THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JULIE MARIE PRICE,
Grievant,

v. **DOCKET NO. 2011-1583-MAPS**

DIVISION OF CORRECTIONS/LAKIN CORRECTIONAL CENTER,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Julie Marie Price, on May 4, 2011, contesting her five-day suspension without pay. As relief Grievant seeks to have the "[s]uspension revoked and removed from [her personnel] file. To be made whole again. Receive my wages plus 10%. To be held free from any future harassment."[1]

A level three hearing was held on August 8, 2011, before Administrative Law Judge Landon R. Brown in the Grievance Board's Charleston, West Virginia, office. Grievant appeared *pro se*, and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on receipt of Respondent's Proposed Findings of Fact and Conclusions of Law on September 8, 2011. Grievant declined to submit written proposals. This matter was transferred to the undersigned Administrative Law Judge for administrative reasons on March 2, 2012.

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[1] Grievant introduced no evidence of harassment, nor did she pursue any argument that she had been harassed. Accordingly, this issue will not be addressed.

Synopsis

Grievant was suspended for five days without pay for failing to conduct a pat down search of work crew inmates prior to their departure from the facility, as she was required by post order to do. Grievant admitted that she failed to conduct the search, and that she knew she was supposed to do so. Grievant felt the discipline imposed was too severe because officers at the facility have a habit of not conducting the required pat down searches of work crew inmates, she was under time restraints on the day in question, and she did not have any latex gloves with which to conduct the search. She also proved that a fellow officer had been given a written reprimand for the same infraction. Grievant demonstrated that the discipline imposed was clearly excessive.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ("Corrections") at the Lakin Correctional Center ("Lakin") since 2002. She is a Correctional Officer 2.

2. Lakin houses female inmates, and is a maximum security facility. However, it also houses inmates who are considered to be low level security risks. Inmates housed at Lakin who are level 1 or 2 are low level security risks, and have clearance to go outside the prison on work crews supervised by Division of Highways or Division of Forestry employees. These inmates are housed in modular units on the prison grounds. The area around the modular units is fenced.

3. There are 12 inmates assigned to the Division of Forestry work crew. When the work crew inmates are needed by the Division of Forestry to work for the day, two Division of Forestry employees usually appear at Lakin between 7:30 and 8:30 a.m. and ask that the work crew assigned to perform work for the Division of Forestry be brought out to be taken off-site to work for the day.

4. The post order for the modular units outlines, among other things, when inmates are subject to pat down searches. It states that after the Front Desk Officer contacts the Modular Unit Officer to notify the Modular Unit Officer that the Division of Forestry employees have arrived, "[t]he Modular Unit Officer will conduct a 'pat down' search of each inmate."

5. Grievant was assigned to the modular units on January 30, 2011, as the Modular Unit Officer. She was provided with the post order for the modular units when she was assigned to the units.

6. On April 5, 2011, the employees from the Division of Forestry did not appear at Lakin for the work crew until after 10:00 a.m. Grievant received a telephone call from the Front Desk Officer, Correctional Officer Queen, telling her that the Division of Forestry employees were at the facility, and to send the Forestry Crew inmates out. Grievant believed after her discussion with Correctional Officer Queen that she had a limited amount of time to get the inmates ready to go out on the work crew.

7. Upon their return to the facility from the work crew, inmates are strip searched. On April 5, 2011, when the inmates in the Division of Forestry work crew were strip searched on their return to the facility, Correctional Officer Dena Fry found a disposable razor in the coat pocket of one of the inmates. The razor was the same type

of razor which is issued to the inmates housed in the modular units at the request of the inmates. These razors are not confiscated from the inmates each day, nor is their disposal monitored by anyone at Lakin.

8. When Grievant was asked if she patted the inmates down before they were sent out on the work crew on the morning of April 5, 2011, she admitted that she had not conducted a pat down search.

9. Grievant knew she was required by the post order to perform a pat down search of the inmates prior to sending them out to work on the Forestry Crew, and she had been taught how to conduct a pat down search.

10. Grievant did not perform a pat down search of the inmates prior to sending them out to work on April 5, 2011, because she and some of the other officers who have been assigned to the modular units have a habit of not doing pat down searches of the inmates as required. In addition, in this instance she had no latex gloves with which to conduct the search, and she did not believe she had time to do conduct a pat down search.

11. Lieutenant David Rees, the Assistant Shift Commander on Grievant's shift, and Captain Kevin Dugan recommended to the Associate Warden of Security at Lakin that Grievant be issued a written reprimand for her failure to perform a pat down search of the inmates on April 5, 2011.

12. By letter dated April 19, 2011, Grievant was suspended for five days without pay for failure to conduct a pat down search of inmates, as required, on April 5, 2011. The suspension letter states that Grievant violated Division of Corrections Policy Directive 129.00, Section 5, Letter J, Subparagraphs 1, 5, 14, and 47, specifically:

1. Failure to comply with policy directive, operational procedures, or post orders.
5. Instances of inadequate or unsatisfactory performance.
14. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.
47. Breach of facility security or failure to report any breach or possible breach of facility security.

13. Deputy Warden John Sallaz believed the five-day suspension was warranted in this instance because Grievant made a conscious decision not to conduct the pat down search, and he believed this was a serious infraction.

14. Deputy Warden Sallaz was not aware that other Officers were not conducting pat down searches as required.

15. Grievant had never been disciplined by Respondent before this incident, and had received good conduct awards.

16. The inmates on the Forestry Work Crew are supervised only by Division of Forestry employees when they are offsite on the work crew, and the work may involve the use of knives which are provided to the inmates.

17. Correctional Officer Ferrell relieved Grievant at the modular units while Grievant's predetermination hearing was conducted in this matter in April 2011. Officer Ferrell had been employed at Lakin as a Correctional Officer for two years, and had not previously worked at the modular units. Officer Ferrell sent an inmate work crew out of the modular units to work outside Lakin without conducting a pat down search of the inmates. When Grievant returned to relieve Officer Ferrell she discovered that Officer Ferrell had not conducted a pat down search of the inmates as required, and told Officer Ferrell of her error. Officer Ferrell immediately reported her mistake to supervisory personnel, and

admitted her mistake. Officer Ferrell was given a written reprimand for this mistake because she had only two years of experience, and had not been assigned to the modular units before the day in question, and because she reported the mistake immediately.

18. Division of Corrections Policy Directive 129.00, dated November 1, 2009, sets forth Corrections' Progressive Discipline policy. Policy Directive 129.00 states that a written reprimand or warning "[m]ay be issued when minor infractions/deficiencies continue or when a more serious infraction/deficiency is discovered." It further provides that a suspension may be issued, "where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs." Policy Directive 129.00 does not offer any guidance on what is considered to be a minor infraction or deficiency, and what is considered to be a more serious infraction.

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. *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 and 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*.

Respondent demonstrated that Grievant failed to conduct a pat down search of inmates, that Grievant was required to do the pat down search, and that Grievant was

aware she was required to do the pat down search. Respondent has proven the charges against Grievant.

Grievant admitted that she had failed to follow the post order, but argued the discipline imposed was too severe for a first time offense. “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).

In 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). 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). “Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer.

Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Grievant testified that other employees do not conduct pat down searches of work crew inmates as required by the post order. Correctional Officer Fry admitted that she had not always conducted pat down searches as required. However, Deputy Warden Sallaz testified that he was not aware of this improper practice adopted by the employees. While Grievant may have just been doing, or in this case, not doing, as everyone else was, this does not excuse her behavior, but it does explain why she neglected her duty. It also indicates a belief on the part of the employees that the pat down search of work crew inmates was not a serious matter.

Further, Grievant's immediate supervisors felt that this infraction warranted only a written reprimand, and Officer Ferrell was issued only a written reprimand for the same infraction around the same time. Deputy Warden Sallaz attempted to justify this difference in treatment, pointing to the difference in experience of the two officers, and the fact that Grievant chose not to conduct the search, while Officer Ferrell did not know any better. The undersigned finds nothing in Policy Directive 129.00 which supports such a distinction. Either this was a more serious infraction or it wasn't. If Officer Ferrell did not know she was committing an infraction, and was not required to familiarize herself with the post order, then she should not have been disciplined at all. The undersigned concludes that Grievant has demonstrated that Respondent, by its treatment of a fellow officer, does not consider the failure to conduct a pat down search of work crew level inmates at Lakin to be a more serious offense, and that a five-day suspension was clearly excessive for a first time offense.

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

2. Respondent proved the charges against Grievant.

3. "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).

4. In 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).

5. 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). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

6. Grievant demonstrated that the discipline imposed was clearly excessive.

Accordingly, this grievance is **GRANTED.** The five-day suspension is **ORDERED REMOVED** from Grievant's record, and reduced to a written reprimand. Respondent is also **ORDERED** to pay Grievant five days of backpay, with interest, and to restore all other benefits which Grievant lost as a result of the five day suspension, including leave and retirement benefits.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 16, 2012