THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY MARK WHITTINGTON,
Grievant,

v. **Docket No. 2012-0115-MAPS**

DIVISION OF CORRECTIONS/MT. OLIVE CORRECTIONAL COMPLEX,
Respondent.

Grievant, Timothy Mark Whittingon, filed a grievance against Respondent on July 26, 2011. The statement of grievance asserts that Grievant was wrongfully disciplined and suspended. As relief, Grievant seeks,

> That all records and documentation of this disciplinary action and suspension be removed from my personnel records and that my records are to be made whole. I also seek the lost wages that I incurred during the three day suspension.

Grievant elected to file directly to level three of the Public Employees Grievance Procedure in accordance with WEST VIRGINIA CODE § 6C-2-4(a)(4).

A level three hearing was conducted by the undersigned on November 7, 2011, in Beckley, West Virginia. Grievant appeared *pro se*. Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on December 20, 2011.

Synopsis

On July 7, 2011, Grievant received a three day suspension without pay. Respondent

asserts that Grievant's three day suspension was consistent with progressive discipline. Grievant asserts that Respondent failed to prove that he did not comply with Policy Directives, Operational Procedures, or Post Orders.

Respondent has met its burden of proof in demonstrating that Grievant continuously violated West Virginia Division of Corrections Policy Directive 129.00. Grievant was given an improvement period and received a written warning, as well as warnings of the areas needing improvement in Employee Performance Appraisals, before he received the three day suspension. Grievant's three day suspension was in compliance with progressive discipline.

Findings of Fact

1. Grievant is the Associate Warden of Programs for Respondent.

2. As part of his duties and responsibilities, Grievant was the direct supervisor of the Fire & Safety Inspector.

3. In 2010, David Ballard, Warden, and Marvin Plumley, Deputy Warden, noticed several issues that were not being addressed in the area of fire and safety, including the actual completion of mandatory inspections. Deputy Warden Plumley is Grievant's direct supervisor.

4. Deputy Warden Plumley met with Grievant regarding the incomplete mandatory inspections and the need for the Fire & Safety Inspector to improve his performance. Grievant was instructed to take an active role in the supervision of the Fire & Safety Inspector.

5. In January 2011, Grievant was given an Employee Performance Appraisal

(EPA 1).[1] Grievant's EPA 1 performance expectations included patrolling his assigned areas of responsibility a minimum of once per week, taking immediate corrective action including discipline when discrepancies and violations of policy and procedure are noticed, providing necessary leadership to accomplish operational tasks through subordinates in a timely, accurate and complete manner, and providing guidance and direction and monitoring the work of subordinate staff to ensure that they meet established performance standards and expectations.

6. In February of 2011, Warden Ballard noticed that the Fire & Safety Inspector had failed to complete his required monthly inspections of fire extinguishers at Mt. Olive. This failure to complete mandatory inspections was brought to the attention of Grievant. As Grievant was the Fire & Safety Inspector's direct supervisor, Grievant was subsequently instructed to take corrective action and issue a written reprimand to the Fire & Safety Inspector.

7. In March of 2011, a Fire and Safety audit took place. During the audit, it was found that the required fire and safety inspections, including inspections of fire extinguishers, were not being performed within required time frames. One fire extinguisher was last inspected in January of 2011, and another fire extinguisher was last inspected in December of 2010.[2]

8. Respondent's Post Order: 3B-12 requires the Fire & Safety Inspector to conduct or arrange monthly preventative inspections, maintenance and testing of fire

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[1]Respondent's Exhibit No. 7, Grievant's EPA 1.

[2]Respondent's Exhibit No. 9, Memorandum outlining Fire & Safety Audit findings.

extinguishers, among other safety items.[3]

9. Following the audit, a walk through of the facility found that fire extinguishers claimed to have been inspected had not been signed off on the fire extinguisher as having been inspected for the month.

10. Grievant was instructed to take corrective action and to request a suspension of the Fire & Safety Inspector.

11. On May 4, 2011, a pre-determination meeting was held with the Fire & Safety Inspector regarding a three day suspension. Grievant was in attendance because he was the Fire & Safety Inspector's direct supervisor. During the pre-determination hearing, it was made clear that the monthly inspection of all fire extinguishers were mandatory and considered a critical safety procedure for the maximum security prison. It was also made clear that the practice of inspecting a fire extinguisher after the month had passed and then back dating that an inspection had taken place in the previous month was unacceptable and a fraudulent act. Following the pre-determination hearing, the Fire & Safety Inspector was suspended for three days without pay.

12. On May 5, 2011, Grievant was placed on a sixty day improvement period due to his failure to monitor the Fire & Safety Inspector. Respondent conducted an EPA 2 (special) of Grievant.[4] The EPA 2 (special) specifically stated that Grievant would be "reviewed again at the end of this special rating period to determine if improvement has been made. If so, this special EPA-2 will be closed out. If no improvement has been made,

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[3]Respondent's Exhibit No. 5, Respondent's Post Order 3B-12.

[4]Respondent's Exhibit No. 12, Grievant's EPA 2 (special).

disciplinary action may be taken."

13. Grievant's EPA 2 (special) informed him that he needed improvement in: exercising more initiative in the management of Fire Safety, directing and monitoring the work of subordinate staff, and ensuring subordinate staff meet established performance standards and expectations. Grievant was specifically instructed to "increase your supervision of the Safety Inspector and the tasks he is supposed to be performing... Ensure that the Inspector is in compliance with all directives that have been assigned to his position."[5]

14. Grievant created work sheets and check lists in an attempt to track the Fire & Safety Inspector's duties and be more proactive in supervising his subordinate staff.[6]

15. The Fire & Safety Inspector was on approved annual leave from June 7 through June 26, 2011. As his supervisor, Grievant was responsible for ensuring that the Fire & Safety Inspector's inspections and duties were still carried out.

16. On July 1, 2011, Deputy Warden Plumley observed multiple fire extinguishers throughout the facility which had not been inspected during the month of June 2011.

17. The Fire & Safety Inspector came by later the same day and inspected the fire extinguisher and signed off on them as having been inspected for the months of June and July 2011.

18. That same day, Deputy Warden Plumley met with Grievant to discuss possible disciplinary action of the Fire & Safety Inspector. When Deputy Warden Plumley asked

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[5] *Id.*

[6] Level three hearing testimony of Grievant.

Grievant if he was aware of any issues with the fire extinguishers or the Fire & Safety Inspector, Grievant replied "no."

19. Later that same day, July 1, 2011, the Fire & Safety Inspector informed Grievant that he had not completed his monthly inspections of fire extinguishers. Upon learning of this failure, Grievant told him not to let it happen again. Grievant did not inform Deputy Warden Plumley of the Fire & Safety Inspector's failure to inspect all the fire extinguishers for the month of June 2011 or that he did not find it necessary to request disciplinary action be considered in the matter.[7]

20. During Grievant's sixty day improvement period, Grievant received a written reprimand on June 17, 2011 for failing to spend more time visiting areas under his

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[7]Deputy Warden Plumley learned of the Grievant's discussion with the Fire & Safety Inspector in a memorandum dated July 12, 2011. The memorandum was from the Fire & Safety Inspector to Deputy Warden Plumley. The memorandum stated, in part:

> During the month of June, I was on approved annual leave from 7 June 2011 through 26 June 2011...When I returned from vacation, I was up against a deadline of four days to finalize not only monthly inspections for the month of June, but also quarterly inspections for the second quarter of 2011...On 1 July 211 I began to clear my desk of all the paperwork I had been doing that week. I noticed that I had missed some fire extinguishers for the month of June and I began to panic seeing as how I had very recently been disciplined for not finishing fire extinguisher inspections. I immediately grabbed my check list and went about finalizing the inspections... At approximately 1400-1430 hrs., on 1 July 2011 I saw my supervisor AWO Tim Whittington. I informed him that I had missed some fire extinguishers for the month of June, and that as soon as I realized what I had done I went around and corrected my mistake. He responded by telling me not to let it happen again.... I realize now I should have told my supervisor of my mistake before correcting it on my own.

In addition, during a pre-determination hearing on July 28, 2011, regarding the Fire & Safety Inspector, Grievant admitted to Deputy Warden Plumley that the Fire & Safety Inspector did inform him of the failure to timely inspect all fire extinguishers and that he decided not to seek any disciplinary action.

supervision.[8] More specifically, Grievant had been instructed by Deputy Warden Plumley in March 2011 to visit the work camp at Mt. Olive at least once a month and to document the visit in his monthly reports. Grievant's monthly reports failed to document any visits to the work camp for the months of April and May 2011.

21. On June 13, 2011, during the same sixty day improvement period, Deputy Warden Plumley instructed Grievant to set up his voice mail on his blackberry phone. Staff had been having trouble reaching Grievant when Grievant was acting as Administrative Duty Officer at Mt. Olive. On June 5, 2011, Grievant could not be reached by phone regarding a critical incident involving injury.

22. The duty of Administrative Duty Officer is performed on a rotating basis between the Associate Wardens and Deputy Warden at Mt. Olive. The Administrative Duty Officer is required to be available to make management decisions and handle crisis situations as the Warden's designee. An Administrative Duty Officer is required to be available by telephone and, should he/she be unable to answer the blackberry phone due to cell phone service reception, needs to be able to receive and listen to voice mail.

23. Respondent performed an EPA 2 of Grievant on June 13, 2011.[9] Under the Performance Development Needs section of the EPA it stated, in part, that "At least three occasions have been documented where you were unable to be contacted as ADO [Administrative Duty Officer] and you had made no notification to the Shift Commander that you were unavailable."

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[8]Respondent's Exhibit No. 21, Grievant's written reprimand dated June 17, 2011.

[9]Respondent's Exhibit No. 13, Grievant's EPA 2 dated June 13, 2011.

24. On June 30, 2011, Deputy Warden Plumley called Grievant's state issued blackberry and received a message informing him that the voice mailbox was not set up.

25. A pre-determination hearing was held on July 7, 2011 with Grievant regarding contemplated disciplinary action.

26. By letter dated July 7, 2011, Grievant was notified of Respondent's decision to suspend him without pay for three days.[10] The suspension letter stated, in part:

> Upon consultation with the Division of Corrections Central Office, I have concluded that your suspension is in compliance with Division of Corrections Policy Directive 129.00 "Progressive Discipline" and the West Virginia Division of Personnel Administrative Rule, specifically:
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> Rule 1 - Failure to comply with Policy Directives, Operational Procedures, or Post Orders.
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> Rule 3 - Abusing state work time - examples include unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, loafing, wasting time, or **inattention to duty**. (Emphasis in the original suspension letter)
>
> Rule 5 - Instances of inadequate or unsatisfactory job performance.

27. As basis for the decision to suspend Grievant, the letter lists as section headings: Fire and Safety, Expected duties while functioning as Administrative Duty Officer (ADO), and Management Patrols (Walk-Thru's).

28. Under the section heading of Expected duties while functioning as Administrative Duty Officer (ADO), the letter states, in part:

> On 02 July 2011, I received a call from the facility following an emergency incident and was informed that they could not contact you and they were unable to leave you a voice message.[11]

29. The blackberry cell phone used by Grievant has caller ID. But when the

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[10]Respondent's Exhibit No. 1, Grievant's suspension letter.

[11]*Id.*

phone is in a location of poor cell reception due to mountainous terrain, a call will go directly to voice mail. If the voice mail has not been set up, callers cannot leave a voice message.

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. W. VA. CODE § 29-6A-6; *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.*

West Virginia Division of Corrections Policy Directive 129.00, Section V, Subsection J[12] sets forth as conduct subject to discipline:

1. Failure to comply with Policy Directives, Operational Procedures, or Post Orders.
3. Abusing state work time - examples include unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, loafing, wasting time, or inattention to duty.
5. Instances of inadequate or unsatisfactory job performance.

West Virginia Division of Corrections Policy Directive 129.00, Section V, Subsection G 2 sets forth that a suspension is "issued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs."[13]

Respondent asserts that Grievant's three day suspension was consistent with

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[12]Respondent's Exhibit No. 24, Policy Directive 129.00.

[13]*Id.*

progressive discipline. Respondent argues that Grievant failed to follow its instructions to be proactive in the supervision of the Fire & Safety Inspector and to ensure that the Fire & Safety Inspector did not miss mandatory monthly inspections. Respondent asserts that Grievant failed to carry out the instructions to regularly patrol and document those patrols, of the areas under Grievant's supervision. Respondent argues that Grievant failed to follow the instruction to set up his voice mail on his blackberry phone.

Grievant asserts that he followed the directive and became more proactive in his supervision of the Fire & Safety Inspector when he created work sheets and lists to track the Fire & Safety Inspector's duties. Grievant asserts that he did not intentionally disobey the directive to set up his voice mail. Grievant asserts that he had difficulty setting up the voice mail until he spoke with Respondent's information technology department staff.

The Grievant was instructed to be more proactive in supervising the Fire & Safety Inspector in January 2011. When problems continued with Grievant's supervision of the Fire & Safety Inspector, Grievant was counseled and placed on a sixty day improvement period in May 2011. Grievant's continued failure to supervise the Fire & Safety Inspector was demonstrated by the monthly fire extinguisher inspections not being completed in June 2011. In June 2011, Grievant received a written reprimand for failure to regularly patrol and document the patrols of the areas under his supervision. The written reprimand was followed by Grievant's failure to follow Deputy Warden Plumley's instruction on June 13, 2011, to set up his cell phone voice mail.

On June 30, 2011, Deputy Warden Plumley called Grievant's cell phone and learned that the voice mail had not been set up. On July 2, 2011, the facility attempted to contact Grievant during an emergency situation and was unable to leave a voice message. Even

though Grievant had difficulties setting up his voice mail, he should have contacted information technology staff to help resolve the problem as soon as possible. Setting up his voice mail was a directive from his supervisor. After a period of over two weeks later, Grievant still could not receive voice messages.

Respondent has met its burden of proof in demonstrating that Grievant continuously violated West Virginia Division of Corrections Policy Directive 129.00. Grievant was given an improvement period and received a written warning, as well as warnings of the areas needing improvement in EPAs, before he received the three day suspension. Grievant's three day suspension was in compliance with progressive discipline.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health &Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Respondent met its burden of proof in demonstrating that Grievant continuously violated West Virginia Division of Corrections Policy Directive 129.00.

3. Grievant's three day suspension was in compliance with progressive discipline.

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: February 2, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge