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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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Charleston, WV 25301
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LAUD A. GIFFORD

v.

Docket No. CORR-88-055

W.VA. DEPARTMENT OF CORRECTIONS

DECISION

Grievant, Laud A. Gifford, is employed by respondent Department of Corrections as a Corrections Officer assigned to the West Virginia Penitentiary at Moundsville. On November 2, 1988 he filed a level four grievance in which he protested respondent's disciplinary procedures whereby it placed a letter of reprimand in his file for alleged work-related misconduct. He also asserted that respondent did not act on the grievance at level three and sought removal of charges and reprimand (letter) from his record. At grievant's request, the case was transferred from Elkins, where it was originally assigned, to the Wheeling office on December 12, 1988.

By letter of December 27, 1988, respondent's counsel stated that he was going to confer with grievant's advocate as they believed they could stipulate the facts of the case and argue

the remaining issues in writing. On January 18, 1989 he wrote that a level four hearing would be necessary because of disagreement between the parties and his erroneous impression about the posture of the case.

By motion filed January 25, 1989 on behalf of its new administration, respondent requested that the grievance be remanded to level three in order that it may correct the procedural deficiency, develop a proper record below and perhaps reconsider its previous position on the matter in light of a recent West Virginia Education and State Employees Grievance Board decision, Martin v. WV Department of Corrections, Docket No. CORR-88-020 (December 30, 1988). The motion was granted by order dated January 26, 1988 with note that Corrections had not appealed Martin to date. Corrections was also ordered to conduct a level three hearing with all due haste.

The issue in Martin is analogous to the instant grievance. Although the grievant in Martin admitted using a racial slur in the workplace in the presence of a fellow black officer, he prevailed at level four in his request that a letter of reprimand be removed from his file because the respondent Corrections had failed to timely discipline in accordance with its own written policy. According to the July 18, 1988 letter of reprimand issued to grievant herein by former Commissioner Dodrill, grievant was charged with using the word "darkie" (to describe black prisoners) in the presence of a black officer. See Eisenhauer v. Dept. of Corrections, Docket No. CORR-88-020 (November 15, 1988) for more background on the matter. (In

Eisenhauer, respondent Corrections was initially cited for improper disciplinary procedures with respect to the same general circumstances which gave rise to the instant grievance.)

On February 1, 1989, respondent Corrections filed a motion that the instant grievance be dismissed and stated in support of said motion that:

(1) Upon reconsideration of the grievance in light of the Board's decision in the case of Ronald Martin v. Department of Corrections, Docket No. CORR-88-020, (December 30, 1988) the respondent has decided to resolve the grievance at Level II, by removing the letter of reprimand from the grievant's personnel file; and

(2) The respondent understands that the Board considers its prior decisions as established precedent; and

(3) The respondent, by making this motion, in no way condones such actions as were the subject of this grievance, i.e., racial slurs and/or harassment, but abhors such conduct and intends to take immediate corrective action in such instances in the future; and

(4) Having thus resolved this grievance at Level II, the respondent considers the grievant's appeal as moot.

It is clearly understood that respondent's motion is due to its legal determination that the discipline administered to grievant was untimely and contra to its written regulations. This was the sole reason it did not prevail in Martin. The West Virginia Education and State Employees Grievance Board likewise does not condone any manner of racially offensive conduct.

Grievant filed no response to respondent's motion and had not, on his own behalf or by his advocate, withdrawn the grievance herein to date.

In addition to the foregoing, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant is employed by the Department of Corrections as a Correctional Officer assigned to the West Virginia Penitentiary at Moundsville.

2. Grievant was allegedly involved in employee on-the-job misconduct, offensive behavior with racial implications and was reprimanded by letter placed in his file.

3. By motion filed February 2, 1989, respondent made offer to remove the letter of reprimand from grievant's file on the basis of a decision rendered in Martin v. Dept. of Corrections, Docket No. CORR-88-020 (December 30, 1988).

4. Grievant filed no response to respondent's motion and did not withdraw the grievance.

CONCLUSIONS OF LAW

1. Department of Corrections Policy Directive No. 400 §3.01 provides respondent authority to immediately correct the unsatisfactory behavior of employees through counseling, issuance of written notice or other formal disciplinary action, depending on the severity of the situation. See Martin v. W.

Va. Dept. of Corrections, Docket No. CORR-88-020 (December 30, 1988).

2. Policy Directive No. 400 §§5.01, 5.02 and 5.03B(1) require that a written notice for Class A, B or C offenses be issued as soon as practicable. Martin.

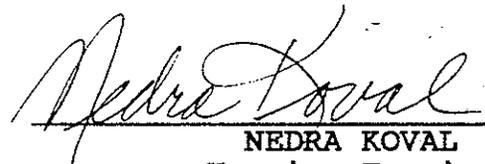
3. Respondent's removal of the letter of reprimand from grievant's file rendered the grievance issue herein moot.

4. W.Va. Code §19-29-3(d) provides that an employee may withdraw a grievance at any time by written notice. When a grievance becomes moot it is incumbent upon the grievant to dismiss the grievance promptly. See Harper v. Wayne Co. Bd. of Educ., Docket No. 50-86-221-1, (February 26, 1987); Dunlevy v. Kanawha County Board of Education, Docket No. 20-87-102-1 (June 30, 1987).

The grievance issue, having been resolved by respondent's action regarding the contested letter, is therefore not a matter for adjudication herein. Respondent's Motion to Dismiss is Granted and the matter is stricken from the docket of the West Virginia Education and State Employees Grievance Board.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: March 21, 1989



NEDRA KOVAL
Hearing Examiner