SAMUEL CASSITY,

Grievant,

v. DOCKET NO. 97-CORR-267

DIVISION OF CORRECTIONS,

Respondent.

DECISION

Grievant Samuel Cassity filed a grievance stating:

> On [February 24, 1997, I] was notified in roll call by Lt. Lucas that I had been suspended for 15 days, in front of everyone who was in roll call, and that was an embarrassment to me and very unprofessional. I was not aware that I had been suspended. The certified letter that was supposed to have been sent to me was actually sent to [an] Officer Richard Carte. In relief I am seeking full back pay during my suspension, any annual [and/or] sick leave that may have accumulated, and the suspension [removed from his] record, and also I request a formal apology in front of roll call.

(Emphasis in original.)

The parties submitted the matter for decision based upon the record developed below, and the case became mature for decision on July 2, 1997. The record consists of the Level I, II and III decisions, a transcript of the Level III hearing (Tr.) and Exhibits admitted at that hearing, and other documents, including the suspension letter dated February 14, 1997, and a memorandum from Deputy Warden Howard H. Painter dated February 26, 1997, forwarding a copy of the suspension letter after discovering the original was sent to the wrong address. Although a close case is presented, I find that Respondent did not substantially comply with its own procedural requirements, despite its good faith attempt to do so, and that significant harm resulted from the procedural error. Consequently, the suspension must be vacated, but without prejudice to Respondent's reinstatement of disciplinary action after proper notice.

The facts of this matter are essentially undisputed, and arefound as follows:

FINDINGS OF FACT

1 1. Grievant is employed as a Correctional Officer I at Mount Olive Correctional Complex, and has

been so employed since November 1, 1994.

2 2. On Friday, February 14, 1997, Grievant met with Deputy Warden Painter. Grievant had not been told what the meeting was about in advance. Mr. Painter discussed with Grievant his excessive absences, and informed him that further disciplinary action was being considered. Mr. Painter stated that he would "get back" to Grievant about any further disciplinary action. (Tr. pp. 12, 17-18, 19-21.) Mr. Painter did not talk to Grievant again.

3 3. Mr. Painter signed and mailed a letter dated February 14, 1997, informing Grievant that he was suspended without pay for fifteen days, beginning February 24, 1997. The letter states, in pertinent part, "[t]he reason for this suspension is your repeated violation of WV Division of Corrections Policy Directive 400.00, Section 7.00, offense A-1, `Unsatisfactory attendance or excessive tardiness,' as well as other violations stipulated below." The letter goes on to state the factual events upon which he based the decision to suspend Grievant for 15 days without pay. The events itemized attendance and leave problems; one reference to failure to perform random pat down searches and cell searches; and one reference to Grievant requesting leave approval from two different supervisors, which Mr. Painter stated was offense B2, "Failure ordelay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures."

4 4. Due exclusively to Respondent's error, the suspension letter was mailed to the address of another officer. The letter was accepted at the other officer's home, and the certified receipt card was returned to Respondent. A copy of the letter was also given to Grievant's supervisor.

5 5. Grievant worked on February 21, 22, and 23, 1997. At no time did anyone mention the impending suspension to him, or give him a copy of the suspension letter. (Tr. p. 18.)

6 6. Grievant appeared for work at roll call on February 24, 1997. When he was not assigned a work location, he inquired of Lieutenant Lucas, who informed him that he was on suspension. The information was given out loudly enough that all thirty persons in roll call could hear. (Tr. pp. 16, 30-32.)

7 7. Lieutenant Lucas gave Grievant a copy of the suspension letter after roll call on February 24, 1997. Mr. Painter subsequently sent Grievant another copy with a memorandum apologizing for the error in mailing, which Grievant received several days later. (Tr. p. 22.)

8 8. The letter stated that Grievant had failed "to answer roll call" on February 16, 1996; March 9, 14, and 15, 1996; and April 1, 5, 7, and 10, 1996 (See footnote 1) ; that he had taken sick leave on

December 22,1996; and that he had taken sick leave on six days between January 1 and February 2, 1997. While it is not entirely clear, the letter appears to state that Grievant missed work on September 22, 23, and 24, 1996, as well. Other missed days are implied in references to counselling and warnings, and notices of leave deficits.

9 9. The letter states that Grievant "may respond to this matter in writing or you may meet with me in person to present me with an explanation for any reason why you may think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, provided you do so within eight (8) calendar days of receipt of this letter."

10 10. Grievant disputes facts and grounds contained in the suspension letter. Specifically, Grievant asserts that, contrary to the recitations in the suspension letter, he had not received counselling about his absences on more than one occasion, and he challenges the facts allegedly constituting offense B2, "Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures." Grievant agreed that he had missed the days of work itemized in the suspension letter. (Tr. pp. 7, 18, 22-25, and 36.)

11 11. Grievant had been counselled about his absences on at least one occasion (State Exs. 2 and 3); he had received several notices about leave deficits (State Exs. 5 and 7); his pay had been docked on at least two occasions (State Exs. 4 and 8); and he had received a written reprimand (State Ex. 6), prior to his meetingwith Deputy Warden Painter on February 14, 1997.

12 12. Respondent's Policy Directive 400.00, Section 4.03(A), states:

> Prior 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.

13 13. An exception is made to the provision requiring prior written notice, where "the employee's continued presence may be a threat to the welfare of the agency or fellow employees." In that case, the employee may be immediately sent away from the work area. Even then, the employee "shall be given notice of the charges and an explanation of the agency's evidence as soon as possible thereafter and shall then be given a reasonable opportunity to respond <u>prior to being placed on suspension without pay or being removed</u>." Policy Directive 400.00, Section 4.03(A) (emphasis added).

14 14. Grievant's continued presence posed no threat to the welfare of the agency or fellow employees.

15 15. Unsatisfactory attendance or excessive tardiness, abuse of sick leave, and inadequate or unsatisfactory job performance are Class A offenses under Policy Directive 400.00. Sanctions for Class A offenses are recommended as follows: First offense warrants official reprimand up to a five day suspension; second offense warrants a six day to a fifteen day suspension, third offense warrants a sixteen day suspension up to dismissal. (Section 7.00) "Upon the accumulation of four `active' Class A offenses, theemployee should normally be dismissed." Policy directive 400.00, Section 5.01(B)(2). A written notice for a Class A offense remains active for two years from the date of issuance. (Section 5.01(B)(3).)

DISCUSSION

In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's suspension by a preponderance of the evidence. W. Va. Code §29-6A-6; Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV- 569 (Jan. 20, 1990). Here, Respondent carried its burden of proof with regard to Grievant's attendance problems, and also proved that it engaged in progressive discipline. Respondent's policy clearly permitted a fifteen-day suspension on the basis of attendance problems alone. However, Respondent's action was also based on additional grounds, and Respondent failed to rebut Grievant's evidence contesting these other grounds. Thus, the issue becomes partly one of mitigation, where two reasons given for the suspension are removed. In addition, Grievant alleges the clear procedural error requires nullification of the suspension.

The policy at issue here requires notice and an opportunity to respond to allegations and evidence, prior to the employee being deprived of either his pay or his job. This is true even when circumstances permit immediately sending the employee away from the work area for safety reasons. Respondent admittedly failed to comply with the requirements of Policy Directive 400.00, Section 4.03, although it attempted to do so. Respondent argued that it had substantially complied with the procedural requirements, by attempting to notify Grievant of the suspension. However, notice simply was not given. Despite Respondent's good faith attempt, sending notice to the wrong address cannot be deemed substantial compliance with the notice requirement, where the intended recipient is not at fault and is not otherwise given actual notice. Nor can the February 14, 1996 meeting with Mr. Painter serve as notice and opportunity to respond, on the facts shown here. Vague reference to

possible disciplinary action made during the meeting cannot substitute for clear and written notice that suspension without pay had been ordered. Grievant's disputes regarding the charges of the letter show that the February 14, 1997 meeting cannot be deemed an effective substitute for the opportunity to respond, as required by Policy Directive 400.00. While Respondent acted in good faith, it did not substantially comply with the procedural requirements.

Normally, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. McFadden v. W. Va. Dept of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10. In McFadden, it was determined that harmful error had occurred as a result of procedural error, and the action was reversed. There, an administrator, who did not have proper delegated authority from the employing agency to act, suspended and then dismissed the grievant. That administrator admittedly had not considered all factors which should have been considered, such as the grievant's work record and the punishments previously imposed upon other employees for similar infractions. Evidence indicated that, had such factors been considered by a person with appropriate authority, a three day suspension would have been imposed.

The Administrative Law Judge in McFadden determined that the grievant had established "that a different result would likely have occurred" had the proper procedure been followed, and thus that she had shown harmful error. Id. at 11-12. "Simply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error." Id. at 10 (citation omitted).

In Scarberry v. Bureau of Employment Programs, Docket No. 94- BEP-625 (Jan. 31, 1995), an employee was suspended for ten days based upon attendance problems. The employer failed to give him eight calendar days notice prior to suspension, as required by its procedures, due to clerical error. When the employer was made aware of the procedural error, the employer put the grievant back to work, thereby shortening the suspension to four days.

The Administrative Law Judge in Scarberry specifically noted that the grievant was "in a better

position through Respondent'sattempt to rectify the error, than he would have been if the suspension was redone," and concluded that "no harm to the Grievant has been demonstrated." Id. at 10. The suspension was not overturned, as the procedural error was found harmless.

The facts of this case fall somewhere between the circumstances considered in Scarberry and those in McFadden. Like the Scarberry case, the suspension here was an appropriate response to Grievant's unsatisfactory attendance. Had Respondent simply re- initiated its disciplinary action when it appeared that Grievant had not received notice of the suspension, the fifteen day suspension would certainly be upheld. However, unlike in Scarberry, Grievant was not benefitted by any effort by Respondent to ameliorate its procedural errors. Indeed, here Respondent arguably compounded its error by publicly announcing Grievant's suspension, which may have violated its Operational Procedure #4.15. (See footnote 2)

In contrast with McFadden, in this case it is not clear that a different disciplinary result would occur, if proper procedurewere followed. While Grievant had had some opportunity to discuss his absences with Mr. Painter during the February 14, 1997 meeting, there is no evidence that Grievant had notice of any other allegations or any of the evidence upon which Mr. Painter relied in imposing the suspension. Indeed, at the Level III hearing, Grievant argued that he had not "failed to follow a supervisor's instructions" when one officer denied his request to take annual leave on a certain day, and he later requested taking the same day as holiday leave from another officer, who granted the request. He also testified that he had not received counselling cited in the suspension letter. (Tr. pp. 18, 24-25, and 36.) Respondent did not rebut Grievant's testimony on these points, and there is no evidence that these facts have ever been considered by Mr. Painter. Had Grievant raised these disputes with Mr. Painter, his determination regarding appropriate disciplinary action may have been altered. Certainly, the issue of offense B2 requires an interpretation of agency policy which Mr. Painter should make in the first instance. Having received less counselling about absenteeism may or may not have been a mitigating factor, in Mr. Painter's opinion. Mr. Painter may have chosen to impose the fifteen day suspension regardless of these facts, but I am unwilling to substitute my judgment on these points for his. The same disciplinary result, although allowable, is not inevitable in this case.

The obvious purpose of the procedure set by Respondent is to prevent an unwarranted disciplinary action, and/or erroneousdeprivation of job or compensation. Without prior notice and

opportunity to be heard, there is little opportunity to prevent any potential error. In such circumstances, it is best to err, if at all, on the side of the employee whom the procedures were designed to protect. See e.g., Dillon v. Board of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986), Syl. Pt. 2; and Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). This is particularly true where, as here, the agency has set the standard for itself. Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

Due to the procedural errors of Respondent, Grievant had no notice that he was actually being suspended, and he did not have a meaningful opportunity to contest the facts and basis for the decision to suspend him, prior to being suspended without pay. Grievant in fact contests some facts and bases for the disciplinary action. Respondent did not prove that the same disciplinary action would inevitably result had Grievant been given the opportunity to contest the specific information contained in the suspension letter. Although Respondent acted in good faith, Respondent did not comply with procedural requirements. For these reasons, the suspension is reversed. However, as the reversal is strictly on procedural grounds, and not on the merits of the suspension, Respondent is not precluded from re-initiating its disciplinary action. Accord, McFadden at 12.

CONCLUSIONS OF LAW

1 1. In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's suspension by a preponderance of the evidence. W.Va. Code §29-6A-6; Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV- 569 (Jan. 20, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W.Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Id.

2 2. Respondent proved that the Grievant had a history of unsatisfactory attendance, that the suspension was imposed after progressive disciplinary action was taken, and that the suspension was within the guidelines established by Respondent's Policy Directive 400.00. However, Respondent failed to prove other charges cited in its suspension letter.

3 3. "When a defense is raised by a grievant in a discipline- based claim[,] it is his burden to establish

the validity of that defense." Young v. W. Va. Dept. of Health and Human Res., Docket No. 90-HHR-541, at 12 (Mar. 29, 1991).

4 4. Grievant proved that Respondent did not follow the procedural requirements of its Policy Directive 400.00, Section 4.03(A), in that it did not provide him with prior written notice of the allegations and evidence, or an opportunity to respond, before suspending him without pay. He also proved that some facts and grounds given by Respondent for the suspension were in error,and that Respondent's procedural error was not harmless.

5 5. Respondent failed to prove that it substantially complied with the requirements of Policy Directive 400.00, Section 4.03(A), or that it would have inevitably imposed the same sanction had it properly followed its Policy requirements.

6 6. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

Accordingly, the grievance is **GRANTED IN PART AND DENIED IN PART.** The suspension is vacated on exclusively procedural grounds, and Respondent is ordered to remove this suspension from Grievant's record and to give him full back pay and other benefits for the fifteen day period of the suspension. However, Respondent may re- initiate disciplinary action as deemed appropriate, in accordance with Policy Directive 400.00.

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

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Dated: August 25, 1997 **JENNIFER J.MEEKS**

Administrative Law Judge

Footnote: 1

The record indicates that Grievant was late, but did report for work, on February 16 and March 19, 1996. 1996 Absentee Calendar for Grievant.

Footnote: 2

Operational Procedure #4.15 (G. Ex. 2) reads, in pertinent part: "Employees will not verbally degrade any staff member ...in the presence of... other employees." Grievant has emphasized this issue, and his embarrassment and the damage to his reputation caused by public announcement of the suspension, at all stages of his grievance. While I am unwilling to find that public announcement of disciplinary action in these circumstances constitutes "harmless error," more damage was likely caused by Grievant's own conduct, than was caused by the truthful, factual announcement. Therefore, the harm is found to be "de minimis," or very small. No apology is required, and this Board has traditionally declined to order such relief. Fekete v. Bd. of Trustees, Docket No. 95-BOT-484 (Aug. 20, 1996) and cases cited therein.