**ELAINE HOPE COLEMAN,**

**Grievant,**

**v. Docket No. 97-CORR-097**

**WEST VIRGINIA DIVISION OF CORRECTIONS**

**WEST VIRGINIA INDUSTRIAL HOME FOR YOUTH,**

**Respondent.**

## DECISION

Elaine Hope Coleman, Grievant, filed this grievance against Respondent, West Virginia Division of Corrections\West Virginia Industrial Home For Youth (IHY) on October 15, 1996. She alleges:

> I feel that statements made in the letter of suspension are untrue. I want the issue resolved, the letter removed from my personnel file, money repaid to me that I will lose during the suspension. I feel that the punishment for the allegations is unfair and harsh.

Grievant was denied relief at the lower levels of the grievance procedure on November 4, 1996, December 11, 1996, and February 4, 1997, respectively. Grievant appealed to Level IV on February 18, 1997. This case was transferred to the undersigned Administrative Law Judge, for administrative reasons, on March 21, 1997.

At Level IV, this grievance was scheduled on May 14, 1997, but continued for good cause shown by Respondent. A Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on June 9, 1997. The case became mature for decision, on July 9, 1997, at the end of the filing period.

The following findings of fact were derived from the record.

## FINDINGS OF FACT

1. Grievant is employed as a Corrections Program Specialist, Sr., at the West Virginia Industrial Home for Youth (IHY). She is a department head. Level IV, R. Ex. 1.

2. Respondent observes and administers a progressive discipline policy.

3. On October 28, 1994, Grievant was issued a letter of reprimand, from Commissioner Nicholas

J. Hun, for violating the following employee standards of conduct:

> (1) Section 3.01 Supervising for Better Work Performance; (2) A5. Inadequate or unsatisfactory job performance; (3) B2. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures; (4) B4. Careless workmanship or negligence resulting in spoilage or waste of materials or delay in work production and (5) B17. Unauthorized dissemination of official information which could breach the security or the institution or disrupt its orderly operation. (See footnote 1)

Level III, Ex. 2. Grievant's work was monitored for six months following the letter of reprimand.

The above letter of reprimand was issued because of:

> [Grievant's] failure to be an active member of the management team at [IHY] and [her] failure to adequately supervise [her] subordinate staff. During a review of the programs at [IHY] the following problems were revealed: (1) the program plan for overall provision of services is more of a rough draft than a specific plan; (2) it appears that the plan is not actually followed; (3) tasks assigned to you are often not started, performed or completed on time or in the manner directed by the Superintendent; (4) you have not held your subordinate staff accountable for their work performanceand conduct; (5) you have demonstrated that you do not see your role as that of a member of the management team in that even though you are a department head you do not direct, manage or implement, in short you are an ineffective manager.

Level III, Ex. 2

4. On April 27, 1995, Grievant was issued a letter of reprimand, from James J. Ielapi, IHY Superintendent, for “inadequate or unsatisfactory job performance in meeting deadlines on an assignment” in reference to a Programs/Employment Opportunities project. Level III, Tr. at 3, and Level III, Ex. 3. Grievant received the above assignment on April 4, 1995, with a deadline of April 20, 1995. By memo dated April 11, 1995, she was reminded of the importance of this assignment and that the information was needed for a briefing with General Skaff. The day the assignment was due, Grievant called Superintendent Ielapi's office stating she was confused about what was needed for the assignment.

5. On August 22, 1995, Superintendent Ielapi wrote Grievant a memo regarding her failure to complete assignments. This memo outlines two separate incidents where assignments (concerning programs for incarcerated mentally ill residents, and recreation during the August School Break) were not completed timely. Level III, Ex. 4. The letter was placed in Grievant's personnel file. 6. In a letter to Grievant, dated September 22, 1995, Superintendent Ielapi expressed his concern over her poor job performance (generally) in meeting deadlines and following through with assignments. He warned that future poor job performance mayresult in disciplinary action. Level III, Ex. 5.

7. By a letter dated January 18, 1996, Grievant was to provide summary reports of education meetings. Level III, Tr. at 7-8.

8. Grievant and Superintendent Ielapi had conversations concerning her assignment of writing reports summarizing education meetings. She was aware the task mentioned in the above Finding of Fact was assigned to her.

9. On February 8 and 21, 1996, Grievant provided Superintendent Ielapi with summaries of weekly school faculty meetings held on February 6 and 13, 1996, respectively. Level III, Exs. 7 and 8.

10. A letter of admonishment, dated May 29, 1996, from Superintendent Ielapi, was placed in Grievant's personnel file because she stopped providing him with summary reports of educational meetings. Grievant had not provided Superintendent Ielapi with these summaries for three months, since February 21, 1996. Level III, Ex. 6.

11. On August 15, 1996, Grievant was issued a letter of admonishment, from Superintendent Ielapi, for “not meeting deadlines in a timely manner.” She failed to return a video tape during the fifteen day preview period. She finally returned the tape approximately one year later, and Respondent was charged $211.86. Level III, Tr. at 11, Ex. 9.

12. On September 6, 1996, Grievant was issued a memo dated September 6, 1996, from Superintendent Ielapi. It, in pertinentpart, provides:

> On Thursday, August 29, Wednesday, September 4, and Friday, September 6, 1996[,] we met concerning residents programs, activities and job assignments.
>
> We discussed a number of issues concerning resident programs that had been completed and programs that had not been completed.
>
> We reviewed the previous memos issued and why or why not assignments were not completed. We also discussed future expectations from you as a manager, organizer and planner in your area of assignments.
>
> I have exhausted all means of disciplinary action, sending you letters of admonishment and reprimands due to your neglect and not complying with instructions which should have warranted suspension.
>
> Also, we discussed that your office will be moved to the Administration Building by

October 1, 1996[,] and why I feel this will be necessary.

Level III, Ex. 10.

13. By letter dated September 19, 1996, Superintendent Ielapi informed Grievant that he was considering suspending her for five days because of her “failure of not complying with [his] instructions in attending education meetings and providing [him] with written summaries of th[o]se meetings ... .” Level III, Ex. 11. She received the letter around twelve o'clock. Level III, Tr. at 23. Grievant was given until 4:00 p.m. (the same day) to respond to him “on why this disciplinary action should or should not be taken... .” Level III, Ex. 11. At 4:35 p.m., Grievant handed Superintendent Ielapi a dictation tape as her response to the proposed suspension. Her response was not typed, and thirty- five minutes late. Level III, Tr. at 25.

14. Also on September 19, 1996, Grievant left IHY, forapproximately two hours, because a television repairman was expected at her house. Level III, Tr. at 23.

15. By letter dated October 2, 1996, Grievant was advised that she would be suspended October 17-23, 1996, for not providing him with timely summaries of the education meetings as she had been instructed by letter dated January 18, 1996. (See Finding of Fact 7.) Superintendent Ielapi referred to Grievant's failure as “continued insubordination by failing to follow [Superintendent Ielapi's] instructions regarding [her] assignments and completing job tasks in a timely manner”. Level IV, R. Ex. 1.

## DISCUSSION

Rule 12.03, of the Administrative Rules and Regulations of the Department of Personnel, entitled “Suspension,” provides that an employee may be suspended for cause as long as the employee's conduct has a rational nexus to the employee's performance of his/her job. Respondent proved, by a preponderance of the evidence, that Grievant failed to provide Superintendent Ielapi with summaries of weekly and monthly educational meetings.

Grievant testified at Level IV that she did not receive the January 18, 1996, letter until May 29, 1996, when she received the letter of admonishment. However, Grievant was clearly aware that she had been assigned the task of providing Superintendent Ielapi written summaries of educational meetings. During the Level IV hearing, Grievant testified Superintendent Ielapi had spoken with her about this assignment, and she had provided him with summaries of the education meetings held on February 6 and 13, 1996. Finally, it seems strange that Grievant would have allowed the May 29,

1996, letter of admonishment to be placed in her file, without filing a grievance, (See footnote 2) unless she knew that the task of providing Superintendent Ielapi with summaries of education meetings had been assigned to her. The exact date when this task was assigned to Grievant is not critical. She simply stopped performing the task or was untimely in completing the assignment.

Grievant also asserts that "the punishment for the allegations is unfair and harsh." Grievance Statement. Pursuant to W. Va. Code §29-6A-6, "[t]he burden of proof shall rest with the employer in disciplinary matters." Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993). However, "the appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination." Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion." Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. V. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluation; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Grievant has been employed by Respondent since at least July 1, 1983, (See footnote 3) and she has progressed through several classifications to attain her current position. Her evaluations reveal that she has received good marks since July 1, 1983. While in Grievant's last evaluation, covering January 1, 1995, through December 31, 1995, she received a 7 out of 10, (See footnote 4) Superintendent Ielapi listed under "Areas Where Improvement Is Needed", the following concerns:

1. Reports to work in a punctual manner.

2. Housekeeping - needs to keep office area in a more organized fashion.

3. Job assignments are not completed on time.

4. Programs of service to residents are rough drafts rather than a plan of action.

5. Follow up on job tasks completed by subordinates.

Level III, Gr. Ex. 2. (See footnote 5)

Grievant did not offer any evidence concerning the penalties imposed by Respondent against other employees guilty of similar offenses. The record supports a finding that Grievant knew her assignment, failed to complete it timely, and was advised in the past concerning her tardiness and the possible consequences of failing to complete assignments on time.

Based on the circumstances, Respondent's use of progressive discipline, Grievant's past admonishments for completing assignments late, and the rest of the evidence of record in this case, the undersigned cannot find that the penalty was clearly disproportionate to the offense proven. Moreover, it was not arbitrary and capricious.

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

## CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code §29-6A-6, “[t]he burden of proof shall rest with the employer in disciplinary matters.” Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993).

2. Respondent proved, by a preponderance of the evidence,that Grievant failed in providing Superintendent Ielapi with timely summaries of the education meetings as she had been instructed by letter dated January 18, 1996.

3. The record does not support a finding that the penalty was clearly disproportionate to the offense proven, or that Respondent violated any law, regulation, or policy.

4. Respondent's decision to suspend Grievant for her failure to meet deadlines, under its progressive disciplinary policy, was not the result of an arbitrary or capricious abuse of its administrative discretion.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 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.

Dated: 8/25/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

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Footnote: 1

*Respondent failed to offer evidence defining the standards of conduct Grievant violated.*

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Footnote: 2

*The record is devoid of any evidence that Grievant grieved being admonished for a memorandum which she says she did not receive until she was admonished.*

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Footnote: 3

*An evaluation covering July 1, 1983, through December 31, 1983, was the earliest documented evidence of record.*

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Footnote: 4

*The rating scale is as follows:*

*0 - 1.08 = Unsatisfactory*

*1.09 - 3.08 = Marginal*

*3.09 - 5.08 = Satisfactory*

*5.09 - 7.08 = Good*

*7.09 - 9.08 = Very Good*

*9.09 - 10.0 = Exceptional*

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Footnote: 5

*During the Level III hearing, Grievant's evaluations were admitted into evidence. Superintendent Ielapi objected because*

*the back side of the evaluations had not been copied and submitted. Although the Level III hearing evaluator went off the record to have the back copied, only the back of Grievant's 1995 evaluation was included in the exhibit.*