LORI L. HEATWOLE

v. DOCKET NO. 93-RJA-238

WEST VIRGINIA REGIONAL JAIL and

CORRECTIONAL FACILITY AUTHORITY

DECISION

Grievant, Lori L. Heatwole, employed by the West Virginia Regional Jail and Correctional Facility Authority (Respondent), initiated these grievance proceedings at level one on May 25, 1993. Grievant offered no statement of complaint but requested that she receive the promotion which she had been awarded earlier in May. Both Grievant's immediate supervisor and Eastern Regional Jail Administrator Jerry L. Detrick lacked the authority to grant the relief at levels one and two; the matter was denied at level three. The grievance was advanced to level four on June 22, 1993, and an evidentiary hearing was conducted on September 22, 1993. A post-hearing briefing schedule was concluded on October 20, 1993.

The essential facts of this matter are undisputed by the parties; therefore, the events leading to this grievance are set forth in the following narrative. Grievant was employed as a Correctional Officer II at the EasternRegional Jail on February 21, 1993, when she and another female entered the Central Regional Jail (Central or CRJ), located at Flatwoods, West Virginia, for the purpose of confronting Grievant's husband, Mike Jarvis, then- administrator of the CRJ. (See footnote 1) Upon entering the facility, Grievant met First Sergeant Kenneth Underwood. Sergeant Underwood testified at the level four hearing that Grievant accused him of knowing that her husband had a girlfriend and threatened that she would "have his job" if he did not take her through security to see Mr. Jarvis. Because Grievant was married to the administrator, Sergeant Underwood accorded the threat substantial weight and complied with her request. Sergeant Underwood later reported the incident to his immediate supervisor and the matter was referred to Howard Painter, Chief of Operations. (See footnote 2) Mr. Painter subsequently assigned Carl Legursky to conduct an investigation.

Mr. Legursky filed a Memorandum dated May 5, 1993, in which he advised Mr. Painter that the investigation had been concluded. Mr. Legursky's report included summaries of interviews which he conducted with Director of Inmate Services Breant Hammond, Sergeant Underwood, and Grievant. Mr. Hammond stated that he had observed Grievant enter thefacility and question Sergeant Underwood regarding his knowledge of Mike Jarvis' girlfriend. He noted that Grievant made a second appearance and "yelled" at Sergeant Underwood, telling him that if he didn't get her through the two security doors into the area where Mr. Jarvis was located, she would have his job.

Sergeant Underwood advised Mr. Legursky that Grievant approached him with accusations that he knew Mr. Jarvis had a girlfriend, and that the three of them (Sgt. Underwood, Mr. Jarvis, and the girlfriend), had had dinner together. He stated that he was trying to calm Grievant down when the alleged girlfriend walked in and said, "That's not him." At this point Grievant left but returned shortly and screamed at him that if he didn't get her in to see Mr. Jarvis, she would have his job. He proceeded to escort her to the administrator's office and then, following the chain of command, verbally reported the incident to his immediate supervisor.

Mr. Legursky's report of Grievant's interview follows in pertinent part:

She immediately admitted that she was at Central. She admitted to being angry. She admitted that she did not recall what she had said; and she admits that if the incident occurred the way the First Sergeant (Underwood) said it occurred, she did act in an unprofessional manner. She attempts to justify her actions by saying she was not assigned to the institution; and she was on her days off; and as a result our rules and regulations did not apply. When questioned as to the policy on conduct referring to on and off duty, she admits that it does refer to on and off duty; but that this was her personal life. On a number of occasions, she said that she didn'tthink it had anything to do with her work. She does admit that her conduct should not reflect a negative image whether on or off duty, but she attempts to rationalize by saying that the policy does not stipulate what type of conduct is negative.

Mr. Legursky concluded by finding that Grievant's conduct was unbecoming an officer and was in violation of Policy 3010-18 which provides:

All employees shall conduct themselves whether on or off duty in the manner that earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service.

Based upon this finding, Mr. Legursky recommended that Grievant be given a written reprimand, to be a part of her permanent personnel file.

Concurrent with the investigation, in April 1993, Grievant applied for promotion and transfer to the South Central Regional Jail, located in Charleston, which was scheduled to be opened later that year. By letter dated May 10, 1993, Mr. Painter advised Grievant that she had successfully completed the promotional testing and that her advancement to Corporal would be effective the date of her transfer to South Central.

On or about May 28, 1993, Grievant received a letter dated May 14, in which Mr. Painter advised in pertinent part:

Upon completion of an investigation by Mr. Carl Legursky, I have determined that conduct exhibited by you at the Central Regional Jail on Sunday 21 February 1993 was inappropriate, unprofessional and in violation of Policy and Procedure No. 3010, Procedure 18, which reads, 'All employees shallconduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority or public service,' and Procedure 33, which reads, 'At all times, employees are to be respectful, polite, and courteous in their contact with inmates, other employees, and the public. This is a prime factor
in maintaining order, control and good discipline in the facility.'

Specifically, at approximately 1300 hours on Sunday, 21 February 1993, you did enter the Administrative area of the Central Regional Jail and confront First Sergeant Kenneth Underwood in a loud and threatening manner, accusing him of having knowledge of your husband, Michael Jarvis, being involved with another woman. A short time after this confrontation, you did threaten First Sergeant Underwood with a statement that, 'you get me to see Mike or I'll have your job.'

Officer Heatwole, although I am empathetic to your situation, such conduct is unbecoming an officer of this Authority, and will not be tolerated.

This letter is to serve as an official reprimand and will be placed in your personnel file. Any similar conduct in the future will result in more severe disciplinary action.

Grievant received three additional letters. The first dated June 21, 1993, notifying her that as a result of the reprimand being placed in her file, she was ineligible for promotion until at least May 14,

1994. A follow-up letter dated May 24, 1993, stated that the previous letter contained a typographical error and should have been dated May 21, 1993. Mr. Painter issued a letter dated May 26, 1993, and marked "HAND DELIVERED May 28, 1993" to Grievant in which he advised that due to an error the May 14 letter was not mailed. He further noted that a copy of the letter was mailed to the Administrator of the Eastern Regional Jail and was shared with her. It is the timing and order, as wellas the content, of these letters which serve as the basis, in part, of this grievance. (See footnote 3)

Grievant asserts that the letter of reprimand was issued in violation of several of Respondent's policies:

First, the action was not taken by the Executive Director, but rather by the Chief of Operations, who is required to submit a report, with recommendations, to the Director, but has no authority to issue disciplinary action pursuant to Policy 3036.

Second, Policy 3036 requires an employee to first report such incidents to the jail administrator who in turn is then to forward the report to the Chief of Operations. In the present matter Sergeant Underwood violated that policy when he reported the matter to his immediate supervisor rather than Mr. Jarvis.

Third, Mr. Painter violated Policy 3036 when he failed to submit a report to the Executive Director, along with recommendations for corrective actions.

Fourth, there was no documentation of the incident as required by Policy 3036 (Sections 1 and 4), Policy 3008 (Section C.1), and Policy 3031.

Fifth, Mr. Painter lacked authority to issue a letter of reprimand because Policy 3008 provides that only JailAdministrators, Chief Correctional Officers, First Sergeants, and Shift Supervisors may initiate written reprimands.

Grievant further asserts that the rules governing employee conduct, specifically, Policy 3010 (33), are so vague that she was denied due process. Grievant concludes that Respondent was bound to follow its Policy and Procedures and that the failure to do so renders the letter of reprimand invalid.

Respondent argues that even though Grievant had been notified of her successful bid for promotion on May 10, said promotion was not to be effective until her transfer to South Central was accomplished. No paperwork, salary increase, change in rank or insignia were to take effect until the date of the transfer. Because the promotion was pending at the time the letter of reprimand was

issued, Policy 3038 rendered her ineligible for the advancement. Respondent further argues that the letter was properly placed in Grievant's personnel file in that her actions of February 21 violated Policy and Procedures Statement 3010, the Code of Conduct, specifically paragraphs:

(15) All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.

(18) All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent in their position. No employee shall bring discredit to their professional responsibilities, the Authority or public service.(33) At all times, employees are to be respectful, polite, and courteous in their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility.

Respondent asserts that the letter of reprimand is the first step in the formal disciplinary process and was the appropriate measure to be taken in this situation. Finally, Respondent argues that the matter was properly routed to Mr. Painter in this case because the normal chain of command, through the jail administrator, was obstructed by Grievant's marriage to that individual. Respondent further asserts that the Chief of Operations, having the responsibility to oversee all operational matters, acted within his authority when issuing the letter. Further authority for the action, Policy 3008, provides that only the executive director, deputy director, chief of operations, or deputy chief of operations may initiate suspensions, dismissals or demotions, lower ranking personnel may initiate lesser disciplinary measures.

Respondent's Policy and Procedure Statement 3038, (Section C.2) provides that "a valid letter of reprimand, demotion or suspension, as identified by this section, shall eliminate an officer's promotional eligibility for a period of twelve months from the date of such action." Consequently, two questions must be addressed in reference to this policy. First, did Respondent issue a valid letter of reprimand, and second, if valid, did the letter precede the promotion? The descriptions of Grievant's actions on February 21, 1993, given by First Sergeant Kenneth Underwood and Director Breant Hammond, are accepted as what actually occurred. Sgt. Underwood's recollection of the events was clear and complete. Director Hammond's testimony substantiated that Grievant was "loud, angry, and unprofessional." Neither witness lacked credibility. Grievant's recollection of the action in question; however, was vague by her own admission. Grievant did not testify at the level

four hearing; however, she did voluntarily engage in the aforementioned interview with Mr. Legursky and she testified at the level three hearing.

Grievant's account at the level two hearing of the events in question was in pertinent part:

It was the 21st of February, at approximately 1:00 in the afternoon or shortly thereafter. I entered the Central Regional Jail located in Braxton County, Flatwoods, along with another individual by the name of Gloria [ ]. (See footnote 4) I went through the administration area of the facility. I might note that the facility is not open yet so there wasn't anyone to greet me at the door. The door was unlocked so I walked in and the first person I saw was First Sgt. Kenny Underwood coming around the corner and, at that time, this Gloria had indicated to me that she had had lunch with my husband and First Sgt. Underwood and I went there along

with her to confront my husband because it became evident that he was having an affair with this young woman. When I saw Kenny, the first thing I said to him was, what I recall, it was 'You are who I want to speak to.' I told him, in my mind, what I believe I told Mr. First Sgt. Underwood is that, 'Kenny, if you have any knowledge of this, Iwill have your job. Can you get me in to see Mike or can you get him on the radio?' At that time, First Sgt. Underwood asked me to step into his office where we continued the conversation at the doorway of the lockroom.

Level II Transcript, pp.24-25.

Even if her suggested comments are accepted, Grievant threatened Sgt. Underwood with his job and accused him of acting improperly in regard to her husband's alleged marital infidelity. (See footnote 5) Such behavior fails to comply with Respondent's Code of Conduct which requires that all employees conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position, that does not bring discredit to their professional responsibilities, the Authority or public service, and that they be respectful, polite, and courteous in their contacts with inmates, other employees, and the public.

Grievant's argument that Policy 3010 is inapplicable because she was not on duty and did not work at the facility at the time of the incident is not persuasive. First, Paragraph 18 specifically states that even when off duty an employee is not to act in such a manner so as to bring discredit to themselves or the agency. Second, the activity took place in a facility operated by her employer. Grievant's employment status with Respondent, theinvolvement of other, on-duty employees, and the location of the incident all constitute a rational nexus between the misconduct and the responsibilities

and duties of Grievant's position. See generally Kidd v. W.Va. Dept. of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991). Based upon the foregoing it must be determined that Grievant acted in violation of the Code of Conduct and was subject to discipline consistent with the nature of the offense and in compliance with relevant policies.

It may also be determined that a written reprimand was the appropriate level of discipline to be imposed in the present matter. Respondent's Policy 3008 establishes a disciplinary procedure which provides that its employees may be dismissed, suspended, demoted or reprimanded in varying degrees for misconduct. Both the measure of discipline to be imposed and the level from which the punitive action must originate are determined by the seriousness of the infraction. This policy provides that verbal reprimands be given for minor rule violations and poor performance at the work station. Written reprimands are defined as the first step in the formal disciplinary process, given when the rule infraction is more serious than when a verbal reprimand may be given. The violation of the Code of Conduct as occurred herein cannot be characterized as a "minor rule violation." Because Grievant's actions were entirely within her control and involved other employees, imposition of the first level of formal discipline, a letter of reprimand, was neitherclearly excessive or plainly disproportionate to the offense.

Grievant's argument that the letter of reprimand was not valid due to numerous violations of Policies regarding procedure are not persuasive. Grievant first alleges several violations of Policy 3036 when (a) the disciplinary letter was not issued by the Executive Director; (b) the Chief of Operations failed to submit a report with recommendations to the Executive Director and exceeded his authority by issuing the reprimand; and, (c) Sgt. Underwood failed to report the incident to the facility administrator. Policy 3036 provides:

Policy: During the course of normal operation of regional jails the need for the conduct of internal investigations will arise from time to time. Such need may result from the occurrence of unusual incidents, or allegations of inappropriate or illegal conduct of inmates or staff. When such incidents occur, or allegations are made, the Executive Director shall cause the conduct of a comprehensive internal investigation.

Procedures: 1. Each employee of a regional jail has an affirmative duty to report unusual incidents and/or allegations of inappropriate or illegal conduct of inmates or staff to the Administrator . . . 2 . . . the administrator or designee shall immediately notify the Chief of Operations . . . 3 . . . The Chief of

Operations or designee shall conduct an investigation. . . 4 . . . The Chief of Operations shall review the findings and submit a report to the Executive Director, along with recommendations for corrective action.

Undeniably, the letter of reprimand was issued by the Chief of Operations; however, Policy 3036 does not require that the Executive Director execute this lower-leveldiscipline. The Policy does state that the Executive Director "shall cause the
conduct of a comprehensive internal investigation." It does not appear that the Executive Director instigated the investigation, but the Chief of Operations assumes many duties and there is no evidence that he acted outside the scope of his authority when assigning the investigation.

Second, Mr. Painter testified that he did not file a written report of the investigation but that he did orally report and discuss the matter with the Executive Director. Again, Policy 3036 does not specify that the report must be written and cannot be verbal.

Third, Respondent does not deny that Sgt. Underwood did not report the incident to the Jail Administrator. Respondent asserts that the matter was properly routed to Mr. Painter in this case because the normal chain of command was obstructed by Grievant's marriage to the jail Administrator. Policy 3036 does, as Grievant argues, provide that each employee has a duty to report incidents to the Administrator. To apply this directive literally would require a multitude of employees to report directly to the chief facility administrator. Such a practice would not be feasible. Further, the policy does not state that each employee must report directly to the Administrator. Thus, Respondent's procedure requiring Sgt. Underwood report to his immediate supervisor and that the matter be referred upward through the chain of command was not in violation ofPolicy 3036. This, and indeed all, policies cannot address every possible contingency which might arise. Policy 3036 does not state an alternative procedure to be followed when the Administrator is involved in an incident. Because Mr. Painter was on-site and was Mr. Jarvis' supervisor, reporting the matter to the Chief of Operations was reasonable in this instance.

Grievant next asserts that the incident was not properly documented in violation of Policy 3008 (Section C.1.) which requires that "[a]ll actions relating to misconduct will be documented on RJCFA Form 27, as well as other pertinent documents" and Policy 3031 which provides that "an Incident Report form shall be used ... for written documentation and reporting of unusual incidents, violations of rules of conduct, requests for maintenance or other circumstances which require a written record."

Grievant alleges that Respondent also violated Policy 3008 (Section B.2.) when the Chief of Operations issued the reprimand because "[w]ritten and verbal reprimands may be initiated by the Jail Administrator, as well as Chief Correctional Officer, First Sergeant, and Shift Supervisors of the regional jails."

It is unclear whether Respondent followed Section B.2. of Policy 3008 when it imposed the discipline upon Grievant. That section provides that "written and verbal reprimands may be initiated by the Jail Administrator, as well as Chief Correctional Officer, First Sergeant, and Shift Supervisorsof the regional jails." If First Sergeant Underwood's report of the incident to his supervisor is to be interpreted as initiating the reprimand, then no violation of the policy occurred. However, if the First Sergeant was to have issued the reprimand himself, there was no compliance.

A review of Policy 3008 in its entirety reveals that lower-levels of discipline may be imposed by the aforementioned facility administrators while more serious measures, such as dismissal, demotion and suspensions in excess of twenty days, may only be exercised by the Executive Director or his designee. Grievant correctly argues that the letter of reprimand was not issued by any individual designated by Section B.2.; however, because that paragraph is not exclusionary, it must be determined that higher ranking officers may impose lower-level discipline and that the Chief of Operations did not act outside his authority when issuing the letter of reprimand.

Respondent does not deny that it failed to comply with Section C.1. of Policy 3008. That provision requires that:

All actions relating to misconduct will be documented on RJCFA Form 27, as well as other pertinent documents. When RJCFA-27 is completed, the individual initiating the punitive action will counsel the employee as to the nature of the offense, punitive actions taken, corrective actions and follow-ups. Copies of completed RFCFA-27 will be forwarded to the Chief of Operations for review.

Neither does Respondent deny that it lacked compliance with Policy 3031 which requires that an Incident Report becompleted by any staff member "to report an allegation of the violation of the Rules of Conduct as the first step in the disciplinary process."

Although neither Form 27 nor the Incident Report were completed as required, the record establishes that the individual imposing the discipline, the Chief of Operations, did advise Grievant as to the nature of the offense and the corrective action taken. It is well established that an administrative body must abide by the remedies and procedures it properly establishes to conduct its

affairs. Powell v. Brown, 238 S.E. 2d 220 (W.Va. 1977). Without condoning Respondent's failure to comply with the letter of its policies, it appears that Grievant suffered no harm due to the Respondent's failure to complete the forms. Therefore, the violations of Policy 3008, Section C.1. and Policy 3031, are deemed harmless error in this case.

Also not accepted is Grievant's argument that the rules governing employee conduct, specifically paragraph 33 of Policy 3010, are so vague as to deprive her of due process. The requirement that employees act in a respectful, polite, and courteous manner is not so ambiguous as to give no guidance or direction for appropriate behavior. While the directives may be general, they are not vague. Further, Grievant has demonstrated through her interview and testimony that she is intelligent and perceptive, thus, it is the opinion of the undersigned that Grievant understoodthe Code of Conduct and has not been denied any due process by its application herein.

It must next be determined whether the letter of reprimand was issued prior to, or after, Grievant's promotion. Grievant interprets the May 10, 1993 letter from Howard Painter to evidence her promotion. In fact, the letter only advises Grievant that she has successfully completed the promotional testing and that her promotion would "become effective on the date of your transfer to South Central Regional Jail." No WV-11 form had been completed to process the change in classification and Grievant had received neither a change in title at her worksite at the the Eastern Regional Jail nor had she received the salary increase attendant to the promotion. The May 10 letter did not effectuate the promotion, it merely advised Grievant that she would be promoted upon transferring to South Central.

Implicit in the letter of May 10, is that the promotion would take place in the future contingent upon Grievant's satisfactory job performance. Grievant's violation of the Code of Conduct on February 21, nullified the pending promotion. Although it is questionable why the May 10 letter was issued while an investigation was pending, the lack of efficiency on Respondent's part does not alter what actually occurred, i.e., Grievant engaged in behavior in February which resulted in a letter of reprimand being placed in her personnel file, thereby exempting her from apromotion that she would have otherwise received in June 1993.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Regional Jail and Correctional Facility Authority as a Correctional Officer II assigned to the Eastern Regional Jail in February 1993.

2. On February 21, 1993, Grievant, accompanied by another female, entered the Central Regional Jail which was scheduled to open the following day. Grievant approached First Sergeant Kenneth Underwood and accused him of having knowledge that her husband, the Central Regional Jail Administrator, was having an illicit affair. Grievant further demanded that Sgt. Underwood take her through two security doors to her husband's office and threatened that she would "have his job" if he did not comply.

3. Grievant was not on duty at the time of the incident.

4. Grievant's actions were witnessed by the Director of Inmate Services.

5. Following an investigation, Chief of Operations Howard Painter determined that Grievant had violated the Respondent's Code of Conduct by acting in a mannerunbecoming an officer. The result of this finding was that Chief Painter issued Grievant a letter of reprimand.

6. In April 1993 Grievant applied for promotion.

7. By letter dated May 10, 1993, Grievant was advised that she would be promoted to corporal effective the date of her transfer to the South Central Regional Jail.

8. By letter dated May 14 and hand delivered to Grievant on May 28, Grievant was advised that as a result of the February 21 incident a letter of reprimand would be placed in her personnel file.

9. By letter erroneously dated June 21, 1993, and later corrected to May 21, 1993, Grievant was advised that as a result of the letter of reprimand being placed in her personnel record she would be ineligible for promotion for one calendar year.

10. In June 1993 Grievant was transferred to the South Central Regional Jail as a Correctional Officer II.

CONCLUSIONS OF LAW

1. Respondent has proven by a preponderance of the evidence that Grievant exhibited behavior contrary to the Code of Conduct and that the appropriate measure of discipline for the infraction was a letter of reprimand.

2. Respondent's processing of this matter was not in strict compliance with all appropriate, relevant policies; however, the omissions constituted only harmless error. 3. Respondent properly

denied Grievant a pending promotion after the letter of reprimand was issued, in compliance with Policy 3038 which provides that a letter of reprimand "shall eliminate an officer's promotional eligibility for a period of twelve months from the date of such action."

Accordingly, the grievance is **DENIED**.

DATED 5/31/94 SUE KELLER

Footnote: 1

Mr. Jarvis is no longer employed by Respondent.

Footnote: 2

Central was scheduled to open the following day, February 22. It appears that the staff was at the facility on February 21 as were Mr. Painter and Billy Burke, then-Director of the Regional Jail and Correctional Facility Authority.

Footnote: 3

The final outcome of the disciplinary process was that Grievant was permitted to transfer to South Central in Summer 1993 as she had requested, but she retained the rank of Correctional Officer II, having been denied the promotion to Corporal.

Footnote: 4

It is unnecessary to further identify this individual for purposes of this grievance.

Footnote: 5

Grievant suggests that it was Sgt. Underwood and Mr. Jarvis who had violated the Code of Conduct while she had merely, and properly, brought their indiscretions to the attention of Respondent's administrators.