THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SKYE REVEAL,

Grievant,

v. **Docket No. 2012-1002-CONS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL,

Respondent.

DECISION

Grievant, Skye Reveal, filed two expedited Level Three grievances against her employer, West Virginia Regional Jail and Correctional Facility Authority/South Central Regional Jail ("RJA"), challenging the two suspensions without pay imposed upon her for various alleged policy violations.[1] The first grievance, formerly Docket No. 2012-0592-MAPS, dated December 6, 2011, states as follows: "[h]ostile work environment and retaliation for testifying truthfully in a discrimination case. As retaliation, I was disciplined for conduct that other correctional officers were not. I also believe that my punishment occurred in part because I am gay." As relief sought, Grievant seeks "to stop all retaliation and to stop with hostile work environment. I would like this suspension rescinded and back pay awarded as well as any write-ups removed from my file." The second grievance, formerly Docket No. 2012-0833-MAPS, dated February 15, 2012, states as follows: "Grievant was improperly suspended for placing a sealed envelope in a lock box. The envelope contained cash obtained from an inmate. Grievant did not violate any written procedures and the employer failed to employ a progressive discipline policy as used with others. As relief sought, "Grievant requests

[1] *See*, W. VA. CODE § 6C-2-4(a)(4).

all disciplinary action be rescinded and any reference to such be removed from her file. Grievant also requests payment of all lost wages and costs for medical insurance." The two grievances were consolidated by Order entered March 27, 2012.

A Level Three hearing was held on June 19, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person, and by counsel, Paul M. Stroebel, Esq., Stroebel & Johnson, PLLC. Respondent appeared by counsel, Doren Burrell, Senior Assistant Attorney General. At the Level Three hearing, Grievant, by counsel, informed the undersigned that as she is no longer employed by Respondent, her non-disciplinary claims are now moot and she would not be pursing the same. As such, the non-disciplinary claims in the consolidated grievance were not addressed. However, Grievant noted that she was still grieving her two suspensions.[2]

This matter became mature for decision on July 16, 2012, upon receipt of the Grievant's proposed Findings of Fact and Conclusions of Law. Respondent did not avail itself of the opportunity to submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent imposed two suspensions upon Grievant between December 2011 and March 2012. In two separate grievance actions, which were later consolidated, Grievant argued that these suspensions were improper. Respondent denied Grievant's

[2] At the commencement of the Level Three hearing during the discussion of preliminary matters, counsel for Respondent clarified that there were two suspensions at issue and provided the dates each was served. Counsel for Grievant explained that Grievant was no longer employed by Respondent; therefore, she would not be pursuing her stated non-disciplinary claims. Counsel for Grievant stated that it was Grievant's contention that her suspension was retaliatory in nature.

allegations. Respondent failed to present any evidence at the Level Three hearing regarding Grievant's December 6, 2011, grievance. As such, Respondent failed to meet its burden of proof in this grievance. Regarding the February 15, 2012, grievance, Respondent alleged that Grievant violated various RJA policies, procedures, and post orders during an incident that occurred on January 31, 2012. Respondent failed to meet its burden of proving the charges alleged against Grievant. Accordingly, this consolidated grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At all times relevant herein, Grievant, Skye Reveal, was employed as a Correctional Officer II by Respondent at the South Central Regional Jail ("SCRJ").[3]

2. As a disciplinary action, Grievant was suspended from employment for ten days without pay from January 9, 2012 through January 20, 2012. Respondent presented no evidence regarding this disciplinary action at the Level Three hearing in this matter.[4]

3. On January 31, 2012, Grievant was working in the rear of Central Control at the SCRJ. Grievant was not working in the Booking Area.

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[3] Since at least the time of the Level Three hearing, Grievant is no longer employed by Respondent.

[4] The Grievance regarding this suspension contained certain non-disciplinary claims Grievant was pursuing. However, by the time of the Level Three hearing, Grievant was no longer employed by the Respondent. Therefore, Grievant advised that such claims were, therefore, moot, and that she would not be pursuing the same. However, Grievant still grieved this suspension.

4. The correctional officer working in the booking area, Michael Toney, received money from an inmate who was being booked, and recorded the money received, $371.00, in a log. Officer Toney then placed the money received in an envelope and sealed the same. This sealed envelope was then transferred to Grievant. *See*, Respondent's Exhibits 4, 5, and 6.

5. Grievant received the sealed envelope and signed a receipt indicating that she received the $371.00. Officer Toney did not sign off on the receipt. Grievant then placed the sealed envelope in a lock box for the fiscal clerks to process. Grievant did not open the envelope and recount the money therein before placing it in the lock box. *See*, Respondent's Exhibits 4, 5, 6, and 9; testimony of Stephen Tucker.

6. When the fiscal clerk, Wayne Hayes, pulled the envelope from the lock box to process and deposit the money received from the inmate, he discovered a discrepancy in the amount recorded on the receipt and the money contained in the envelope. The log and the receipt stated that $371.00 was received from the inmate, but only $351.00 was contained in the envelope. Mr. Hayes reported the discrepancy to Corporal Jaburs Terry. *See*, testimony of Stephen Tucker.

7. On February 1, 2012, Corporal Terry called Grievant and informed her that the envelope was missing $20.00. Grievant explained to him that she did not open the sealed envelope and recount the money inside before placing it in the lock box. *See*, Respondent's Exhibits 5 and 6.

8. Because of this discrepancy, both Grievant and Officer Toney were directed to draft incident reports concerning their actions in receiving and processing the money. Grievant's incident report was directed to Corporal Terry. Officer Toney's

incident report was directed to Lieutenant Craig Adkins, Chief Correctional Officer. *See*, Respondent's Exhibits 4, 5, and 6.

9. Officer Toney had miscounted the money when he received it from the inmate. Officer Toney admits this mistake in his report dated February 3, 2012. *See,* testimony of Stephen Tucker; Respondent's Exhibit 4.

10. No one alleges that any of the money received from the inmate was stolen, lost, or destroyed. *See*, testimony of Stephen Tucker.

11. On February 9, 2012, Stephen Tucker, SCRJ Administrator, conducted a predetermination conference with Grievant as he was considering discipline against her for her actions in the January 31, 2012, miscounted money incident. Present at this conference were Mr. Tucker, Grievant, Grievant's counsel, Lt. Craig Adkins, and Sergeant Norm Atkins. At this meeting, Mr. Tucker informed Grievant that he was considering suspending her for fifteen days for her conduct. *See*, Respondent's Exhibits 8 and 9.

12. By letter dated February 9, 2012, which was delivered to Grievant on February 13, 2012, Mr. Tucker informed Grievant that she was being suspended without pay for fifteen days for violating Regional Jail and Correctional Facility Authority General Post Order #5. The dates of this suspension were February 21-24, February 27-29, March 1-2, March 5-9, and March 12, 2012. *See*, Respondent's Exhibit 8.

13. Officer Toney was not disciplined for his failure to follow RJA policy during the January 31, 2012, incident.[5]

[5] Respondent asserts that Officer Toney was not disciplined as a result of the January 31, 2012, incident because although policy requires both officers to sign off on the receipt, it had "become commonplace" for only one officer to sign off on the receipt.

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); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

There are two suspensions at issue in this matter. Grievant argues that the first suspension was retaliatory in nature; therefore, it was improper. However, Respondent presented no evidence regarding the first suspension. Regarding the second suspension, Respondent asserts that it was proper because Grievant violated RJA policy, post orders, and its Code of Conduct. Grievant denies Respondent's allegations. It is noted that the first suspension was for ten working days, which Grievant served from January 9, 2012 to January 20, 2012. The second suspension was for fifteen working days, which Grievant served from February 21, 2012 to March 12, 2012.

Grievant asserted that the suspension she served in January 2012 was improper. Specifically, Grievant alleged that the suspension was retaliatory in nature. Respondent, as indicated during the preliminary portion of the Level Three hearing, denied Grievant's claims. Respondent had the burden of proof as this was a disciplinary grievance. However, Respondent presented no evidence regarding the

January suspension. Grievant advised on the day of the hearing that she was not pursuing the non-disciplinary claims stated in her December 6, 2011, grievance, but she did not withdraw her claim that this suspension was improper. Counsel for Respondent acknowledged that there were two suspensions at issue, and provided the dates of each for the record at the commencement of the hearing. Accordingly, Respondent failed to meet its burden. Therefore, this portion of the consolidated grievance should be granted.

Turning to the second suspension, Respondent asserts that Grievant's failure to open the sealed envelope she received from the booking officer and recount the money contained therein violates three policies, the first being the Policy and Procedure 3010 "RJA Code of Conduct" paragraph 5, which reads as follows: "[t]he personal property of inmates shall be handled and accounted for with extreme care. Any employee who has lost, damaged, or destroyed any property belonging to an inmate may be required to make restitution."[6] Respondent does not allege that Grievant lost, damaged, or destroyed any property belonging to the inmate. Instead, Respondent argues that Grievant did not handle the inmate's property with extreme care. Grievant did not make the mistake in counting the money. Grievant's mistake was that she did not recount the money in the sealed envelope and still issued a receipt for the money. "Extreme care" is not defined anywhere in the evidence presented. Although she did not recount the money, Grievant did not mishandle the money. She signed a receipt so that the money in the envelope could be tracked. She placed the sealed envelope in the lock box to safe guard it. From the evidence presented, the undersigned cannot conclude that

[6] *See*, Respondent's Exhibit 2.

Grievant failed to handle the inmate's money with extreme care. As such, Respondent failed to meet its burden of proving that Grievant violated Policy and Procedure 3010 "RJA Code of Conduct" paragraph 5.

Respondent next argues that Grievant's conduct also violates RJA Policy and Procedure Statement, Document Number 2020, Procedure D: Booking Area, which states as follows:

> Upon arrival at a West Virginia Regional Jail & Correctional Facility all money will be receipted from an inmate. All cash that is received from the inmate will be receipted and logged in the TAG System. <u>NO cash is to be placed in the inmate's personal property.</u> All cash received must have two (2) signatures on the receipt. Once the money has been counted and verified the money is to be sealed in an envelope with the receipt attached to the front and then it is to be placed in the lock box located in Central Control. During the booking process if an inmate states that he/she does not want a coin or a piece of currency booked due to it being a rare coin or currency (Ex. – Gold or Silver coin, Silver Certificate, etc), this money is to be placed in an envelope and placed in the safe in the administration area. It is also to be logged in TAG under the inmate's property inventory.

Grievant was not working in the booking area at the time the incident occurred. She was working in the rear of Central. Officer Toney was the booking officer. Officer Toney received the money from the inmate, miscounted it, logged it, then placed it in an envelope and sealed it. Officer Toney did not sign off on the receipt as this policy requires. This policy does not address the duties of officers posted at the rear of Central. Respondent proved that Officer Toney violated this policy. However, he was not disciplined. Respondent argues that Grievant failed to "verify" the money she

received from Officer Toney.[7] This policy is simply unclear as to how, when, and who is to "verify" the money. Respondent has failed to meet its burden of proving that Grievant violated Policy and Procedure Statement, Document Number 2020, Procedure D: Booking Area.

Lastly, Respondent asserts that Grievant violated the General Post Orders for her position by failing to open the sealed envelope and recount the money before issuing the receipt. Respondent argued Grievant's actions violated Procedure 5 in the Post Orders which states, "[h]andle all inmate money in accordance with the instructions outlined in Policy and Procedures 2002." However, these Post Orders were not admitted into evidence at the Level Three hearing because the documents offered were not dated, and Respondent's witness acknowledged that there had been some revisions to the Post Orders and that he was not certain if such were the Post Orders in place at the time of the January 31, 2012, incident. Further, it is to be noted that there is no Policy 2002 as referenced in the alleged Post Orders.[8] Respondent asserted that the reference to Policy 2002 was a typographical error and it should have read 2020. However, these Post Orders were not admitted into evidence, but even if they had been, Policy 2020, does not outline duties for officers working in the rear of Central. The procedures for receiving money from inmates by the officers working in the booking area are addressed; however, Grievant was not working in the booking area. Accordingly, Respondent has not met its burden in proving that Grievant violated Post Orders. Therefore, this portion of this consolidated grievance should be granted.

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[7] *See*, testimony of Stephen Tucker.

[8] *See*, testimony of Lt. Craig Adkins.

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

2. Respondent failed to justify the ten-day suspension imposed upon Grievant on December 6, 2011, that was served from January 9, 2012 through January 20, 2012. Respondent presented no evidence regarding this suspension. Respondent did not even articulate the charges alleged against Grievant giving rise to the suspension.

3. Respondent failed to prove by a preponderance of the evidence that Grievant violated RJA policies, procedures, and/or Post Orders on January 31, 2012.

Accordingly, this consolidated Grievance is **GRANTED**. Respondent is **ORDERED** to remove all references to the ten-day suspension from Grievant's personnel file and from any other files maintained by Respondent, to restore to Grievant all benefits lost as a result of the ten-day suspension, including seniority, and to pay her back pay for the ten days she was suspended, plus interest. Respondent is further **ORDERED** to remove all references to the fifteen-day suspension from Grievant's personnel file and from any other files maintained by Respondent, to restore to Grievant all benefits lost as a result of the fifteen-day suspension, including seniority, and to pay her back pay for the fifteen days she was suspended, plus interest.

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: December 7, 2012.

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Carrie H. LeFevre
Administrative Law Judge