WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLENE SOTAK,
Grievant,

v. **Docket No. 2011-1241-MAPS**

WEST VIRGINIA DIVISION OF CORRECTIONS,
Respondent.

D E C I S I O N

Grievant, Charlene Sotak, filed a grievance against her employer, the West Virginia Division of Corrections ("Corrections"), Respondent, on February 23, 2011 protesting a fifteen day suspension. The disciplinary action was administered subsequent to Grievant's failure to timely respond to inmate grievance appeals within the time frames set by Corrections' policy directive, for her taking of unauthorized leave, and for her continued mistakes in time keeping. Grievant seeks to be reimbursed for the lost compensation and any accrued annual and sick leave forfeited pursuant to the suspension.

As authorized by W. VA. CODE § 6C-2-4 (a) (4) this grievance was filed directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on April 18, 2011, in the Grievance Board's Charleston office. Grievant appeared *pro se.* Respondent was represented by John H. Boothroyd, Esquire. Upon both parties being given the opportunity to present evidence and submit proposed Findings of Fact and Conclusions of Law, this matter became mature for decision on May 15, 2011, the deadline for the submission of the parties' proposed fact/law documents.

Synopsis

Grievant challenges her fifteen (15) day suspension by the West Virginia Division of Corrections. Grievant is employed as the Inmate Grievance Coordinator, whose duties,

among other responsibilities, is to investigate and respond within applicable time frames to inmate grievances appealed to the Commissioner of Corrections. In addition to her failure to timely respond to inmate grievance appeals, Grievant did not come to work on days claimed as snow days, during a period in which Grievant did not have adequate leave to cover the absences. Further, Grievant made repeated errors in filling out her monthly time sheets. Respondent established by a preponderance of the evidence the acts and omissions of Grievant were contrary to applicable policy and instruction. Respondent identified and established reasonable, rational, and just cause for disciplining Grievant. This 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 the West Virginia Division of Corrections, Respondent, and is assigned to the Legal Division in Respondent's Central Office. Grievant is classified as a Correctional Program Specialist and holds the position of "Inmate Grievance Coordinator." Grievant has held the position of Inmate Grievance Coordinator either as a trainee or as a full performance Correctional Program Specialist since May 2006.

2. The duties and responsibilities assigned to Grievant's position involve investigating, compiling and coordinating responses to inmate grievances and appeals on behalf of the Commissioner of Corrections. Further, Grievant's duties involve assisting the two attorneys in the Legal Department with inmate grievances.

3. An "inmate grievance" is a formal complaint process under which an inmate may raise a complaint regarding any aspect of his or her conditions of confinement. An inmate starts the complaint process by filing a complaint form ("inmate grievance") with the unit manager of the inmate's housing unit. Should the response of the unit manager not resolve the complaint, the inmate may appeal the grievance, first, to the Warden/Administrator of the inmate's correctional institution and, second, to the Commissioner of Corrections. Grievant's role in the process is to respond to those inmate grievance appeals which have been made to the Commissioner of Corrections.

4. Corrections' Policy Directive 335.00 (Inmate Grievance Procedures) governs the procedure regarding the filing of and responding to inmate grievances. Resp. Ex. 12. Policy Directive 335.00 sets forth time deadlines regarding when an inmate must file a grievance and/or appeal and when a grievance and/or appeal must be answered. Regarding the time frames governing inmate grievances appealed to the Commissioner of Corrections, Policy Directive 335.00 sets forth that "[t]he Commissioner shall respond to the appeal, in writing, within ten (10) days."[1]

5. When an inmate grievance appeal is received by the office of the Commissioner, the inmate grievance appeal is entered on a log labeled "Inmate Appeals and Responses." This log sets forth the date the inmate grievance appeal was received by the Commissioner, the date a response is due on behalf of the Commissioner, and the person who is assigned the response on behalf of the Commissioner. Every working day, the Commissioner's office sends the inmate grievance appeals received and the "Inmate

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[1] The term "Days" in Policy Directive 335.00 means working days exclusive of weekends or state holidays. Resp. Ex. 12.

Appeals and Responses" log[2] compiled for that day to the legal division in the Central Office.

6. Grievant receives both the inmate grievance appeals and the logs in Respondent's legal division. She is responsible for issuing written responses[3] on behalf of the Commissioner within the ten day time frame.

7. An Employee Performance Appraisal (EPA-3) was done of Grievant and her performance of duties by her supervisor, Charles Houdyschell, on February 1, 2010. Grievant's overall performance was rated as "needs improvement." Grievant was viewed as needing improvement in the following categories:

-Adapts to new situations in a positive manner.
-Works well with others to achieve organization's goals.
-Is resourceful and generally seeks work process improvements.
-Shares information with others when appropriate.
-Acts independently while keeping supervisor informed.
-Exhibits ability to secure and evaluate facts before taking action.
-Treats all customers with respect.
-Addresses conflicts and problem situations with patience and tact.
-Work output matches the expectations established.
-Work results satisfy organization's goals.
-Work product is thorough and complete.
-Work product is free of flaws and errors.
-Employee's attendance supports the expected level of work.
-Employee's presence can be relied upon for planning purposes.
-Employee is a dependable team member.

Resp. Ex. 2.

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[2] The log would also include inmate appeals of prison disciplinary matters, which is covered by another policy directive, and informal inmate letters.

[3] Policy Directive 335.00 sets forth that the responses from the Commissioner are to "affirm the Warden/Administrator and deny the grievance," "deny the grievance for reasons other than that which is addressed by the Warden/Administrator and Unit Manager," "grant the grievance," or "remand the grievance back to the Warden/ Administrator or Unit Manager for further action."

8. The February 1, 2010, EPA-3 in the "Summary Comments" sets forth that Grievant's "behavior is best characterized as being focused on her own office comfort without regard for the mission of her work unit or agency. Hours are flexed without advance notice or approval to her supervisor and she shows growing disregard for her accountability to supervisory staff." The EPA-3 in the "Improvement and/or Developmental Plan" sets forth that Grievant "needs improvement in the areas of attendance, attention to detail and interoffice interaction. A list of goals had been attached to Grievant's EPA-1 for 2010. Resp. Ex. 2.

9. The EPA-1 goals provided to Grievant included goals that Grievant "establish a plan to build up and maintain leave balances" and that Grievant develop a check list reflecting the proper legal analysis and Corrections' policy requirements in several areas, including medical issues.

10. Grievant was instructed by her supervisor, Charles Houdyschell, Director of Legal Services, on or about August/September 2010, to refer inmate grievance appeals which involved medical issues to Carol Egnatoff, the Health Services Director for Corrections.

11. Ms. Egnatoff is a correctional employee with a medical background and possesses what is recognized as expertise that would be useful in assessing inmate grievances with medical issues. Ms. Egnatoff's review had an added benefit of assisting Respondent in understanding what complaints inmates may have about the provision of health care services by Corrections' contracted medical services provider.

12. Ms. Egnatoff was instructed by Director Houdyschell to complete an evaluation form of the medical issue and forward the evaluation form to Grievant so that

Grievant could answer the inmate grievance appeal on behalf of the Commissioner.

13. Grievant was not informed that Ms. Egnatoff would be answering the inmate grievance appeals on behalf of the Commissioner.[4] Further, Grievant was not informed that she was relieved of the responsibility of answering inmate grievance appeals with medical issue(s).

14. On all the logs for "Inmate Appeals and Responses" between September 2010 and December 28, 2010, Grievant was assigned the response on behalf of the Commissioner on all inmate grievance appeals, including those grievances that raised medical issues.

15. During the Fall of 2010 up to December 28, 2010, Grievant routinely referred medical grievance appeals to Ms. Egnatoff. The logs of inmate grievance appeals, Resp. Ex. 14, completed or forwarded to Ms. Egnatoff indicate that Grievant would receive completed evaluation forms from Ms. Egnatoff and thereafter respond to these inmate medical grievance appeals on behalf of the Commissioner.

16. Grievant was not informed that inmate grievance appeals with medical issues were exempt from the requirement in Policy Directive 335.00 that a written response on behalf of the Commissioner was due within ten working days.

17. On December 28, 2010 Grievant had been employed in her position as Inmate Grievance Coordinator with Respondent for approximately five years.

18. On December 28, 2010, Grievant approached Director Houdyschell with an

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[4] The duties and responsibilities of Ms. Egnatoff's position do not entail responding to inmate grievance appeals on behalf of the Commissioner. Prior to the Fall of 2010, she did not have any consistent involvement in the inmate grievance process.

expandable redwell folder containing forty-one inmate medical grievance appeals, and five inmate letters regarding medical issues. Resp. Ex. 17, List of documents. Grievant requested instructions from Director Houdyschell as to what she should do with the grievances and letters.

19. Upon review of the inmate medical grievance appeals in the folder, it was discovered that twenty-six of the forty-one inmate grievance appeals had not been answered by Grievant and were past their due date under Policy Directive 335.00.

20. Two of the twenty-six unanswered inmate grievance appeals were over two months past their due date. Seven of the twenty-six unanswered inmate grievance appeals were over one month past their due date. There were also five more unanswered inmate grievance appeals in the folder which were either due on December 28 or 29, 2010 and which were also not responded to before their due date.

21. Three of the five inmate letters in the folder had been referred to Ms. Egnatoff back on September 24, 2010, October, 22, 2010, and November 15, 2010 and were still awaiting an evaluation from Ms. Egnatoff. One of the unanswered inmate letters had no documented date showing it had been referred to Ms. Egnatoff.

22. After reviewing the folder, Director Houdyschell communicated with both Ms. Egnatoff and Grievant regarding what had been happening with the unanswered inmate grievance appeals. Resp. Ex. 19.

23. From September 2010 to December 28, 2010, Grievant sent a copy of inmate grievance appeals with medical issues to Ms. Egnatoff via e-mail. Grievant did not inform Ms. Egnatoff that the inmate grievance appeals referred to her had a deadline or even a time frame for the evaluation form to be completed.

24. Grievant was aware during the time period of September 2010 to December 28, 2010 that some of the inmate medical grievance appeals referred to Ms. Egnatoff had not had an evaluation returned by her. Grievant, however, did not contact Ms. Egnatoff during this time period to address any of these inmate grievance appeals to which Ms. Egnatoff had not promptly provided an evaluation.

25. From September 2010 to December 28, 2010, Grievant did not contact her supervisor Director Houdyschell to clarify any concerns or confusion regarding inmate medical grievance appeals referred to Ms. Egnatoff.[5]

26. Grievant did not inform Director Houdyschell that she was not receiving evaluations from Ms. Egnatoff to referred inmate medical grievance appeals.

27. Prior to December 28, 2010, Grievant did not inform Director Houdyschell that a number of the inmate medical grievance appeals referred to Ms. Egnatoff appeared to be past their due date pursuant to Policy Directive 335.00.

28. Grievant was aware that a core duty of her position is to respond to inmate grievance appeals within the applicable time frames.[6] The Inmate Grievance Coordinator investigates and responds to inmate grievances appealed to the Commissioner, as the Commissioner's designee, within applicable time frames. See Resp. Ex. 18, West Virginia Division of Personnel position description.

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[5] There is no evidence that Grievant developed a check list reflecting the legal analysis and Corrections' policy requirements on inmate grievance appeals regarding medical issues as was set forth as one of her EPA-1 goals for 2010. Grievant testified that she did not know what had become of numerous inmate medical grievance appeals. During the identified time period, Grievant speculated that perhaps Ms. Egnatoff had directly sent a response on those inmate medical grievance appeals on behalf of the Commissioner. Grievant never inquired into this speculation.

[6] Eg., Resp. Ex. 2, Performance Standards and Expectations in Grievant's EPA-1 and 3.

29. For an unspecified period, Grievant was unclear as to the process for the inmate medical grievance appeals referred to Ms. Egnatoff. Grievant did not contact her supervisor Mr. Houdyschell in an attempt to clear up her confusion regarding the inmate medical grievance appeals referred to Ms. Egnatoff.

30. The failure to respond in a timely manner to inmate medical grievance appeals on behalf of the Commissioner had potential consequences for Respondent.[7] For example the Commissioner's failure to respond to an inmate's medical grievance appeal in a timely, attentive manner could be used as evidence to support a claim of deliberate indifference.

31. Corrections' Policy Directive 129.00 (Progressive Discipline), V. J. 5 lists "[i]nstances of inadequate or unsatisfactory job performance" as conduct subject to discipline. Resp. Ex. 25.

32. On December 16 and 17, 2010, Grievant did not show up for work and did not have any annual or sick leave to cover the absences. On January 12, 2011, Grievant did not show up for work and had only three hours of annual leave which did not cover the work day.

33. Grievant claimed that her absence from work on December 16 and 17, 2010, and January 12, 2011, were due to snow.

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[7] If there was a serious problem with the medical treatment of an inmate, the Commissioner had a strong interest in promptly resolving such a problem. Further, the inmate grievance process is the manner in which inmates in West Virginia exhaust administrative remedies regarding conditions of confinement prior to being allowed to pursue a civil action under West Virginia Code § 25-1A-2. The responses provided to the inmate from the unit manager, Warden/Administrator and Commissioner may become evidence in any future civil action filed by an inmate and often reflects how Corrections handled the matter.

34. On all three days, the Central Office for Corrections located in Charleston, West Virginia was open.

35. Grievant resided on Valley Drive in South Charleston, West Virginia and the drive from Grievant's residence to the Central Office is approximately 8.5 miles. Valley Drive is approximately one mile from the Montrose Road Entrance (Exit 56) to I-64 which can be accessed by a number of routes. The Kanawha Boulevard can be accessed via Montrose Road, Route 60 and the Patrick Street Bridge. Resp. Ex. 5.

36. Grievant testified that on all three days, there was significant snow on her road and that she did not want to take the risk of driving to work. Grievant did not get in her car and did not try to drive or test her road on these three days. Grievant did not seek alternative transportation or request help in getting to work from someone in the Central Office or from anyone else.

37. On the three days in discussion, Grievant's supervisor Mr. Houdyschell made it in to work. Director Houdyschell lives in Ona, West Virginia, which by car is approximately 40 minutes away from work. Director Houdyschell's route to work takes I-64 East and goes reasonably close by Grievant's residence.[8]

38. On December 16, 2010, work was cancelled at approximately 3:00 p.m. that day when the Governor's office issued an e-mail asking all state agencies and state offices throughout West Virginia to close due to the inclement weather. According to the National

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[8] It is highly probable that Director Houdyschell's and Grievant's route to work ultimately overlap. Grievant, testified that she does not take I-64 to work and uses a route via Kanawha Boulevard. There exist potential variations, but the logical direct routes from Grievant's residence intersect with the route traveled by Director Houdyschell to their mutual work site. Resp. Ex. 5, Computer map print out.

Oceanic and Atmospheric Administration (NOAA) there was a new snowfall of 4.4 inches on that date in the Charleston, West Virginia area. [9]

39. On December 17, 2010, there was a new snowfall of 0.1 inches in the Charleston, West Virginia area according to the National Oceanic and Atmospheric Administration. According to the Road and Weather Conditions Report by the West Virginia Division of Highways, the road conditions on December 17, 2010 were as follows:

<u>7:41:29 a.m.</u>	
I-64/77 Charleston	wet, plow/treated (both slow and fast lanes)
Primary roads Kanawha Cty.	clear, plow/treated
Secondary roads Kan. Cty.	wet, snow spots, plow/treated
<u>8:30:26 a.m.</u>	
I-64/77 Charleston	wet, slushy, plow/treated (slow lane)
Primary roads Kanawha Cty.	slushy, snow spots, plow/treated
Secondary roads Kan. Cty.	slushy, snow spots, snow covered, plow/treated
<u>9:53:50 a.m.</u>	
I-64/77 Charleston	wet, plow/treated (both slow and fast lanes)
Primary roads Kanawha Cty.	clear, plow/treated
Secondary roads Kan. Cty.	wet, snow spots, plow/treated
<u>10:04:46 a.m.</u>	
I-64/77 Charleston	wet, slushy plow/treated (slow lane)
Primary roads Kanawha Cty.	slushy, snow spots, snow covered, plow/treated
Secondary roads Kan. Cty.	slushy, snow spots, snow covered, plow/treated

[9] The weather conditions on December 16, 2010, were arguably the type of weather considered under section II F of the West Virginia Division of Personnel Policy on Emergency Situations/Inclement Weather which covers when "an employee must be late or absent from work due to an emergency situation and/or inclement weather." However, where emergency situations and/or inclement weather conditions make traveling to and from work hazardous, the same Policy states that an absence may be charged to accrued annual leave and that agencies are encouraged (but not required) to grant such leave in that situation. Director Houdyschell testified, had Grievant only taken the December 16, 2010 date as a snow day, he would not have had a problem with Grievant's failure to come to work on that day.

The road conditions for December 17, 2010 do not indicate that the roads that Grievant might take to work were impassable on that date. Resp. Ex. 6.

40. On January 12, 2011, there was a new snowfall of 1.1 inches in the Charleston, West Virginia area according to the National Oceanic and Atmospheric Administration. According to the Road and Weather Conditions Report by the West Virginia Division of Highways, the road conditions on January 12, 2011 were as follows:

<u>7:02:27 a.m.</u>	
I-64/77 Charleston	wet, snow spots (slow lane)
Primary roads Kanawha Cty.	wet, ice spots, snow covered
Secondary roads Kan. Cty.	wet, ice spot, snow covered
<u>9:43:04 a.m.</u>	
I-64/77 Charleston	wet (slow lane)
Primary roads Kanawha Cty.	snow spots, ice spots, snow covered
Secondary roads Kan. Cty.	snow covered
<u>1:13:48 p.m.</u>	
I-64/77 Charleston	wet (slow lane)
Primary roads Kanawha Cty.	wet, snow spots, ice spots, snow covered
Secondary roads Kan. Cty.	wet, snow spots, snow covered

The road conditions for January 12, 2011 do not indicate that the roads Grievant might take to work were impassable and are consistent with Director Houdyschell's testimony regarding road conditions.

41. Grievant failed to come to work and/or attempt to come to work on December 16, 2010, December 17, 2010, and January 12, 2011, when other employees in the Central Office were able to come to work.

42. Corrections' Policy Directive 129.00 (Progressive Discipline), V. J. 2 and 13 lists "[u]satisfactory attendance" and "[u]nauthorized absence" as conduct subject to discipline. Corrections' Policy Directive 129.08 (Authorized Employee Leave/Absences)

sets forth that in cases where an employee is absent from work without authorization for sick or annual leave, the appointing authority may consider such unauthorized leave as leave abuse and may consider taking disciplinary action against the employee. Resp. Ex. 8.

43. Grievant's February 2010 EPA-1 indicated a specified goal of Grievant's was to "[e]stablish a plan to build up and maintain leave balances." From January 2010 through January 2011, there were only two months (April and September) in which Grievant did not resort to using up all her accrued leave. Resp. Ex. 20.

44. From January 2010 through January 2011, Grievant submitted seven out of eleven monthly time-sheets,[10] which incorrectly set forth Grievant's additional accumulated annual and sick leaves for the month. The months in which Grievant erred in calculating accrued leave were January, February, May, August, November, December and January.

45. "Additional accumulated annual and sick leaves for the month" are calculated by determining the percentage of required work hours during the pay period which were actually worked or covered by paid leave and then multiplying the hours of annual and sick leave normally accumulated for the pay period by that percentage.

46. There is a mathematical formula for calculating additional accumulated annual and sick leaves for a given month. Grievant alleged she used an out-dated formula for her calculation. Grievant never asked the Human Resources Department in the Central Office for the correct formula or for instructions on how to calculate additional accumulated annual and sick leaves for the month. Instead, Grievant repeatedly incorrectly calculated

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[10] Grievant did not submit a monthly time sheet for June and July 2010 when she was off on unpaid medical leave.

her additional accumulated annual and sick leaves and left it to the Human Resources Department to review and correct her mistakes.

47. In addition to the mistakes regarding calculating additional accumulated annual and sick leaves for the month, Grievant put forward monthly time sheets with the following errors:

January 2010	Mistake in sick leave hours brought forward from December 2009.
April 2010	Mistake in double counting the five extra hours worked by the grievant from April 26 to April 28 as the 29 hours worked during the week of April 26th and as part of the 10.5 compensatory hours (grievant had 5.5 compensatory hours from week of April 19th) used to cover her absences on April 29th and 30th.
May 2010	Mistake in double counting time for week of April 26th carried over into 5.0 extra hours being credited to annual leave brought forward.
November 2010	Mistake in sick leave and annual leave used to cover dates of November 29 and November 30.

48. The number of errors made by Grievant in her monthly time sheets was noticeably greater than any errors made by any other employee in the Central Office. Rebecca Ferrell, Administrative Services Manager I, was specifically assigned to review and assist with Grievant's monthly time sheets.

49. In response to Grievant's problems in filling out a correct monthly time sheet, Grievant was required to fill out a weekly time sheet for her supervisor and Rebecca Ferrell. A great deal of time was devoted to Grievant's time sheets by the Human Resources Department in the Central Office.

50. Prior to the fifteen day suspension set forth in the February 2, 2011 letter, Grievant's employee disciplinary history consisted of a written reprimand in January of 2007 for attendance issues, to-wit: over six full days of unauthorized leave taken in the month of January 2007, and a five day suspension in August 2009 regarding an altercation in the Central Office with co-workers. Grievant was counseled in March 2009 regarding the amount of time she had been spending engaged in non-work related activity.

51. Respondent, in review of Grievant's failure to carry out one of the essential functions of her job, and Grievant's continued attendance problems, gave serious consideration to terminating Grievant's employment. Ultimately, it was decided to give Grievant a lengthy suspension.

52. Respondent was of the opinion that a lengthy suspension would reflect the seriousness of Grievant's poor work performance, attendance issues, and adhere to the principles of progressive discipline.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent maintains that Grievant failed to properly perform the duties and responsibilities of her position. Respondent cites the following as justification for the disciplinary action taken with regard to Grievant.

- *Failure to respond to inmate grievance appeals within the time frames set out by policy directive 335.00.*
- *Unauthorized leave on December 16 and 17, 2010, and January 12, 2011.*
- *Mistakes in time sheets from January 2010 through January 2011*.

Grievant contends that the fifteen-day suspension levied was not warranted. Grievant does not dispute that on December 28, 2010, she presented to her supervisor a folder containing forty-one inmate grievance appeals. Twenty-six of these forty-one inmate grievance appeals had not been responded to within the ten working days as required by Corrections' Policy Directive 335.00.[11] Grievant disputes that she is the employee responsible for the late responses to the inmate grievance appeals. Grievant maintains that she did not understand what she was supposed to do and how she was supposed to handle inmate medical grievance appeals which were referred to the Health Services Director, Carol Egnatoff.

The preponderance of the evidence readily establishes that it was Grievant's responsibility to respond to the inmate grievance appeals and was to do so within the time

[11] Corrections' Policy Directive 335.00 (Inmate Grievance Procedures) governs the procedure regarding the filing and responding to inmate grievances. Resp. Ex. 12.

frames set forth in policy and instruction. See Corrections' Policy Directive 335.00 (Inmate Grievance Procedures), Resp. Ex. 12; West Virginia Division of Personnel position description, Resp. Ex. 18; Performance Standards and Expectations of Grievant's Employee Performance Appraisal EPA-1 and 3, Resp. Ex. 2. In August/September 2010, an additional procedural step was implemented with regard to inmate grievance appeals which dealt with medical issues. It is not established that Grievant, as the Commissioner's designee, was relieved of her duty to respond to inmate grievance appeals involving a medical issue.

The logs for "Inmate Appeals and Responses" all indicated that the appeals, including appeals with medical issues, were assigned to Grievant for a response. Grievant was never informed that inmate medical grievance appeals were no longer assigned to her for a response. From September through December 2010, in fact, Grievant received numerous completed evaluation forms from Ms. Egnatoff on inmate medical grievance appeals and then, using Ms. Egnatoff's information, responded to the appeal on behalf of the Commissioner. In these cases, Grievant apparently understood she was still responding on behalf of the Commissioner.

Regarding the applicable time frames, each day's log of inmate grievance appeals, including inmate medical grievance appeals, received by Grievant from September 2010 through December 2010 had a due date for when the response on each inmate grievance appeal was due on behalf of the Commissioner. Grievant was not given any contrary instructions that the due dates set forth in the logs for "Inmate Appeals and Responses" or the time frames set forth in Policy Directive 335.00 did not apply to the inmate medical

grievance appeals. It was Grievant's responsibility to ensure that the responses made on behalf of the Commissioner were within the given time frame.

Grievant's contention that she did not understand how she was supposed to handle inmate medical grievance appeals which were referred to the Health Services Director, Ms. Egnatoff, is not persuasive. Assuming Grievant was genuinely confused about what to do about the inmate medical grievance appeals, it was Grievant's responsibility to clear up her confusion regarding the handling of such appeals. Clearing up her confusion does not seem like an overwhelming burden. A short question to her supervisor as to whether the referral of inmate medical grievance appeals to Ms. Egnatoff changed the dates when the responses were due, would have resolved the confusion.

Grievant chose to remain unclear regarding applicable time frames in September, October, November and December (until the 28th) of 2010. Remaining confused or unclear about how to handle a set of inmate grievance appeals for months is an act of omission, at best and/or a conscious failure to perform core duties and responsibilities as the Inmate Grievance Coordinator. Grievant's inaction in seeking clarification was also inconsistent with the "Improvement and/or Development Plan" set forth in Grievant's February 2010 EPA-3 which counseled Grievant of the need for her "to communicate with her supervisor."

Grievant's attempt to shift responsibility on to Ms. Egnatoff, is factually flawed. The duties and responsibilities of Ms. Egnatoff's position do not entail responding to inmate grievance appeals on behalf of the Commissioner. Grievant was assigned the response on behalf of the Commissioner on all inmate grievance appeals, including those grievances that raised medical issues. *See* Finding of Fact 14. Grievant failed to timely perform her

duly assigned duties. It is not established that Ms. Egnatoff was ever authorized to officially respond, on behalf of Respondent, to inmate appeals.

On December 16 and 17, 2010, and January 12, 2011, other employees successfully made it in to work. On all three dates, Grievant's supervisor also was able to make it into work from a far greater distance than Grievant. Towards the end of his commute, Director Houdyschell, Grievant's supervisor, traveled within one mile of Grievant's residence in South Charleston, just off of Interstate 64.[12] The weather reports and highway reports are consistent with the supervisor's testimony that, at a minimum, the roads in Charleston, West Virginia going into work were in fact passable on December 17, 2010 and January 12, 2011. It is not established that due to snow, Grievant's situation, on the dates specified, reasonably necessitated her absence from work.

Grievant's use of unauthorized leave had been addressed on more than one occasion by her supervisor as being a serious problem. Grievant should make a reasonable effort to be at work when she is physically able to work. Respondent's expectation that Grievant would be at work on a regular basis is a justifiable parameter of employment. Grievant's conduct of not being available to work or being absent from work, when she did not have annual leave to cover her absence were considered as unauthorized leave and subject to employee discipline under Policy Directives 129.08 and 129.00. This is reasonable, and a recognized condition of employment subject to corrective action by Respondent. *See* Corrections' Policy Directive 129.00 (Progressive Discipline), V. J. 2 and 13 lists "[u]satisfactory attendance" and "[u]nauthorized absence"

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[12] Grievant's supervisor had knowledge of the weather and general road conditions of the area near where Grievant resides.

as conduct subject to discipline. Grievant's failures to come to work on December 16, 2010, December 17, 2010, and January 12, 2011, when other employees in the Central Office were able to come to work, is contrary to her February 2010 EPA-1 goal to "[e]stablish a plan to build up and maintain leave balances."

Lastly, all employees at Respondent's Central Office are required to provide monthly time sheets as part of their duties. The importance of accuracy in completing time sheets was underscored, reiterated and emphasized by Respondent. Grievant was or should have been aware that submitting incorrect information could subject an employee to discipline. Corrections' Policy Directive 129.00 (Progressive Discipline). Grievant was uniquely aware her time sheets needed to be accurate. NEVERTHELESS, the monthly time sheet records from January 2010 through January 2011 signed by Grievant show errors in the calculation of accrued leave for the months of January, February, May, August, November, December 2010 and January 2011. The same time sheets also contained additional errors unrelated to the calculation of accrued leave time. Grievant did not correctly calculate her accrued leave or take adequate measures to address her errors. Instead, Grievant routinely required Respondent to police her monthly time sheets and make appropriate corrections. This conduct reached a point which could be characterized as abuse of process.

In summation, Respondent highlights that Grievant's failure to carry out a core function of her job was a serious "singular" incident and in and of itself supported a suspension of fifteen days. 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). In addition to the failure to carry out core duties, Grievant continued to be absent from work even though she had not accrued leave to cover the absences. In the case of her absences on December 17, 2010 and January 12, 2011, Grievant was absent when the weather and road conditions permitted travel to and from the Central Office. This unauthorized leave occurred even after her supervisor had directed her to develop a plan to maintain sufficient accrued leave.[13] Further, during the same months of December 2010 and January 2011, Grievant also continued to hand in monthly time sheets with errors in the calculation of accrued leave in violation of policy and instruction.

It is established that Grievant's conduct warranted attention. Respondent considered termination of Grievant's employment. Respondent identified and established reasonable, rational, and just cause for disciplining Grievant. Ultimately, Respondent's disciplinary action was administered in an attempt to correct unacceptable employee conduct and to emphasize the serious nature of Grievant's conduct. The principles of progressive discipline, contemplate that more severe sanctions may be used when an employee continues conduct for which she has already been disciplined. W.Va. Div. of Corrections Policy Directive 129.00, section V, subsections F and G.2.

The following conclusions of law are appropriate in this matter:

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[13] Historically, Grievant has been given a written reprimand for her attendance/unauthorized leave. See Resp. Ex. 23.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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).

2. Respondent has established by a preponderance of the evidence that Grievant was responsible for responding to inmate grievance appeals within the time frame set forth by West Virginia Policy Directive 335.00 and failed to do so.

3. Respondent has shown by a preponderance of the evidence that Grievant took unauthorized leave on days when the weather permitted employees to travel to work.

4. Respondent established by a preponderance of the evidence that Grievant repeatedly made errors in filling out of her monthly time sheets (January 2010 to January 2011).

5. Pursuant to West Virginia Division of Corrections' Policy Directive 129.00, a suspension may be issued "where minor infractions/deficiencies continue beyond the

written warning or when a more serious singular incident occurs." Respondent's disciplinary actions with regard to Grievant are in compliance with applicable corrective agency directives.

6. Respondent established a credible basis for disciplining Grievant.

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 (2008).

Date: October 20, 2011

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Landon R. Brown
Administrative Law Judge