant falsely signed off on the log book, a resident he was responsible for was found in his cell unresponsive due to a medical condition. Grievant admits he engaged in the conduct alleged. However, he claims that Respondent failed to follow its progressive discipline policy and the penalty should be mitigated.

West Virginia Division of Juvenile Services Policy 138.00 provides that suspension is permitted for a serious, singular incident. Grievant's conduct was serious, with safety issues for the residents and potential liability and security consequences for the Respondent. Grievant did not demonstrate the Respondent violated its progressive discipline policy. Nor has he established that mitigation is appropriate. Insofar as the Grievant's allegations could be construed to allege discrimination or favoritism, Grievant has not met his burden of proving these claims by a preponderance of the evidence. This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following Findings of Fact:

## Findings of Fact

1. Respondent's operational procedures require that security checks be performed every fifteen (15) minutes when residents are on a unit to ensure the well-being and safety of the residents. This requires correctional officers to walk to the window of each resident's

room and visually confirm the status of each and every resident on a unit.

2. On the 25th day of March, 2008, Grievant, a Correctional Officer ("CO"), was working the 3:00 p.m. to 11:00 p.m. (1500 hours - 2300 hours) shift in the Security Unit of the Industrial Home for Youth.

3. Grievant conducted a resident security check at 1502 hours when he first reported to the Security Unit.

4. At 1552 hours, Grievant's co-worker, CO 1 Clifford Cork, checked on Resident TW[1] and had a brief conversation with him.

5. At 1603 hours, a formal count was called for by Control. Grievant and CO Cork conducted a security check of all residents, as required by policy.

6. At approximately 1622 hours, medical staff reported to Grievant's unit for Med-Pass.[2] In the course of conducting Med-Pass, Resident TW was found to be unresponsive due to a diabetic reaction.

7. From 1502 hours until 1625 hours, Grievant documented five (5) resident security checks on the resident security check sheet as having been performed at the required fifteen (15) minute intervals up to the aforementioned 1625 hours. Video documentation indicates that no such security checks were performed apart from the Grievant's initial check at 1502 and the formal count performed at 1603 hours. Contrary to the documented security check sheet, approximately one hour elapsed during which

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[1] The parties recognized the sensitivity of this matter and followed the traditional practice of using the initials of the juvenile resident. *See State v. Sonja B.*, 183 W. Va. 380, 381 n. 1, 395 S.E.2d 803, 804 n. 1 (1990)(citing cases).

[2] Based upon the proposals submitted by the parties, it appears Med-Pass is a medical-type unit that distributes medication throughout the facility.

Grievant performed *no* resident security checks.

8. As a result of the above misconduct, Grievant received a three (3) day suspension without pay via correspondence dated April 11, 2008. Specifically, the letter stated that:

- Overall, your engaging in the aforementioned conduct in the performance of your duties constitutes and supports a charge of Unsatisfactory Job Performance;
- Your action in failing to conduct your resident security checks as required by operational procedures constitutes and supports a charge of Failure to Comply with Policy Directives, Operational Procedures or Post Orders and Failure to Properly Conduct Resident Count; and
- Your action in recording that resident security checks were completed when no such security checks were completed constitutes and supports a charge of Falsifying Records through Misstatement, Exaggeration or Concealment of Facts.

9. In response to the allegations, Grievant explained that many times he can hear and engage in conversation with the residents. He claims this lets him know the residents are okay. However, there is no evidence that Grievant had a conversation with any resident on March 25, 2008.

10. In November of 2007, a written reprimand was issued by Joseph Merendino, Superintendent of the West Virginia Industrial Home for Youth, to a CO based upon her failure to conduct security checks and falsely documenting the same. In the spring of 2008, due to the continued and widespread failure of COs to timely conduct security checks, the penalty for this violation was increased by the Director of Juvenile Services, Dale Humphreys. The Industrial Home for Youth began a facility-wide audit of security tapes and records in an effort to enforce the fifteen minute security checks.

11. Since the penalty was increased in 2008, approximately seventeen (17) COs working at the Industrial Home for Youth, including the Grievant, have received suspensions of at least three (3) working days or longer as a result of their failure to conduct and accurately record security checks.

**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 § 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*.

There is no question in the instant case that Respondent proved the allegations against Grievant. Grievant admitted that he falsified facility records and did not conduct the required fifteen minute security checks. He admitted he violated several policy directives of the DJS. Hence, the Respondent has met its burden of proving the Grievant committed the alleged act.

The issues in this grievance are (1) whether Respondent failed to properly utilize its progressive discipline policy and (2) whether mitigation is appropriate. First, DJS properly followed its progressive discipline policy because a suspension is warranted where a

disciplinary event is serious. DJS Progressive Discipline Policy 138.00 (1)(h)(i) provides that "[t]he level of discipline should be determined by the severity of the violation." Thereafter, Subsection (1)(i)(iii), which covers suspensions, provides that a suspension can be "[i]ssued where minor infractions/deficiencies continue beyond the written warning or when a more serious *singular incident* occurs." (Emphasis added).

Based upon the plain language of the policy, the Respondent may suspend an employee for a "serious singular incident." *Id*. In this case, Respondent found that the offense warranted a three-day suspension. The Respondent's interpretation or adherence to its policy was not erroneous. Progressive discipline need not be followed where a serious single event occurs. The event in question was serious in nature and the Grievant has *not* argued the contrary. The Respondent did not violate its progressive discipline policy.

Grievant generally maintains that even if the progressive discipline policy was followed, mitigation is appropriate. 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).

The 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).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). When assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted).

Based on the stipulations of the parties, Grievant's conduct had serious implications for his employer. The failure to conduct his security checks to account for the residents' presence and well-being is a serious infraction. It places the safety and well-being of the residents in question. Additionally, it has potential liability and security consequences for the Respondent. If medical personnel had not came onto the unit to pass out medications, Resident TW *might* not have been found before more serious medical complications occurred.

The Grievant has presented no evidence of past satisfactory performance and it is clear he knew that security checks must be performed every fifteen minutes. *See Hall v. Div. of Juvenile Services*, Docket No. 05-DJS-293 (Oct. 10, 2006)(finding mitigation appropriate in light of years of service and no prior disciplinary record). Under the circumstances presented, the undersigned cannot find any abuse of Respondent's discretion. A three-day suspension is not " so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." *Overbee*, *supra*.

Insofar as the Grievant's arguments could be construed to constitute allegations of discrimination or favoritism, this grievance still must be denied. As these claims are non-disciplinary, Grievant has the burden of proving these claims by a preponderance of the evidence. *See* Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove, by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007). *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).[3]

Grievant has failed to establish discrimination or favoritism under the facts presented. The record evinces that another CO was given a written reprimand for similar conduct in November of 2007. However, the policy changed in spring of 2008. Grievant is not similarly situated to the CO in 2007 as he is under a different policy. Since the policy change, COs who violated these policies have received *at least* a three-day suspension. Grievant has not proven favoritism or discrimination by a preponderance of the evidence.

The following conclusions of law are appropriate in this matter:

**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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent has proven, by a preponderance of the evidence, that the Grievant failed to conduct required security checks and falsified records in violation of applicable DJS policy.

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[3] Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

3. Respondent's Progressive Discipline Policy 138.00 permits an employee to be suspended for a "serious singular incident."

4. Respondent did not violate the provisions of its progressive discipline policy by imposing a three-day suspension upon Grievant for failing to conduct required security checks and falsifying facility records.

5. "[M]itigation 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).

6. Grievant has failed to prove that mitigation is appropriate in this case.

7. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove, by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and
> (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007). *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

8. Grievant has failed to establish, by a preponderance of the evidence, discrimination or favoritism.

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 WEST VIRGINIA 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**: March 18, 2009

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**Mark Barney**
**Administrative Law Judge**