

ELI ROBERT BELL

v. Docket No. 96-CORR-228

DIVISION OF CORRECTIONS

DECISION

___Grievant, Eli Robert Bell, employed by the Division of Corrections (Respondent) as a Correctional Officer II assigned to the Northern Regional Jail and Correctional Facility, filed a level one grievance on March 29, 1996, in which he complained that a five-day suspension had been imposed without providing him due process. Grievant's level one supervisor waived consideration because he lacked the authority to grant the requested relief. The matter was denied at levels two and three; appeal was made to level four on June 10, 1996. The matter became mature for decision following the level four hearing, conducted on September 18, 1996, when the parties waived the opportunity to submit proposed findings of fact and conclusions of law.

The facts of this matter are undisputed.

1. Grievant has been employed by the Division of Corrections for approximately eleven years, and is presently assigned to the Northern Regional Jail and Correctional Facility (NRJ), classified as a Correctional Officer II. 2. By letter dated March 21, 1996, NRJ Warden Paul Kirby advised Grievant that he would be suspended without pay for ten working days. The basis for the suspension was that Grievant had violated Respondent's Policy Directive No. 400.00 by "giving or offering an unauthorized article or favor to any inmate," a Class "B" offense, and "aiding or abetting inmate violation or attempted violation of any law, rule or regulation," a Class "C" offense.

3. The action constituting the offenses allegedly occurred in December 1995, when Grievant deposited a pair of used tennis shoes at the State Shop in the NRJ. The shoes were found in the possession of Inmate #DOC14098.

4. Warden Kirby offered, and Grievant accepted, the opportunity to meet with him prior to April 2, 1996. Subsequent to this meeting, Warden Kirby reduced the suspension to five days.

5. Inmate #DOC14098 was charged with possession of contraband; however, upon review of the report filed by the Institutional Investigator, the charge was dismissed by Respondent's Magistrate.

Warden Kirby testified that he did not meet with Grievant during the investigation, and that he was not required by policy to meet with him prior to the suspension. After meeting with Grievant, and in consideration of Grievant's work record and years of service, he concluded the five day suspension to be appropriate, although it could have been, by policy, more severe.

Grievant argues that he was denied due process when the investigator failed to issue an Administrative Rights Warning or a Memorandum of Investigation or Inquiry required by Respondent's Operational Procedure 4.16. The stated purpose of this procedure is to "[e]stablish, delineate, and define the process by which an employee will be advised that he/she is about to be questioned as part of an official investigation . . . and/or receive an official memorandum informing the employee that he/she is the subject of an interdepartmental investigation." The procedure states in pertinent part:

II. Administrative Rights Warning

The NRJ&CF Investigator (after consultation with the NRJ&CF Administrator) shall order the issuance of an Administrative Rights Warning Statement to those employees he/she believes need to be questioned as part of an official investigation (Attachment #1).

III. NRJ&CF Official Memorandum of Investigation or Inquiry

If, during the investigative process, the NRJ&CF Investigator (after consultation with the NRJ&CF Administrator) determines that an employee is going to be the subject of an official investigation, the NRJ&CF Investigator shall cause to be issued a NRJ&CF Memorandum of Investigation or Inquiry (Attachment #2).

IV. Documentation Process

The employee shall receive a copy of either or both the aforementioned documents any time he/she signs either one of them. One copy shall remain in the NRJ&CF files.

Grievant also argues that his due process rights under Respondent's Policy Directive 400.00, Section 4.03, were violated when his request to meet with the Warden on February 14, 1996, was

denied. Section 4.03 provides that “[p]rior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.” In the level three decision the hearing evaluator determined that no violation of Policy Directive 400.00 occurred because the suspension was not in effect when Grievant called to make an appointment on February 14. She further concluded that Grievant was not entitled to an Administrative Rights Warning because they are only required as part of an official investigation. Policy Directive 400.00 defines an official investigation as those conducted by the State Police and/or other federal, state or local government law enforcement agencies. Because this was not an official investigation, it was held that the warning was not mandated. The hearing evaluator did find that Grievant should have signed an Investigation or Inquiry form as the subject of an internal investigation; however, because he was not suspended pending the investigation and was aware through conversations with investigator Lou Moore that he was being investigated, no harm was incurred as a result of the omission.

Consistent with Respondent's argument, Grievant has not shown that he suffered any harm from the failure to provide him with an Investigation or Inquiry form. However, this incident should not be treated lightly. Clearly, Respondent considered the issuance of this document to be sufficiently important to merit inclusion as an operational procedure. It is well accepted that institutions must abide by the remedies and procedures which it properly establishes to conduct its affairs. Powell v. Brown, 220 S.E.2d 238 (W.Va. 1977). Neither is Respondent's argument that Grievant was not entitled to an Administrative Rights Warning because he was not subject to an “official” investigation as defined by Policy Directive 400.00 found persuasive. Although the Policy Directive does define an official investigation as one conducted by outside law enforcement agencies, Operational Procedure#4.16, which provides for the Administrative Rights Warning, makes no reference to an “official” investigation, but rather addresses “interdepartmental” investigations. Therefore, Grievant was entitled to an Administrative Rights Warning.

Grievant's claim that his due process rights were violated when he was denied an appointment with the Warden on February 14, 1996, is not supported by the evidence. Policy Directive 400.00, Section 4.03, requires that an employee be given notice of the offense, an explanation of the agency's evidence, and an opportunity to respond, prior to the disciplinary action being imposed. The Policy does not require that an administrator meet with an employee at a time designated by the

employee. Grievant did meet with Warden Kirby on March 27, 1996, prior to the effective date of the suspension, and there was no violation of Policy Directive 400.00, Section 4.03.

Grievant's undisputed testimony at level four was that he had observed a certain inmate in desperate need of shoes. Grievant stated that he wears athletic, or running, style shoes and that they must be replaced approximately every three months because he "breaks them down" due to his weight. Since the shoes are in substantially good condition, he decided to donate them to a needy inmate. Following a procedure he had used before to donate items, Grievant took the shoes to the State Shop in December 1995. The shoes were found in the possession of the inmate in January 1996.

Testimony of other witnesses support a finding that Grievant did not directly give the shoes to an inmate. Mike Pszcholkowski, Recreation Director, recalled Grievant inquiring whether he could donate shoes. Mr. Pszcholkowski advised that he could not accept the shoes and directed Grievant to the State Shop to check on the procedure for a donation. Captain Pat Glasscock also testified that Grievant had stated that he wanted to donate the shoes. Sergeant Peggy Rine stated that she had accompanied Grievant, at his request, to the State Store, and observed him deposit the shoes on the counter.

Grievant responded to testimony that the inmate had advised a counselor that an officer would be bringing him a pair of shoes by stating that the inmate may have overheard a conversation. Grievant does not have an explanation as to why the shoes were not properly processed through the State Store and documented on the property card which lists all items given to inmates. However, it is noted that Warden Kirby confirmed that the supervisor of the Shop was absent and on sick leave. While the Store was being "covered" by other employees, this situation provided an adequate opportunity for the shoes not to be processed.

Undeniably, Grievant would be in violation of Policy Directive 400.00 had he given the shoes directly to the inmate. Despite a Policy which may be interpreted to ban correctional officers donating items to inmates, such is not the case in practice. Warden Kirby initially stated that employees were not permitted to donate items to the State Shop, but then noted that books intended for the general population were an exception. [\(See footnote 1\)](#) Sergeant Rine testified that she knew of correctional officers who had donated items to inmates at the West Virginia Penitentiary. Of course, the fact that a policy may be regularly violated does not absolve an employee of any specific incident.

More persuasive in this case is the fact that no evidence was submitted that any policy or procedure exists which specifically addresses donations to a State Shop. While Grievant may have had a certain individual in mind who needed the shoes, the evidence establishes that he did not give the shoes to any individual, but deposited the shoes at the State Shop. Thus, Grievant did not violate Policy Directive 400.00 by giving an unauthorized article to an inmate or by aiding or abetting an inmate violation, or attempted violation, of any law rule or regulation. This is not to condone Grievant's actions. As a long-term employee of Respondent, he should have known that such contributions were not encouraged, if not strictly prohibited, and that he had not obtained proper authorization for depositing the shoes at the State Shop. It may only be determined that Grievant did not directly give an inmate unauthorized goods.

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

Conclusions of Law

___ 1. The burden of proof in disciplinary matters is upon the employer. W.Va. Code §29-6A-6.

2. Respondent failed to prove that Grievant gave the shoes to any specific inmate.

3. Respondent failed to prove that Grievant violated Policy Directive 400.00 when he donated a pair of used athletic shoes to the Northern Regional Jail State Shop.

___ Accordingly, the grievance is **GRANTED** and Respondent Ordered to compensate Grievant for the five day suspension without pay and to purge his record of documentation relating to this discipline. Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: October 31, 1996 _____

SUE KELLER

Senior Administrative Law Judge

[Footnote: 1](#)

Correctional Officers at Huttonsville Correctional Center regularly give inmates newspapers and other reading materials. See Pingley v. Dept. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).