DEWANA PAULEY,

Grievant,

v.

DOCKET NO. 96-CORR-534

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Dewana Pauley, filed this grievance on July 8, 1996, protesting her three (3) day suspension without pay, effective July 12 through July 15, 1996. Specifically, Grievant stated:

> I feel the punishment is too harsh for first time offense and I feel that a letter of reprimand would have been enough. And I feel that I was not the only one (1) in the wrong. The relief sought is for the suspension to be rescinded and the other person involved should receive a letter of reprimand/suspension as well.

The grievance was denied by her immediate supervisor, Donald M. Ervin, on July 19, 1996. Grievant appealed to level two on July 25, 1996. A decision was rendered denying the grievance on August 24, 1996, by Manfred G. Holland, Deputy Commissioner. Grievant then appealed to level three on August 21, 1996. Hearing was held on September 25, 1996, and decision denying the grievance was issued on December 10, 1996, by Teresa Waid, Grievance Evaluator. Grievant appealed to level four on December 23, 1996, and hearing was held in the Grievance Board's Charleston, West Virginia, office on June 10,1997. This matter became mature for decision on August 18, 1997, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

SUMMARY OF EVIDENCE

Level III Corrections' Exhibits

Ex. 1 -

Work/Study Release Center Informational Report dated May 31, 1996, by Dannette B. Clark.

Ex. 2 -

Work/Study Release Center Informational Report dated May 31, 1996, by Sharon C. Spurlock.

Ex. 3 -

Work/Study Release Center Informational Report dated May 30, 1996, by Eric N. Miller.

Ex. 4 -

Work/Study Release Center Informational Report dated May 31, 1996, by Dewana D. Pauley.

Ex. 5 -

Work/Study Release Center Informational Report dated May 30, 1996, by Dewana D. Pauley.

Ex. 6 -

May 31, 1996 letter from Deborah M. Huck to Donald M. Ervin.

Ex. 7 -

June 12, 1996 memorandum from Donald M. Ervin.

Ex. 8 -

Work/Study Release Center Job Description, Corrections Program Specialist, dated June 16, 1995

Ex. 9 -

May 2, 1996 memorandum from Donald M. Ervin to all staff.

Ex. 10 -

West Virginia Corrections Academy Training Information Form.

Level III Grievant's Exhibits

Ex. 1 -

September 25, 1996 memorandum from Dewana D. Pauley to Teresa Waid.

Level IV Correction's Exhibits

Ex. 1 -

May 2, 1996 memorandum from Donald M. Ervin to all staff.

Ex. 2 -

July 1, 1996 letter to Dewana D. Pauley from Don Ervin.

Grievant's Exhibit

Ex. 1 -

Statement of Dewana D. Pauley

Testimony

Corrections offered the testimony of Donald Ervin and Deborah Huck. Grievant testified in her own behalf.

DISCUSSION

The Grievant does not dispute the events which led up to her being suspended for three days without pay. Grievant was a Secretary I at the Charleston Work Release Center (Center) of the West Virginia Division of Corrections (Corrections) when she was suspended by a letter dated July 1, 1996.

On May 30, 1996, two representatives from the Gideons arrived at the Center to donate Bibles to the residents of the Center. Deborah Huck, Deputy Administrator, and EEO representative for the Center, was in charge of religious materials. Grievant became upset because she was informed the

Bibles could not be placed on the residents' cots in their rooms. Donald Ervin, Administrator for the Center, and Grievant's immediate supervisor, told her to “stay out of it” and not to get involved. He told her this because the “same thing happened last year.” LIII R. Ex. 7. Grievant then went to her office, screaming “I can't believe they can't put Bibles in here”, and slammed her door. LIII R. Ex. 5. Mr. Ervin told Grievant to leave the Center to calm down, which she did, returning approximately two hours later. Grievant admits to creating a disturbance at the Center on May 30, 1996.

Mr. Ervin had previously issued a memorandum to all staff that when he was away from the Center, Ms. Huck was acting administrator. LIV R. Ex. 1. The next day, May 31,1996, Grievant approached Ms. Huck to apologize for the previous day's outburst. Mr. Ervin was away from the office that day. Ms. Huck tried to explain to Grievant again why the Bibles could not be placed in the residents' rooms. The conversation quickly became heated, resulting in both Grievant and Ms. Huck raising their voices. Grievant refused to speak to Ms. Huck without Mr. Ervin present, stating she was not her boss. Grievant does not admit she created a disturbance on May 31, 1996, but rather, it was Ms. Huck who created the disturbance. Grievant contends she has been singled out for discipline and that Ms. Huck should have been disciplined as well for the May 31, 1996 incident.

Following these incidents, Mr. Ervin wrote Grievant on July 1, 1996, advising her he was imposing a three day suspension without pay for her failure to obey his orders and for causing a disturbance in the Center, in accordance with W. Va. Division of Personnel Administrative Rule 12.03 regarding suspensions. LIV R. Ex. 1.

W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

> that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to make a prima facie case of discrimination in the first instance. She is not similarly situated to Ms. Huck. Ms. Huck was the acting administrator of the Center at the time of the May 31, 1996 incident. Grievant was her subordinate employee. While not specifically mentioned in her suspension letter, it is clear that Grievant was not only insubordinate in disobeying an order of Mr. Ervin not to get involved with the “Gideons”, she was also insubordinate to Ms. Huck when she told her she would not speak to her because she was not her boss. Ms. Huck was her boss, and Grievant had been so informed by a memorandum distributed to all staff members by Mr. Ervin. If Ms. Huck lost her temper as a result of Grievant's conduct, it cannot be determined to be on the same level of misconduct as Grievant's conduct, and it certainly was not insubordinate behavior.

CONCLUSIONS OF LAW

1. In matters concerning discipline, the employer bears the burden of proof to show the charges against the employee by a preponderance of the evidence. Kinney and Toler v. W. Va. Div. of Corrections, Docket No. 93-CORR-195/213 (Dec. 30, 1993).

2. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order toestablish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

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3. Corrections has proven by a preponderance of the evidence that Grievant engaged in the conduct for which she was suspended, and that a three-day suspension for that infraction was not excessive.

4. Grievant was not similarly situated to Ms. Huck, the acting administrator of the Center, and her superior, at the time of the incident which resulted in Grievant's suspension letter. Thus, she has failed to prove by a preponderance of the evidence that she was discriminated against by Corrections.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 21, 1997

Footnote: 1

Grievant asserts entitlement to relief because of the delays in processing her grievance through the lower levels, in contravention of W. Va. Code § 29-6A-4. There is no default provision in the state employees grievance statute, and the only relief Grievant is entitled to for Corrections' failure to process the grievance in a timely fashion is an appeal to the next level of the grievance process. Code § 29-6A-3(a). Once Grievant allowed a decision to be rendered at each level of her appeal, the issue of timeliness became moot. Willard v. W. Va. Dept. of Health and Human Resources, Docket No. 97- HHR-259 (Aug. 28, 1997).