THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICKY L. BECK,
Grievant,

v. **Docket No. 2009-1567-MAPS**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant Ricky L. Beck filed this grievance on May 22, 2009, challenging his ten-day suspension for possessing and reading pornographic magazines while on the job and for his failure to follow workplace policy in calling off from work. Grievant seeks the following relief, "[R]everse the 10 day suspension and pay my back pay to me and reinstate all holidays, sick leave, and annual leave incurred during the suspension period."

This grievance was denied at level one on June 5, 2009, following a conference with Respondent's designee. A level two mediation session was conducted on August 13, 2009. Appeal to level three was perfected on August 25, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on November 13, 2009, in Elkins, West Virginia. Grievant appeared pro se. 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 January 12, 2010.

Synopsis

Grievant is employed as a Correctional Counselor II at the Huttonsville Correctional Center. On February 3, 2009, Grievant's supervisor located several pornographic magazines in the drawer of Grievant's desk. Grievant was on annual leave at the time the magazines were discovered. Respondent elected to leave the magazines in Grievant's desk drawer to see what his actions would be upon his return. On February 9, 2009, Grievant called his unit to inform them he would be off sick for one week. Grievant failed to notify the Control Center Officer he would be off sick in violation of policy. Upon his return to work, Grievant did not report that he had seized contraband and he continued to keep the pornographic magazines in his desk. Grievant admitted to viewing the material during the course of an internal investigation. Grievant was previously disciplined for viewing pornographic websites on his state-owned computer while at work. Respondent proved the charges against Grievant by a preponderance of the evidence. This grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant has been employed as a Correctional Counselor II at the Huttonsville Correctional Center since May 2007. The Huttonsville Correctional Center is a correctional facility with the West Virginia Division of Corrections.

2. On October 28, 2008, Grievant was suspended for four working days based upon his having been seen by inmates and a staff member viewing a pornographic website

on his state-owned computer. Grievant admitted that he had used the state-owned computer to access a pornographic website fifteen to twenty times. This suspension was not grieved.

3. On February 3, 2009, while looking for cleaning supplies in Grievant's office, unit manager Albert Fordyce, Grievant's supervisor, located a few pornographic magazines in the drawer of Grievant's desk. Mr. Fordyce completed an incident report regarding the magazines.

4. At the time the pornographic magazines were discovered, Grievant was on annual leave from Tuesday, February 3, 2009 through Friday, February 6, 2009. Grievant works four ten-hour days per week.

5. On February 9, 2009, Mr. Fordyce spoke with Deputy Warden Grover Rosencrance regarding the pornographic magazines found in Grievant's desk. Deputy Warden Rosencrance instructed Mr. Fordyce to keep the magazines in Grievant's desk for a few days after he returned from annual leave to see if Grievant would report the circumstance under which he came into possession of the magazines.

6. On February 9, 2009, Mr. Fordyce was notified that Grievant had called Unit F, their respective unit, and told Office Assistant Candice Lehman that he would be off sick for one week. Grievant did not call the Control Center Office to report he would be out sick as required by Respondent's Institutional Operational Procedure. Grievant was aware of this reporting requirement.

7. On Tuesday, February 17, 2009, Grievant returned to work. From Tuesday through Friday of that week, the pornographic magazines remained in Grievant's desk and Grievant did not report why he was in possession of the magazines.

8. On Tuesday, February 24, 2009, Mr. Fordyce met with Grievant regarding the magazines. Grievant was given the opportunity to explain what had happened. Grievant explained that he and Officer Zirkle conducted a cell search on Dorm 12 Cell 328 during the week of January 27 - 30, 2009. They confiscated seven magazines of adult material. Grievant put them in his desk and locked it to see if any of the inmates in Cell 328 wanted to claim the magazines and produce verification of a subscription. Grievant went on vacation for a week after seizing the magazines, followed by a week of sick leave.[1]

9. Grievant's incident report and employee response did not indicate that any effort was made to inform the six inmates in Cell 328 that pornographic magazines had been confiscated from their cell.

10. Prior to leaving on annual leave, Grievant did not inform Mr. Fordyce or any other staff member on Unit F that he had confiscated pornographic magazines or that any of the inmates from Cell 328 could get their magazines back by showing that they had a subscription to the magazines.

11. Huttonsville's Institutional Operational Procedure number 3.08, as found in Respondent's Exhibit 16, reads:

> R. Contraband
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> 1. All contraband located during searches will be confiscated.
> 2. A written report that describes the contraband, when and where it was found will be submitted to the Shift Commander.
> 3. If the contraband was associated with a specific inmate, an Incident Report and Evidence/Property Seizure Receipt are to be completed. A chain of custody of evidence will be completed as specified in IOP 3.14-1 "Preservation of Physical Evidence."

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[1]Pornographic magazines are not viewed as contraband if an inmate produces verification of a subscription.

4. Incident Reports will be filed on major contraband that is found, even though it may not be tied to a specific inmate. In addition, all weapons found will be forwarded to the Executive Staff through the Chief Correctional Officer.

5. Any confiscated contraband item whose disposition can not be determined shall be forwarded to the Chief Correctional Officer for disposition. The Chief Correctional Officer shall make disposition as follows:

a. Retain for hearing
b. Destroy
c. Send home
d. Donate to Chaplain
e. Return to State Shop
f. Other disposition as required.

S. Any employee who seizes property from an inmate and fails to comply with any of the rules and regulations in this procedure will be appropriately disciplined.

12. Grievant did not submit a written report to the Shift Commander regarding the seized magazines; Grievant did not dispose of or forward the seized magazines to the Chief Correctional Officer; Grievant did not write an incident report regarding the seizure of the magazines until Mr. Fordyce ordered him to do so on February 24, 2009.

13. In his January 30, 2009 Employee Performance Appraisal of Grievant, Mr. Fordyce instructed Grievant to avoid policy and procedure violations and to know his assigned duties, and perform them according to established procedure. Grievant was told to ask questions if uncertain on how to perform assigned duties. Respondent's Exhibit 9, Level Three.

14. On February 26, 2009, an investigation regarding Grievant's possession of the magazines in his desk was assigned to Investigator Denver Rosier. As part of his investigation, Mr. Rosier interviewed Grievant.

15. Grievant admitted to Mr. Rosier that he did view, read and remembered specific articles and pictorials from the pornographic magazines during the time period of February 17 through February 20, 2009.

16. As a result of the information contained in Mr. Rosier's report regarding the possession of pornographic magazines, and the failure to report to work as scheduled without proper notification, Grievant was suspended for ten working days.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

As is often said around the Old Bailey, Grievant is grasping for straws in his arguments against this suspension. Grievant seeks to challenge his previous suspension of October 2008 because he asserts his due process rights were violated in that he was

not afforded a predetermination meeting prior to the suspension (in support of this argument he cites to Respondent's Exhibit 19). Oddly enough, this very document memorializes the predetermination meeting during which Grievant met with his supervisors to discuss the report that Grievant used his work computer to view pornographic websites. In addition, any challenge to this suspension at this late date is untimely.[2] Grievant offered this challenge for the first time at the level three hearing and Respondent raised the timeliness objection at the hearing. This argument is without merit and any challenge to the October 2008 suspension was not raised in a timely manner.

Grievant also makes the assertion that, regardless of who is to file Incident Reports and Evidence/Property Seizure Receipts, there is no specific time frame in which to complete the reports. In addition, even though there was no paperwork accompanying the magazines in Grievant's desk drawer, they were still considered contraband/evidence. By removing the magazine, Unit Manager Fordyce violated procedure by breaking the chain of custody for the evidence. While there is no specific time frame to complete incident reports in Respondent's policy, for the reasons more fully set out below, this argument is also without any merit.

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[2]WEST VIRGINIA CODE § 6C-2-4(a)(1) states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . .

Grievant admitted to the investigator that he viewed the pornographic magazines in his desk drawer on a few occasions. Even in situations where the pornography is being held as contraband, as Grievant contends, the viewing of the materials in the workplace is an unacceptable activity. *See Vest v. Div. of Corrections/Mt. Olive Correctional Complex*, Docket No. 2009-0024-MAPS (Nov. 25, 2008). After his October 2008 suspension for viewing pornographic websites, Grievant knew the viewing of pornographic materials was unacceptable and would subject him to disciplinary action. At the time Grievant took possession of the magazines, he was aware that he had already been suspended for viewing the same type of material and that a second offense would subject him to harsher discipline. If necessity required Grievant to assume custody of the pornographic magazines, the prudent course of action would have been to document how the magazines came into his possession and either dispose of them, return them to Cell 328, or forward them to the Chief Correctional Officer. To the contrary, Grievant kept the magazines in his desk drawer in order to view them and told no one about what he had done.

Whenever property is confiscated from an inmate's cell, the property seized and the circumstances of the seizure must be documented pursuant to operational procedure. Absent this requirement, there is no check upon staff in the event of improperly seizing inmate property. In addition, there is no record or documentation to show that a staff member acted properly in the event an inmate complains about a particular seizure of property.

Once a search is conducted and property is seized, an incident report is required. An incident report or some type of report by Grievant would have alerted Mr. Fordyce to

the fact that pornographic magazines had been confiscated and were being held in order to permit an inmate to show proof of a subscription. The need for a report in the instant case is accentuated by the fact Grievant was aware he would be on annual leave the week after the confiscating of the magazines and, therefore, someone in Unit F, including his supervisor, should have been prepared to deal with an inmate looking for his property.

When the disposition of the contraband or property could not be determined, the contraband should have been forwarded to the Chief Correctional Officer. This requirement keeps contraband from being kept indefinitely or being left in random, possibly unsecured areas at Huttonsville. This requirement keeps staff from confiscating contraband or inmate property in order to use the contraband or property for their personal use.

The record of this grievance also establishes that Grievant was notified on January 5, 2009, of the need to properly notify the Control Room in a timely manner reporting off with an illness or family emergency. Respondent's Exhibit 8, Level Three. Grievant admitted that he did not contact the Control Room or Control Room Officer when he called Huttonsville to inform Mr. Fordyce that he would be out sick from February 9 through 13, 2009. Grievant's failure was contrary to operational procedure and the instructions of his supervisor.

As mentioned earlier in the discussion, Grievant asserts throughout his proposals that his due process rights were violated. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*,

175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question here is whether the due process protections afforded Grievant were sufficient.

Nothing in the record of this grievance remotely suggests that Grievant's due process rights were violated. Prior to the ten-day suspension, Grievant was provided with a clear explanation of what he did wrong; what he should have done; what conduct was expected; consequences of future violations; and, what specific violations had occurred. Grievant was given an opportunity to be heard on the alleged violations in a predetermination meeting with his supervisors.

The ten-day suspension is supported by the principles of progressive discipline under the reasonable consideration that more severe sanctions may be used when an

employee continues conduct for which he has already been disciplined. Grievant did not seek mitigation of this ten-day suspension. The Division of Corrections has met its burden in proving the charges supporting the ten-day suspension by a preponderance of the evidence.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. 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.

3. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532,

542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

4. Respondent provided Grievant with notice of the charges, explanation of the evidence, and an opportunity to be heard prior to any disciplinary action affecting his employment. As a consequence, Respondent provided Grievant with necessary due process protections.

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 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 (eff. July 7, 2008).

Date: February 2, 2010

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Ronald L. Reece
Administrative Law Judge