WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY FARLEY,

Grievant,

v. **Docket No. 2011-1643-MAPS**

DIVISION OF CORRECTIONS/LAKIN CORRECTIONAL CENTER,

Respondent.

DECISION

_____Grievant, Timothy Farley, filed this expedited Level Three grievance against his employer, Respondent Division of Corrections/Lakin Correctional Center, on May 10, 2011, challenging his forty-hour suspension (five, eight-hour days) without pay from his employment.[1] As relief, Mr. Farley seeks the following:

> 1.) I want the predetermination/disciplinary hearing and all actions and decisions made therein, to include but not limited to the five (5) day suspension, be stricken from any and all state and personnel records.
> 2.) I want any employee that is going into a predetermination/disciplinary hearing be notified of such, so that they may obtain proper representation, evidence, and/or witnesses.
> 3.) I do not want any repercussions of retaliations, now or in the future, regarding this matter or this grievance.
> 4.) I want paid time and a half for the full forty four (44) hours missed due to the suspension, due to the unnecessary hardships faced during an already hard and trying economic time.
> 5.) I want the Administrative personnel at Lakin Correctional Center to be made aware of and realize that their actions and comments reflect directly on the

[1] The Grievant's Statement of Grievance is rather lengthy; therefore, it is being incorporated by reference herein as if stated in its entirety.

actions and moral of all correctional staff, and that they are to "lead by example", not "do as I say, not as I do."

6.) Since they have made this out to be about the Employees Association, I want the current appointed Employees Association disbanded and elections held for the positions.

7.) I want a 5% pay increase.[2]

A Level Three grievance hearing was held at the West Virginia Public Employees Grievance Board office in Charleston, West Virginia, on September 23, 2011, before the undersigned administrative law judge. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Assistant Attorney General, John H. Boothroyd, Esquire. Also in attendance at this hearing were Shelly Gardner, paralegal for the Division of Corrections, and Joseph Wood, Associate Warden of Security, as Respondent's representative.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by October 24, 2011. Respondent submitted its proposed Findings of Fact and Conclusions of Law on October 21, 2011. Grievant did not submit proposed Findings of Fact and Conclusions of Law for the undersigned's consideration. Therefore, this matter became mature for decision on October 24, 2011.[3]

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[2] *See*, Statement of Grievance, Attachment 2. It is noted that some of the relief Grievant has requested is not available to him by law and/or is relief that the Grievance Board has no authority to grant.

[3] Evidence was to remain open until September 30, 2011, to allow Respondent time to submit written transcripts of witness statement recordings submitted as evidence at the September 23, 2011, Level Three hearing. These transcripts were to be filed with the Grievance Board and provided to Grievant. Grievant was granted ten days from his receipt of the same to file any objections to the transcripts he may have had with the Grievance Board. However, the Grievance Board did not receive the transcripts until February 23, 2012. Because the Grievant has not advised the Grievance Board otherwise, the undersigned can only assume Grievant received the transcripts as was ordered. Further, the Grievance Board has received no objections from the Grievant.

Synopsis

Grievant confronted the Deputy Warden of the correctional facility at which he is employed regarding a comment the Deputy Warden had made to Grievant, and a heated verbal altercation ensued. Such occurred in the lobby of the facility in front of other employees. During the confrontation, Grievant raised his voice, used profanity toward the Deputy Warden, and appeared angry and/or agitated. As a result, Respondent suspended Grievant from his employment for forty hours, without pay for behavior in violation of Division of Corrections policies. Grievant alleges that Respondent exaggerated his behavior, that his suspension was inappropriate, and that his predetermination hearing/meeting was conducted improperly. Respondent demonstrated that Grievant's conduct violated its policy, and that the discipline it imposed was appropriate. Grievant failed to prove that his suspension was clearly excessive, disproportionate to his offense, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his suspension. Therefore, this grievance is DENIED.

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

Findings of Fact

1. Grievant, Timothy Farley, is a Correctional Officer III, with the rank of Corporal, employed at the Lakin Correctional Center.

2. On May 3, 2011, while on his way out of the facility after completing his regular work shift, Grievant was having a conversation with another employee in the lobby during which Grievant expressed his displeasure with how the Employees' Association

operates at Lakin. At this time, one shift was ending and another shift was beginning.

3. Deputy Warden John Sallaz was in the lobby at the time and happened to overhear Grievant's comments about the Employees' Association. Deputy Warden Sallaz interjected that he disagreed with Grievant's opinion. Deputy Warden Sallaz then suggested that Grievant join the Employees' Association if he wanted things done differently. Grievant informed Deputy Warden Sallaz that he would not join the association. Deputy Warden Sallaz then said to Grievant, "it is people like you who bring this place down."

4. After Deputy Warden Sallaz's comment, at approximately 7:01 a.m., Grievant left the facility. Deputy Warden Sallaz remained in the facility lobby, talking with Captain Howard Stoffel and Correctional Officer Jeremiah Woodall.

5. Within a few minutes, Grievant returned to the facility lobby, went directly to Deputy Warden Sallaz, and confronted him about his comment. Grievant, appearing upset, asked Deputy Warden Sallaz, something to the effect of, "What did you mean by 'people like me'?" Thereafter, Grievant and Deputy Warden Sallaz engaged in a loud, heated exchange during which Grievant used the word "fuck," and/or variations of this word, in his communications with Deputy Warden Sallaz. In response to which, Deputy Warden Sallaz directed Grievant to "stop 'mother-fucking' [him]." During this exchange, both Grievant and Deputy Warden Sallaz used raised voices. This confrontation was verbal and never became a physical altercation.

6. Other employees were present in the lobby during this time and witnessed the event. However, no inmates or non-staff visitors were present. Further, the doors to the secured area beyond the lobby were closed.

7. During the altercation, Deputy Warden Sallaz attempted several times to get Grievant to go into his office to continue their "discussion" outside the presence of the other employees, but Grievant did not comply.

8. Upon exiting the facility after the incident with Deputy Warden Sallaz, Grievant stated something to the effect of, "It's because of you mother-fuckers we know who cares around here." [4] As Grievant was leaving the facility the final time that day, Deputy Warden Sallaz told Grievant that he [Grievant] "did not have to work here if you don't want to."[5]

9. Because Grievant and Deputy Warden Sallaz were engaged in the altercation, Sergeant Thomas Weiner, who had arrived at the facility to begin his scheduled shift, chose to wait outside the lobby doors and not enter the facility to avoid the altercation. Sergeant Weiner was still outside when Grievant left the facility following the altercation. Sergeant Weiner and Grievant spoke briefly and Grievant appeared agitated.

10. The May 3, 2011, incident between Grievant and Deputy Warden Sallaz surprised the other employees, and to some extent, became a topic of conversation among the other employees. However, Sergeant Thomas Weiner did not hear about the incident from other employees.

11. Later on the day of the confrontation with Grievant, Deputy Warden Sallaz drafted a memorandum to Warden Lori Nohe, detailing his recollection of the incident. *See*, Respondent's Exhibit 3. Some of the witnesses to the incident had provided informal

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[4] *See,* testimony of Sergeant Thomas Weiner.

[5] *See,* testimony of Deputy Warden John Sallaz.

statements to Warden Nohe and Associate Warden Joseph Wood about what they had observed in the lobby on May 3, 2011. Thereafter, someone assigned Robin Ramey to investigate Grievant's May 3, 2011, conduct.[6] Investigator Ramey interviewed witnesses to the event and prepared an investigative report.[7] Oddly, Investigator Ramey did not complete her investigation before Grievant was officially informed of his suspension. Investigator Ramey conducted witness interviews on May 9, 2011 and May 10, 2011. *See*, Respondent's Exhibits 4 and 7.

12. On May 6, 2011, a predetermination hearing/meeting was held with the Grievant to discuss the May 3, 2011, incident. Present at this meeting were Grievant, Associate Warden of Security, Joseph Wood, Captain Howard Stoffel, and Human Resources Manager, Cheryl L. Kaylor. At this meeting those in attendance discussed the incident with Grievant, and he was given the opportunity to present his side of the events. Grievant denied using the phrase "mother-fucker" toward Deputy Warden Sallaz, but admitted using the word "fuck."[8] After discussing the incident with Grievant, Lakin administration determined that Grievant's conduct warranted a forty-hour suspension and

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[6] The record is unclear as to who assigned Ms. Ramey to investigate the incident.

[7] *See,* Respondent's Exhibits 4 and 7. Respondent did not call Investigator Ramey to testify as a witness at the Level Three hearing, asserting that Ramey was unavailable to testify. However, Respondent called as witnesses those interviewed by Ramey, introduced the audio recordings of the witness statements taken by Ramey into evidence, as well as, Ramey's investigative report. Grievant had no objection to the same, and he indicated that he had been provided copies of the audio recordings prior to the date of the Level Three hearing.

[8] Grievant further appeared to think that his use of the word "fuck" as an adjective made its use more acceptable.

orally informed Grievant of such on May 6, 2011 at the end of their meeting. The suspension was ultimately approved by those in the Commissioner's office.

13. Grievant was officially informed of his forty-hour suspension in writing by letter dated May 9, 2011, which was hand-delivered on that same date. *See*, Respondent's Exhibit 1. However, Grievant was informed on May 6, 2011 at his predetermination hearing/meeting that Lakin administration wanted to suspend him. The suspension letter was signed by Warden Lori Nohe, but delivered to Grievant by another correctional officer. In this letter, Warden Nohe charged Grievant with four violations of Policy Directive 129.00 as a result of his conduct on May 3, 2011. Further, the letter advised Grievant that his suspension would be for forty hours (five, eight-hour days), commencing on May 14, 2011 at 11:00 p.m. and ending on May 18, 2011 at 7:00 a.m., and that Grievant was to return to work on May 22, 2011, at 7:00 p.m. Warden Nohe also informed Grievant that he could respond to the suspension letter within three days of his receipt of the letter, and advised him of his time frame to file a grievance.

14. Normally, Grievant would have worked two hours of overtime each week, for a total of forty-two hours worked weekly. However, Grievant was suspended for forty-hours only. Grievant did not work in excess of forty hours during the weeks of May 7, 2011 and May 14, 2011. Therefore, Grievant was not paid overtime for hours actually worked that week. The May 9, 2011, suspension letter explains that $290.41 would be deducted from Grievant's May 31, 2011, pay check, and $217.81 would be deducted from his June 15, 2011 pay check to reflect his forty-hour suspension. Grievant was not suspended for forty-four hours and was not docked forty-four hours pay; however, as he was suspended,

Grievant lost the opportunity to work any overtime during the pay periods covered by his suspension.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *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.*

Respondent asserts that it properly suspended Grievant for violating State of West Virginia Division of Corrections ("DOC") Policy Directive 129.00, Section V., Letter J, subparagraphs (1) failure to comply with policy directives, operational procedures, or post orders, (4) instances of disrespectful conduct or the use of insulting, abusive, or obscene language, (6) disruptive behavior, and (28) unprofessional treatment of persons contrary to Division policy, Operational Procedure, or philosophy, by his conduct on May 3, 2011, during his altercation with Deputy Warden Sallaz. *See*, Respondent's Exhibits 1 and 6. Further, the Respondent has asserted that Grievant engaged in insubordinate conduct during the incident in question. Lakin Correctional Center's Operational Procedure #1.16, paragraph 39 states as follows: "[e]mployees will not verbally degrade any staff member, the LCC Administration or internal policies in the presence of inmates or other employees."

See, Respondent's Exhibit 11. Paragraph 30, "Insubordination", of this Operational Procedure, further states "[e]mployees are expected to respect authority and do not have unfettered discretion to disobey the explicit or implied instructions, directions or orders of a supervisor." *See*, *Id.*

In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College,* 569 S.E.2d 456 (W. Va. 2002). The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

Moreover, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil

behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

Grievant asserts that he did not commit the above violations and that his suspension was improper. Grievant argues that his actions on May 3, 2011 have been exaggerated, and that his actions were only in response to Deputy Warden Sallaz publicly humiliating him. Grievant further alleges that he was suspended for forty-four hours, not forty hours. Lastly, Grievant asserts that the predetermination hearing/meeting was not conducted properly as he was not advised of any contemplated disciplinary action before it was imposed and as he was provided no advance notice of the predetermination hearing/meeting.

The evidence presented establishes that on May 3, 2011, Grievant confronted Deputy Warden Sallaz in the lobby of the Lakin Correctional Center, in the presence of other employees, over a comment Sallaz had made to Grievant, and that this confrontation quickly escalated into a heated, verbal altercation. During this altercation, Grievant appeared angry and/or agitated, raised his voice, and used profanity toward Deputy Warden Sallaz. Further, Deputy Warden Sallaz attempted to get Grievant to go into his office to discuss the matter outside the presence of the other employees, but Grievant did

not comply. Deputy Warden Sallaz was the highest ranking officer at Lakin at the time of the incident. Even though Grievant asserts that Deputy Warden Sallaz has exaggerated his behavior, Grievant admits to using the word "fuck" toward Deputy Warden Sallaz during the confrontation, and that Deputy Warden Sallaz directed Grievant to stop addressing him in that manner. Grievant admits to confronting Deputy Warden Sallaz in front of other employees. Other employees, who were just there to do their jobs, were negatively impacted by Grievant's conduct. Clearly, Grievant was disrespectful, disruptive, and unprofessional. Further, Grievant failed to follow directives and used obscene language to a superior. Grievant demonstrated a flagrant disregard for authority, as well as for a superior officer. Therefore, Respondent has demonstrated that Grievant violated Policy Directive 129.00, Section V. J., as well as Operational Procedure #1.16, and that Grievant engaged in insubordinate conduct.

Grievant obviously felt offended by Deputy Warden Sallaz's comment that people like Grievant brought the place down, and Grievant wanted to address it. Unfortunately, Grievant handled the situation inappropriately. Grievant could have easily requested a private meeting with Deputy Warden Sallaz to address the issue. Instead, Grievant chose to publicly confront Deputy Warden Sallaz, much like Grievant believed he was publicly humiliated by Sallaz. Grievant argues that Deputy Warden Sallaz instigated the incident and that, somehow, this excuses his behavior. It matters naught whether Deputy Warden Sallaz instigated the altercation. The bottom line is that Grievant conducted himself improperly in addressing his issue with Mr. Sallaz. The undersigned notes that Deputy Warden Sallaz did not handle the situation well, either. However, the only issues before

the Grievance Board in this matter are whether Grievant's conduct violated the stated DOC policies and whether the discipline he received was appropriate.

The Division of Corrections Policy Directive 129.00, Section V.(G)(2) addresses the use of suspension as a disciplinary tool, and states, in part, as follows:

> **Suspension**: Issued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs. . . . Elements of suspension are:
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> a. Predetermination meeting with employee to advise him/her of the contemplated disciplinary action;
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> b. Three (3) working days written notice, prior to the effective date of the action;
>
> c. Specific written reason(s) for suspension;
>
> d. Specific period of time for the suspension (except where the employee is the subject of a criminal proceeding or indictment;
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> e. Written notice of opportunity to respond, either in person or in writing, prior to the effective date. Immediate suspension without written notice can occur in limited situations, but requires written confirmation; and,
>
> f. Notice of appeal rights specifying to whom the appeal should be directed and the time limits to appeal the suspension.
>
> g. A copy shall be placed in the employee's personnel file, with a copy forwarded to the Division of Corrections' Director of Human Resources and the Director, Division of Personnel.

See, Respondent's Exhibit 6. Grievant argues that his May 6, 2011, predetermination hearing/meeting was conducted inappropriately. Grievant alleges that he was provided

no advance notice of the predetermination meeting and that he was never informed, or advised, of the contemplated disciplinary action of suspension, or any other, during the meeting. Grievant argues that, instead, he was excused from the meeting after discussing the incident and his side of the story, then brought back in only to hear the Warden's final decision about pursuing the suspension.

Pursuant to Policy Directive 129.00 and the Division of Personnel Administrative Rule, there is no requirement that any advance notice of the predetermination hearing/meeting be provided to employees.[9] Even so, Grievant received some advance notice of his predetermination hearing/meeting. By a written memorandum from Cheryl L. Kaylor, Human Resources Manager, dated May 3, 2011, and hand-delivered to Grievant later that date, Grievant was informed of the May 6, 2011, meeting. *See*, Repondent's Exhibit 10. This memorandum does not contain the word "predetermination"; it orders Grievant's attendance at a "meeting" with the Warden, and provides the meeting date, time, and location. *See*, *Id.*

Grievant was provided the opportunity to tell his side of the story at the predetermination hearing/meeting. Grievant was advised of the contemplated disciplinary action at the predetermination hearing/meeting, but apparently not until near the end of the meeting. The official suspension letter dated May 9, 2011, hand-delivered to Grievant three days after the predetermination hearing/meeting, provided Grievant with the specific reasons for the disciplinary action, and informed him that the forty-hour suspension was to begin on May 14, 2011. Therefore, Grievant was given at least three days notice of his

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[9] *See*, 143 C.S.R. 1 §12.3 and Respondent's Exhibit 6.

suspension prior to its commencement. Further, the May 9, 2011, letter provided Grievant notice of his opportunity to respond to his disciplinary action and of his rights to file a grievance regarding his suspension. Based upon the evidence presented, Respondent complied with Policy Directive 129.00, Section V.(G)(2) in suspending Grievant.

Grievant's argument that he was suspended for forty-four hours, not forty hours, is without merit. Normally, Grievant would have worked two hours of overtime each week, for a total of forty-two hours worked weekly. However, Grievant was suspended for forty-hours only. Grievant did not work in excess of forty hours during the weeks of May 7, 2011 and May 14, 2011. Therefore, Grievant was not eligible to receive overtime those weeks, and was paid only for hours actually worked. The May 9, 2011, suspension letter explains that $290.41 would be deducted from Grievant's May 31, 2011, pay check, and $217.81 would be deducted from his June 15, 2011 pay check, to reflect his forty-hour suspension. Grievant was not suspended for forty-four hours and was not docked forty-four hours pay; however, as he was suspended, Grievant lost the opportunity to work any overtime during the pay periods covered by his suspension.

The only remaining issue is whether the forty-hour suspension imposed on Grievant was too severe and should be reduced. "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). Further, 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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant did not present any evidence that other employees had received lesser punishment for similar offenses. Sergeant Thomas Weiner testified that he had been disciplined, but not suspended, for using offensive language. However, Sergeant Weiner had not used such language during a heated altercation with a superior officer. It was an entirely different situation that cannot be compared to Grievant's conduct on May 3, 2011. Grievant fails to recognize that his behavior toward the Deputy Warden was improper. Instead, he tries to shift the blame to Deputy Warden Sallaz. Granted, Deputy Warden Sallaz's comment to Grievant was blunt, arguably objectionable, and certainly meant to offend Grievant, but that does not negate the fact that Grievant's conduct toward his superior officer was inappropriate. Given the deference afforded the employer in disciplinary actions, and the lack of evidence that the penalty imposed upon Grievant was disproportionate to the offense, mitigation is not warranted.

For the foregoing reasons, this grievance is DENIED.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *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. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College,* 569 S.E.2d 456 (W. Va. 2002).

3. The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

4. An employer has the right to expect subordinate personnel “to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and

authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

5. "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).

6. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Respondent proved by a preponderance of the evidence that Grievant was insubordinate and violated Division of Corrections policies by engaging in inappropriate conduct toward Deputy Warden Sallaz on May 3, 2011, and that the discipline imposed for his conduct was appropriate.

8. Division of Corrections Policy Directive 129.00 establishes a procedure that must be followed in suspending an employee. Respondent complied with the procedure set forth in that policy directive in suspending the Grievant for his May 3, 2011, conduct.

9. Grievant failed to prove that the penalty he received was clearly excessive or reflects an abuse of discretion. Further, Grievant did not prove that the penalty imposed was disproportionate to his inappropriate conduct. As such, mitigation of the three-day suspension is not warranted.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: March 9, 2012.

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Carrie H. LeFevre
Administrative Law Judge