WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL ALLEN SNEDEGAR,
Grievant,

Docket No. 2008-1889-MAPS

WEST VIRGINIA DIVISION OF CORRECTIONS / ANTHONY CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant Michael Snedegar is employed by the West Virginia Division of Corrections at the Anthony Correctional Center. Mr. Snedegar is in the job classification of Correctional Officer 3, with the rank of Corporal. While working on May 3, 2008, Corporal Snedegar was involved in an incident which resulted in a co-worker being hit in the face with a cup. As a result of this incident, Corporal Snedegar was suspended from work without pay for a period of twenty-four hours (three eight-hour working days). The suspension took effect June 8, 2008. Corporal Snedegar filed a grievance contesting this suspension on June 30, 2008. Grievant Snedegar alleged that the penalty was too harsh, he did not receive proper notice of the suspension and that the disciplinary action was based upon false information. For relief Grievant seeks: to be paid for the time lost during the suspension with interest, to be given credit for sick leave and annual leave he may have earned and to be made whole.

A level one hearing was held at the Anthony Correctional Center on July 14, 2008, and a decision was adopted the next day denying the grievance. An unsuccessful

mediation attempt was conducted on October 21, 2008 and the grievance was appealed to level three.

Prior to a hearing being scheduled at level three, Respondent filed a Motion to Dismiss the grievance alleging that it was not timely filed.[1] A telephonic hearing was conducted to resolve the Motion to Dismiss on December 4, 2008, with the undersigned Administrative Law Judge presiding from the Charleston office of the Public Employees Grievance Board. Grievant participated in the conference personally, without a representative, and Respondent was represented by Charles Houdyschell Jr., Senior Assistant Attorney General. After a brief discussion, Respondent withdrew the Motion to Dismiss without prejudice. During the telephonic conference the parties agreed to submit the grievance for decision at level three, based upon the factual record developed at the level one hearing and to mail post hearing fact / law proposals no later than December 18, 2008. The final fact/ law proposal was received at the Grievance Board on December 18, 2008 and this matter became mature for decision on that date.

Synopsis

Grievant discovered a co-worker that he believed was sleeping on the job. Grievant attempted to throw a small amount of water on the co-worker to wake him up. The cup slipped from Grievant's hand and hit the co-worker in the face near his eye. Respondent suspended Grievant for twenty-four work hours without pay, contending he is a supervisor and it was inappropriate for him to participate in this kind of conduct. Grievant alleges that the penalty was too harsh for the incident, and that he did not receive proper notice before

[1] Respondent had raised the issue of timeliness at the level one hearing. That issue was not addressed in the level one decision which denied the grievance on the merits.

the suspension was implemented. Grievant also claims that the suspension was based upon false information. Respondent demonstrated that the conduct violated their policy and that the length of the suspension was not so disproportionate to the suspension that mitigation is appropriate. Respondent followed proper procedure in implementation of the suspension and it was based upon credible evidence. The grievance is denied.

The following findings of fact are based upon a thorough review of the record developed in this matter.

Findings of Fact

1. Grievant is employed by the Anthony Correctional Center ("ACC") as a Correctional Officer 3, at the rank of Corporal. As a Corporal, Grievant is a first line supervisor of Correctional Officers at the ACC.[2] Grievant has been employed as a Correctional Officer with the Division of Corrections for more than seven years.

2. Darren Winebrenner is a Food Service Supervisor employed at the ACC.

3. On May 3, 2008, while performing his normal supervisory duties, Grievant observed Mr. Winebrenner seated in a chair in a staff office near the kitchen of the ACC.

4. Believing Mr. Winebrenner was asleep, Grievant attempted to throw a small amount of water on Mr. Winebrenner from a cup Grievant was holding. The cup slipped from Grievant's hand and hit Winebrenner in the face near the corner of his eye.[3]

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[2] *See* Division of Personnel Compensation and Classification Plan, description of Correctional Officer 3.

[3] There is no detail in the record regarding the nature of the cup. It is unlikely that it was a disposable cup because it left a bruise where it hit Winebrenner, made noise when it hit the floor and Winebrenner testified that he put it in the sink. However, it also bounced off a wall or desk, struck Winebrenner in the head and landed on the floor without breaking, so it is questionable as to whether it was glass or ceramic.

5. There was no one in the area when the cup hit Winebrenner except Winebrenner and Grievant, however, "some girls" came in to see what was happening when they heard the cup hit the floor.[4]

6. Kelly Taylor is a Licensed Practical Nurse employed in the medical treatment area of the ACC. On May 4, 2008, Mr. Winebrenner stopped Nurse Taylor in the hallway immediately outside the door of the medical center and asked Nurse Taylor to examine the place where the cup had struck him the previous day.

7. Nurse Taylor told Mr. Winebrenner that he had a small bruise and that it would be okay. She did not document the discussion with Winebrenner as a visit to the medical facility.

8. After seeing Nurse Taylor, Mr. Winebrenner submitted an incident report on May 4, 2008, documenting the cup incident and his discussion with Nurse Taylor.

9. As a result of the incident report, Grievant was asked to meet with Marvin Plumley, ACC Associate Warden of Programs, and Captain Jeff Brown regarding the cup incident. When asked what had happened, Grievant admitted that he attempted to throw a small amount of water on Mr. Winebrenner to wake him up. The cup slipped from Grievant's hand, bounced off the desk and may have hit Winebrenner.

10. A predetermination hearing was held in ACC Warden Teresa McCourt's office on June 3, 2008. Present at that hearing were Warden McCourt, Associate Warden Plumley, Captain Brown and Kimberly Wiley. At that hearing, Warden McCourt explained the facts of the cup incident as she knew them and gave Grievant an opportunity to

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[4] It is apparent from the record that the "girls" were inmates of the facility but there is no indication in the record as to how many came in to inquire about the cup.

respond. Grievant admitted that he hit Winebrenner with the cup and what he had done was wrong.

11. On June 3, 2008, following the predetermination hearing, Warden McCourt gave Grievant a letter advising Grievant that he would be suspended, without pay, for twenty-four hours (three eight-hour working days) as a result of the incident that took place on May 3, 2008. In the letter Warden McCourt stated:

> The reason for your suspension is disrespectful conduct toward another staff person causing injury/harm. This personnel action is in accordance with Policy Directive 129.00, section V. J. 4. "Instances of disrespectful conduct or the use of insulting, abusive, or obscene language to or about others," 5. "Instances of inadequate or unsatisfactory job performance," 6. "Disruptive behavior," 28. "Unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy," and 35. "Acts of physical violence, fighting, or dangerous horseplay."

12. In the suspension letter, Warden McCourt also informed Grievant the suspension would not be effective until June 8, 2008, which provided three working days notice of the suspension. Warren McCourt also informed Grievant that he could respond to the letter within fifteen calendar days of receiving it or file a grievance within fifteen working days of the effective date of the suspension.

Discussion

This case involves a suspension which is a disciplinary action. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving, by a preponderance of the evidence, that the action taken against an employee was appropriate. 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.*

Division of Corrections Policy Directive 129.00 Section V. (G) (2) dictates how suspensions may be issued in the Division's progressive discipline process, as follows:

> **Suspension:** Issued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs . . . Elements of a suspension are:
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> **a.** Predetermination meeting with the employee to advise him/her of the contemplated disciplinary action;
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> **b.** Three (3) working days written notice, prior to the effective date of the action;
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> **c.** Specific written reason(s) for suspension;
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> **d.** Specific period of time for the suspension;
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> **e.** Written notice of opportunity to respond, either in person or in writing, prior to the effective date;
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> **f.** Notice of appeal rights specifying to whom the appeal should be directed and the time limits to appeal the suspension;
>
> **g.** A copy shall be placed in the employee's personnel file, with a copy forwarded to the Division of Corrections' Director of Human Resources and the Director, Division of Personnel.

The predetermination hearing held on June 3, 2008, and the letter provided to Grievant by Warden McCourt on the same day, met all of the elements described in subsections a. through f. of the Policy Directive.[5] Grievant does not question the requirements of subsection g. Grievant was given three working days notice prior to the start of the suspension.

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[5] *See* Findings of Fact 10, 11 and 12 supra.

Respondent was able to demonstrate that Grievant's conduct was in violation of Division of Corrections Policy 129.00 section V. J. Even if Grievant had only thrown the water on his co-worker, that would have constituted "horseplay," "disrespectful conduct" and "unprofessional treatment of [a] person in violation of division policy." All of these are violations of the policy cited by Respondent. The fact that the cup slipped and hit the co-worker in the face adds to the serious nature of the offense and indicates that the horseplay was dangerous even though it was intended to be fairly innocuous. Grievant argues that the suspension was based upon false information. Mr. Winebrenner stated in his report that he visited the medical facility to have his bruise checked. However, there was no written report of his visit. In fact, Mr. Winebrenner never actually made it into the medical office. He discussed his minor injury with Nurse Taylor in the hall outside the medical office door and since it was only a bruise Nurse Taylor did not file a written report of an office visit. While it was technically true that Winebrenner did not enter the medical office, he did have his bruise examined by a medical employee at the facility. Respondent met the burden of proving that discipline was justified.

The only remaining issue is whether the twenty-four-hour suspension was too severe and should be reduced. "The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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).

Grievant did not provide any evidence that other employees had received lesser punishment for similar offenses. He asserts that throwing the cup was an accident and that he should be given some consideration for telling the truth about the incident. Respondent counters that even throwing water at a co-worker would violate their policy and Grievant is expected to set an example for others at the ACC because he is a supervisor.

There is little doubt that hitting the co-worker with the cup was not Grievant's intent. Unfortunately, most horseplay is intended to be innocent until someone gets hurt. Respondent has the right to expect a higher level of performance from their supervisors. *See Cobb v. Dep't of Admin./General Services Div.*, Docket No. 97-Admin-404/455 (May 26, 1999). Given the considerable deference that is afforded to the employer in disciplinary actions and the lack of evidence that this penalty was disproportionate to the offense, mitigation is not appropriate in this case. Consequently, the grievance is denied.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving, by a preponderance of the evidence, that the action taken against an employee was appropriate. 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. Respondent proved by a preponderance of the evidence that Grievant participated in conduct that was in violation the Division of Corrections policy and that the discipline that was imposed for this conduct was appropriate.

3. Division of Corrections Policy Directive 129.00 established a procedure that must be followed for implementation of a suspension of an employee of the Division. Respondent complied with the procedures required in that policy when the suspension was imposed on Grievant.

4. “The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. 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 did not prove that the penalty was clearly excessive or reflects an abuse of discretion. Nor did he prove that the penalty was disproportionate to the wrongful act. Therefore, mitigation of the penalty of the suspension for twenty-four hours is not appropriate.

Accordingly, the 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 Decision. *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 (2008).

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WILLIAM B. MCGINLEY
Administrative Law Judge

DATE: January 15, 2009