JACK FERRELL

v. **Docket Nos. 96-CORR-194**

96-CORR-217

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, Jack Ferrell, was employed by the West Virginia Division of Corrections (CORR) as a Correctional Officer I at the Mt. Olive Correctional Complex (MOCC) until his dismissal for cause on May 24, 1996. He filed an appeal of that action at Level IV June 6, 1996; a hearing was held July 3, 1996. The parties submitted proposed findings of fact and conclusions of law by August 6, 1996.

Background

The grievant's account of the events which gave rise to his dismissal differs sharply from that of CORR witnesses on several key points. This much, however, is not in dispute. Since their initial incarceration, MOCC inmates Bruce White and Rusty Lassiter have committed and/or abetted in the murders of seven or eight inmates. Inmate Lassiter has been diagnosed as sociopathic, and inmate White has a history of manufacturing weapons. (See footnote 1) Both prisonershave been convicted of numerous serious infractions of the prison's rules for inmate conduct, including escape attempts. They are perhaps the most dangerous inmates housed in “Pod 6” of “Quilliams II,” the prison's maximum security section. At the time of the events discussed herein, their contact with other prisoners was severely restricted.

On the afternoon of Sunday, April 21, 1996, the grievant was responsible for releasing the two inmates from Quilliams II and escorting them to MOCC's recreation yard. On this date, he deviated from practice, and released them without handcuffs so that they could clean the “multi-purpose” room, an area adjacent to Quilliams II, while he escorted two other prisoners to their cells. White and Lassiter were in the area for ten to fifteen minutes and were eventually escorted, handcuffed, to the recreation yard.

The multi-purpose room is comprised of a large library area and several offices. Correctional Officers Delena Sanford and David Williams, both members of MOCC's Corrections Emergency Response

Team, (See footnote 2) were present in one of the offices attending to paperwork when the inmates entered the area. Correctional CounselorDeborah VanDyke, a “civilian” employee, was working in an adjacent office, but it appears that her presence was unknown to the officers or inmates.
On April 22, 1996, CO Sanford filed an incident report with MOCC Deputy Warden Howard Painter alleging that the grievant had permitted the two inmates to enter the area unannounced and uncuffed, and that inmate Lassiter had entered the office where she and CO Williams were working. Officer Sanford further reported that after the grievant returned to the area, he remarked to inmate White that he should put handcuffs on “before somebody sees him [unrestrained].” She also reported that the grievant then placed handcuffs on White and directed him to place a second pair on Lassiter. Officer Sanford indicated that Lassiter made a statement to the effect that “[t]his shit isn't going to happen,” and then placed the cuffs on himself.

Officer Williams, who began a medical leave of absence on or shortly after April 21, filed an incident report on May 2, 1996. His account of events differed only slightly from Officer Sanford's. He confirmed that the inmates entered the area unexpectedly and without restraints. Officer Williams indicated that the grievant handcuffed only one of inmate White's hands and the prisoner “finished the job.” He also reported that White then remarked to Lassiter that he should place cuffs on “before someone comes in and we get in trouble.” According to Officer Williams' report, Lassiter then “mumbled something” and placed the cuffs on himself. Neither officer indicated that the grievant gave them any advance warning that the inmates would be in the area; they both characterized the grievant's actions as a breach of security.

Deputy Warden Painter directed MOCC Investigator Cheryl Chandler to conduct an inquiry into the matter. Ms. Chandler had just completed an interview on the morning of April 21 with Correctional Officer George Ballard concerning his complaint that the grievant had attempted to dissuade him from testifying on behalf of the agency in a March 28, 1996 Level IV grievance hearing. (See footnote 3) It appears that Mr. Painter receivedthe complaint on or about March 28, but did not direct Ms. Chandler to take any action thereon until shortly before April 21.

By letter dated April 25, 1996, Mr. Painter advised the grievant that the investigation had begun, and that he was suspended for fifteen days without pay pending its outcome. The letter further advised that if the allegations proved false, he would be reimbursed for the loss of wages. (See

footnote 4)

Ms. Chandler conducted an investigation into the charges concerning White and Lassiter which included tape recorded interviews with the grievant, Quilliams II Unit Manager Paul Simmons, and Correctional Officers Sanford, Williams and Brian Yoakum. (See footnote 5) The prisoners refused to talk to her. Ms. Chandler questioned Officer Ballard regarding his complaint of coercion but did not interview the grievant on that matter.

CORR's written policy on recreation time for Pod 6 inmates provides as follows.

When being placed on the recreation yard, [Quilliams II inmates] will be let out of their cell, strip searched before leaving the pod, cuffed and escorted to the recreation yard. The inmate will be placed on the yard and his cuffs removed through the feeding door.

At NO time will these inmates come in contact with any other inmate. If two of these inmates are to recreate together (only by order of the Unit Manager) neither will come in contact with the other while one is restrained.

CORR 's policy on the movement of Pod 6 inmates generally within the facility provides:

It is the responsibility of the officer to ensure that a proper strip search has been performed on the inmate to be escorted.

It is the responsibility of the escorting officer to ensure that handcuffs and leg shackles have been properly applied and deadlocked before departing any area with any [Quilliams II] inmate.

The escorting officer will maintain visual control of the inmate at all times.

The escorting officer will walk behind one shoulder of the inmate being escorted.

The escorting officer will ensure that restraints remain on inmate at all times while out of [Quilliams II] (With the exception of medical discretion).

Unit officers will ensure that restraints have been properly removed and the inmate strip searched upon arrival back to [Quilliams II].

[Quilliams II inmates] will not be escorted with any other inmates.

Escorts will be responsible for all areas being secured of all other inmates prior to escorting [Quilliams II] inmates and Protective Custody Status Inmates.

CORR has adopted policy on the use of mechanical restraints which implicitly requires that they be used by Correctional Officers only. Understandably, there is no specific prohibition therein against allowing inmates to cuff themselves. The parties do not dispute that handcuffs could be used as a weapon, and that they should not be given to an inmate under any circumstances. CORR regulations and/or state law require that inmates White and Lassiter be provided jobs within MOCC; they have held janitorial contracts for several years and are the designated “feeders” in Quilliams II. Exceptions to the above policies are made when they are required to clean the multi-purpose room and other areas in or near Quilliams II. Under the supervision of a correctional officer, they are allowed to work together, unrestrained, with mops and brooms. This work is done almost exclusively after midnight, when fewer officers are on duty and no civilian employees are present in the areas to be cleaned. On occasion, the two prisoners have been permitted to clean during daytime hours. They are also unrestrained and together within the Quilliams II housing unit when they are required, apparently three times per day, to distribute food trays through cell door slots to other maximum security prisoners. This task entails incidental unrestrained contact with a Correctional Officer.

In 1995, White and Lassiter were also allowed to paint a large decorative mural on a wall of the multi-purpose room. The record reveals that this activity occurred during daytime hours and the inmates were unrestrained. The evidence also reflects that while officers and perhaps civilian employees were present in the area, they had advance notice that the inmates would be working on the project.

Ms. Chandler submitted her final report to Deputy Warden Painter on or about May 8, 1996. By letter dated May 24, 1996, Mr. Painter dismissed the grievant for the following detailed reasons:

The Division of Corrections is mandated to operate the prison in such a manner that it provides for the health, safety and welfare of the public at large, as well as the inmates of the facility. By your permitting unrestrainedinmates to enter the multi-purpose room in Quilliams II, you have failed to meet the minimum standards necessary to ensure the well-being of those we serve and those we are charged to supervise. We cannot continue to suffer the risk of maintaining you in employment when you fail to discharge the most basic duties and responsibilities of your position as a Correctional Officer and the resulting liabilities we assume because of your continuing negligence.

You were suspended on 25 April 1996, for a renewable period of fifteen (15) calendar days. This suspension was renewed in a letter dated 09 May 1996, and specified a renewal period not to exceed 25 May 1996. This suspension was issued pending the results of an investigation into allegations of your violation of WV Division of Corrections Policy Directive 400.00. The investigation has been completed and it reveals the following violations of Policy Directive 400.00 as well as the listed MOCC Operational Procedures:

Policy Directive 400.00, Section 7.00, C22-"Breach of facility security or failure to report any breach or possible breach of facility security."

Policy Directive 400.00, Section 7.00, C8-"Violating safety rules where there is a threat to life."

Incident reports MS3132 and MS3291 filed by two members of the CERT team, state that on 21 April 1996, at approximately 1400 hours you allowed inmate #12439 and inmate #12729 to enter the multi-purpose room in Quilliams II unrestrained. There were two (2) officers and a Correctional Counselor II working in the offices and they were not given any warning that the inmates were entering. The two officers were in the multi-purpose room preparing reports when they heard the door open. Assuming it was an officer entering, they continued to work; however when they looked up they found inmate #12439 standing in the door way. The inmate was not restrained. The inmate proceeded to walk over and sit down in a vacant chair beside one of the officers. The door opened again and inmate #12729 was at the door also unrestrained and you were standing behind the inmate. Upon entering the multi-purpose room, you told inmate #12729 to put some handcuffs on before somebody saw him like that. You handcuffed inmate #12729 and then gave him another set of handcuffs to handcuff inmate #12439. When inmate #12729 approached inmate #12439, inmate #12439 said, "this shit aint't happening." Inmate #12729 then handed the handuffs to inmate #12439 andthe inmate put the handcuffs on himself. You then escorted the two (2) inmates from the multi-purpose room.

Officer Ferrell, the above incident could have resulted in serious, if not fatal, injuries to staff members. The possibility of an incident was heightened by the nature of your instructions to the

inmates. This should have been obvious to you by the way inmate #12439 reacted to your instructions to inmate #12729. It should have been equally obvious to you because of the history of the two inmates that your actions would produce the potential for hostile takeover of Quilliams II and eventual escape. You allowed a breach of security and failed to follow safety procedures. Both inmates are housed in the super-max section of Pod 6. They are there because of their history of assault and escape. You stated in your official statement to Cheryl Chandler, Acting Investigator, on 07 May 1996, that you had placed the inmates in the multi-purpose room so they could gather trash while you moved two (2) other inmates from the recreation yard; however, documentation reveals that there was no trash gathered by the inmates. When Ms. Chandler asked you about the policy of not having inmates #12439 and #12729 in the multi-purpose room during the day due to staff being present, you said you could not say it was policy; however, you further stated that you had never seen inmates #12439 and #12729 cleaning in the multipurpose room during the day when staff members were present. Nevertheless, in your statement you said that you left these inmates, two of the most dangerous inmates at MOCC unrestrained for approximately five (5) to ten (10) minutes in the multi- purpose room while you escorted other inmates from the recreational yard.

Operational Procedure 4.15 Item 31 - "All employees shall familiarize themselves with the rules governing inmates and enforce those rules in all divisions. Any violation of this rule may result in disciplinary action being taken against the employee."

A statement taken from Lt. Paul Simmons, CERT Commander and Unit Manager of Quilliams II, reveals that when an inmate moves from Pod 6 to the recreational yard, it would be proper procedure to place the two inmates in the multi-purpose room as a "holding" cell; however, the inmates would be restrained with handcuffs and escorted by an officer at all times. Lt. Simmons further stated that it would be totally inappropriate to give handcuffs to an inmate in order for him to handcuff himself or another inmate. Inmates are never to be given security equipment. He informed Ms. Chandler that inmates #12439 and #12729 are only scheduled to clean after midnight in order to avoid contact with staff due to their assaultive history. Any officer working in Quilliams II must be aware that authorizing inmates to restrain themselves and/or each other is not only a violation of procedure, but potentially dangerous to the inmates, other officers and the officer authorizing such.

As an officer in QII you were expected to be familiar with the Quilliams II Summary of Recreation Schedule which states, under “Place of Control Cell Inmates on Recreation Yard,” the following:

At no time will these inmates come in contact with any other inmate. If two of these inmates are to recreate together (only by order of the Unit Manager) neither will come in contact with the other while one is restrained. When being placed on the recreation yard, they will be let out of their cell, strip searched before leaving the pod, cuffed and escorted to the recreation yard. The inmate will be placed on the yard and his cuffs removed through the feeding door.

Policy Directive 400.00, Section 7.00, C9-Giving an inmate an order which could be hazardous to health and safety.”

You initially violated this directive when you allowed inmate #12439 to enter the multi-purpose room unrestrained and without warning when staff members were present. Granted, there were two officers in the room, but they were unaware of what was transpiring and were taken completely off-guard by your failure to follow procedure regarding the movement of inmates. Additionally, when you gave handcuffs to inmate #12729 and told him to cuff #12439, you created a potential volatile situation wherein inmate #12439, who has a very abusive nature, could have became violent and attacked inmate #12729 who was handcuffed and unable to defend himself.

Policy Directive 400.00, Section 7.00,C-21-”Aiding or abetting inmate violation or attempted violation of any law, rule or regulation.”

Policy Directive 670.00, Section IV,4.01, 1.10-”...Nor shall any offender possess any item, device or tool which could clearly be used to facilitate an escape or is clearly linked to an escape attempt...”

Your actions in giving inmate #12439 handcuffs with which to handcuff himself and inmate #12729 allowed both inmates to be in violation of Policy Directive 670.00 as cited above. Handcuffs are considered security equipment and should never be given to an inmate. The inmates could haveused the handcuffs to restrain the officers and the female Correctional Counselor who was working in the back office oblivious to the events which were transpiring up front. To compound this

violation, in your official statement you told Ms. Chandler that you were unaware that there was another staff member in the offices. Your negligence in following security procedures could have had tragic consequences.

Policy Directive 400.00, Section 7.00, C15-"Threatening or coercing other persons."

Prior to your suspension for investigation into the above incident, there were reports, which have been confirmed in at least one situation, that you had attempted to coerce staff members regarding their statements made during grievance hearings. Ms. Chandler interviewed a Correctional Officer on 21 April 1996, who stated that he was called as a witness for the Institution in a grievance hearing over the firing of another officer. In his statement the officer reported that you approached him about his testimony and stated, "Officers shouldn't write fellow officers up because we all need each other. An officer that writes another officer up may need their help and the officers responding could be a little slow in getting to their aid." I find your blatant threat to this Correctional Officer reprehensible. Officers who are carrying out the responsibilities of their position as directed, should never feel that there will be any form of retaliation for their actions.

An employer has the duty to exercise reasonable care in retaining employees who, because of the nature of the employment, may pose a threat to members of the public. It is the employer's duty to exercise reasonable care in continuing the employment of employees who, if incompetent or unreliable, might pose a risk to members of the public.

As a Correctional Officer, you were employed to perform security work at a State Correctional institution, Mount Olive Correctional Complex. You have been expected to provide for the security of the institution, maintain control over the residents, provide for the resident's welfare while encouraging their rehabilitation within the structured programs of the facility, and protect the general public. Your actions, as described below, have not only compromised the security of the institution, but also your leadership position with the residents. Therefore, I conclude that you have failed to fulfill the duties and responsibilities of your position as a Correctional Officer, thus warranting this dismissal.

Policy Directive 400.00, CORR's personnel manual, characterizes "Class C" violations as "acts and behavior of such a serious nature that a first occurrence should normally warrant an extended

suspension or removal." The grievant had been furnished a copy of the policy and was briefed on its contents.

At the time of his dismissal, the grievant had been employed by CORR for approximately two years; it appears that his evaluations were at least satisfactory or above. He has been a member of the State Employees Union (SEU) since his initial employment at the West Virginia State Penitentiary at Moundsville in May 1994. Subsequent to his transfer to MOCC in March 1995, the grievant became more active in union matters, including recruitment, representation in grievance proceedings, and ongoing discussions with management on various employment-related issues. He was elected President of the MOCC chapter of SEU in April 1995, and was serving in that capacity when discharged.

Officer Sanford and Investigator Chandler are roommates, and the record suggests that they have a close personal relationship; neither is affiliated with any union. Officer Williams is a member of SEU.

Argument

The grievant denies that he threatened Officer Ballard or allowed the inmates to handcuff themselves. He disputes that he otherwise committed any breach of security and contends that CORR exaggerated the seriousness of his actions in order to retaliate against him for his union activities. CORR disputes that the dismissal was motivated by union animus; the agency maintains that the grievant's conduct demonstrated a general disregardfor the safety of fellow officers and the two inmates' propensity for violence.

Evidence

Officer Sanford's Level IV testimony was consistent with her incident report and responses in her interview with Investigator Chandler. She related that inmate Lassiter entered the office where she was working and sat next to CO Williams. According to Officer Sanford, the sudden appearance of the inmate, without handcuffs, alarmed her and caused her to be concerned for her safety. She testified that she attempted to join Lassiter in a conversation she was having with Officer Williams in order to convince him that she was at ease. Officer Sanford explained that she did not attempt to restrain the inmate herself because it was the grievant's responsibility to do so. She reiterated that

the grievant gave White a pair of handcuffs to place on Lassiter, and that Lassiter placed them on himself; she expressed an opinion that this was the grievant's most serious breach of security.

Officer Williams' testimony was also consistent with his prior statements. He recalled that inmate Lassiter, once seated, smiled and made a gesture with his arms to show that he was unrestrained. According to CO Williams, the inmate demonstrated through his demeanor that he was aware that he should be wearing restraints. Except that he recalled that the grievant cuffed only one of inmate White's hands, Officer Williams' testimony corroborated Officer Sanford's account of events. Officer Williams also suggested thatgiving the cuffs to the inmates was a very serious offense; he downplayed the seriousness of allowing the inmates to enter the multi-purpose room unexpectedly and without restraints.

Officer Ballard represented that on March 28, 1996, prior to his testimony on behalf of CORR in a Level IV grievance hearing, the grievant approached him and made a remark to the effect that officers who testified against other officers might not receive immediate assistance in crisis situations. He explained that he perceived the comment to be a threat and that he felt intimidated by it. Officer Ballard confirmed that he immediately reported the incident, and further testified that he was not pressured to do so by any MOCC official.

The grievant testified generally about the extent of his union activity during his tenure with CORR; he represented that he had enjoyed favorable relations with CORR management prior to his appointment to the chapter President post. According to the grievant, MOCC officials then became noticeably unfriendly. He cited three “incidents” he believed to be indicative of the administration's ill-will toward the union and/or him in particular.

The grievant first recounted that he had been transferred from one post to another within MOCC an excessive number of times since his assignment to the facility. He did not represent that he had filed grievances over any particular transfer, and did not allege that the transfers were violative of MOCC policy.

The grievant next asserted that he and Correctional Officer Mike Hundley, a fellow union member, were “singled out” or treated differently from a group of other officers by Captain Timothy Melton. This testimony was confusing, but it appears that Captain Melton was preparing to issue verbal reprimands to a group of officers but, according to the grievant,once he was advised that the grievant and Mr. Hundley were in the group, he made a statement to the effect that he would “write them up.”

The grievant related that he learned of the comment from another Correctional Officer. He did not explain how or why Captain Melton determined that any officer's conduct warranted a reprimand and did not assert that he was ever disciplined for his role in the matter. CORR presented no evidence that the grievant had ever been disciplined prior to his dismissal.

The grievant also related, again, rather confusingly, that MOCC Associate Warden of Operations Carol Sylvester “listened in” on a conversation that he had with another Correctional Officer and then asked that officer to reduce to writing the entire content of their talk. The implication was that Ms. Sylvester was motivated by anti-union sentiments and intended to take some action against the grievant for his comments. The grievant testified that the officer informed him of Ms. Sylvester's request; he did not assert and there is no evidence indicating that she or other MOCC official ever took any such action.

The grievant recounted the events of April 21 as follows. He was aware that inmates Lassiter and White were routinely allowed to clean certain areas of MOCC, including the multi-purpose room, unrestrained. He explained that because the multi-purpose room was littered with trash, he decided to allow them to clean it prior to their recreation period. According to the grievant, he specifically asked Officer Williams to supervise the two inmates while he escorted other prisoners from the recreation yard and Officer Williams agreed. He denied outright the charge that he allowed one or both of the inmates to handcuff themselves. The grievant suggested that since Officer Chandler was an MOCC administrator and she and Officer Sanford were roommates, and neither was a member of the union, they would have reason to slant and even contrive their testimony. The grievant stated unequivocally that he believed Officer Williams had been coerced into providing a false report. He did not explain the basis for this belief.

The grievant also testified generally about his perception of the two inmates' potential for violence. Referring to the prisoners as Rusty and Bruce, he represented that they had never caused him any trouble, and that he “did not see them as a threat.”

Finally, in response to questions regarding Officer Ballard's complaint, the grievant conceded that he advised Mr. Ballard that “[o]fficers shouldn't write other officers up.” He asserted that he often made this comment to other officers, and that it was not intended as a threat; he implied that since he had not singled Officer Ballard out for this advice, he had not acted improperly. He did not explain why he believed one officer should not report the misconduct of another.

Testifying on behalf of the grievant, Counselor VanDyke related that she too had been unnecessarily exposed to inmates White and Lassiter. She represented that Officer Sanford was in control of electronically opening and closing the main and inner cell doors of Quilliams II when she went there on May 15, 1996, to talk to an inmate housed on the second tier of cells in the unit. According to Ms. VanDyke, while on the upper level, she heard the doors to cells on the lower tier open and was surprised and alarmed to then see White and Lassiter, unrestrained, in the area below her. She was able to exit the area safely. Ms.VanDyke completed a report on May 27, 1996, accusing Officer Sanford of an “informational breach of security.” She represented that she gave the report to an officer in MOCC's control tower but was never advised that any action had been taken against Officer Sanford.

Officer Michael Hundley, also testifying on the grievant's behalf, related that he received word from another officer that Captain Melton had made a remark to the effect that “what he [Hundley], needed was a “thirty ought six.” (See footnote 6) According to Mr. Hundley, he interpreted the comment to mean that Captain Melton believed he should be shot. He represented that he reported the incident, but was never advised that any disciplinary action had been taken against Captain Melton.

Investigator Chandler and Deputy Warden Painter testified generally about the steps taken in the investigation of the complaints against the grievant. Cross-examination revealed that Ms. Chandler's report to Mr. Painter was in error to the extent that it represented that the grievant did not place the inmates in the multi-purpose room to clean. Mr. Painter denied that union sentiments played any role in his decision to dismiss. He also represented that he had never seen Ms. VanDyke's May 27 incident report and noted that it did not bear the signature of MOCC Associate Warden of Security Tony LeMasters who normally receives and initially reviews all incident reports.

Addressing Captain Melton's remark about Officer Hundley, Mr. Painter explained that his investigation revealed that the statement was made in jest but that it nevertheless warranted a written reprimand for poor judgment. He denied that his investigation of the matter was not as vigorous as that conducted into the grievant's conduct or that the punishment imposed was not commensurate with Captain Melton's offense. Mr. Painter further explained that the delay in directing an investigation into Officer Ballard's complaint against the grievant was due to the number of such investigations under way at the time.

Findings and Conclusions

When a tenured state employee challenges the sufficiency of the evidence relied upon by the employer in a disciplinary action, the employer must prove, by a preponderance of the evidence, that the employee engaged in the conduct for which he was disciplined, and demonstrate that the conduct was of a "a substantial nature directly affecting rights and interests of the public." Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980); W.Va. Code 29-6A-6, ¶5. The employee bears the burden on any defenses raised. Rhodes v. W.Va. Dept. of Corrections, Docket No. 95-CORR-465 (Nov. 27, 1996). For the reasons discussed below, the undersigned administrative law judge concludes that CORR has met its burden in the case, and that the grievant has failed to substantiate any valid defense to his dismissal.

The grievant was much less convincing in his Level IV testimony than Officers Williams, Sanford and Ballard. While he appeared forthright when responding to questions concerning his employment history with CORR, his union activities, and the alleged retaliatory motives of MOCC officials, the grievant was noticeably uneasy when asked whether he had allowed the inmates to handcuff themselves. He showed the same uneasiness when asked to respond to Officer Ballard's charge of intimidation. The demeanors of Officers Williams, Sanford, and Ballard did not indicate deception. Rather, their testimonywas consistently spontaneous, and they exhibited greater confidence in their responses. Their accounts of events were never embellished or exaggerated.

Moreover, a preponderance of the objective evidence of record establishes that the grievant was not truthful in his testimony or prior statements to MOCC officials. As noted, the testimony of Officers Williams and Sanford was entirely consistent with their previous reports. The grievant presented no evidence to substantiate his claim that Officer Williams was coerced into filing false charges. Williams' membership in SEU and his willingness to discount the seriousness of at least part of the grievant's conduct supports that he had no motive to contrive his version of events. Ms. Sanford corroborated his testimony on nearly all significant points. It is implausible that she and Ms. Chandler, because of their personal relationship and/or union sentiments, conspired to fabricate their reports and testimony and coerce Officer Williams to do the same.

Accordingly, it is accepted that the grievant placed the inmates, unrestrained, in the multi-purpose room to permit them to clean the area and allow him to escort other prisoners to their cells, and that

he did not ask Officer Williams to supervise the prisoners or otherwise provide advance notice that they would be in the area. It is also determined that he permitted Lassiter to handcuff himself and most likely allowed White to partially handcuff himself. Further, the conclusions regarding the relative credibility of the grievant and Officer Ballard dictates that the grievant also made the coercive and intimidating statement attributed to him prior to Officer Ballard's testimony on behalf of CORR.

The grievant's evidence falls well short of substantiating his claim of retaliation. His revelations concerning excessive transfers and the intentions of Captain Melton and Associate Warden Sylvester are almost anecdotal. It is telling that in each instance of alleged retaliatory behavior recounted, the grievant could cite to no real harm to himself or the union. There is no evidence, save the grievant's mostly hearsay testimony, that any MOCC official has ever expressed sentiments or taken any action which could be construed as injurious to the union or any of its members.

The testimony regarding the remark made by Captain Melton about Officer Hundley establishes only that Deputy Warden Painter investigated the matter and determined that the statement was made in jest and that officers who heard it did not believe that Captain Melton would act on it. It was not unreasonable for Mr. Painter to conclude that a reprimand was the appropriate punishment for the remark. Even if it were accepted that the discipline were markedly disproportionate to the offense, this, in and of itself, would not be sufficient to establish union animus on Mr. Painter's part. Moreover, there are obvious, significant differences between the conduct for which Captain Melton was reprimanded and the conduct for which the grievant was dismissed.

The short response to the grievant's claims concerning Officer Sanford's failure to take proper safety precautions following Counselor VanDyke's entry into the Quilliams II housing unit is that Mr. Painter's credible, unrebutted testimony establishes that neither he nor other MOCC official with the authority to act on the complaint ever saw it. The evidence suggeststhat for whatever reason, the unnamed officer who received Ms. VanDyke's incident report never forwarded it to Mr. Painter's office.

To the extent that his SEU affiliation and the increase in his union activities during the year preceding the dismissal entitles the grievant to an initial presumption that the adverse action was motivated by union animus, CORR has presented sufficient evidence to rebut it. See, Graley v. W.Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA- 225 (Dec. 23, 1991). CORR has shown that the grievant committed the acts with which he was charged, and, for the reasons discussed below, has demonstrated that the conduct was not a minor technical violation of

MOCC's security regulations and practices.

The grievant's evidence on the two inmates' cleaning and painting activities does not establish that CORR exaggerated their potential for violence or the need for special precautions during their movements within the facility. That they were allowed to clean or paint, with advance notice, under the supervision of a Correctional Officer, does little to rebut CORR's considerable reliable evidence that both inmates are very dangerous. At best, the evidence tends to demonstrate that the grievant's decision to allow the inmates to clean, in and of itself, was sufficiently consistent with MOCC policy and past practice. It appears that those portions of the dismissal letter which addressed the initial release of the prisoners into the multi-purpose room were based on the erroneous conclusion that they had been placed there for “holding” purposes; the error does not indicate exaggeration or ill-motive. Moreover, that the grievant had reason to permit the inmates to clean does not excuse his failure to provide those present in the area advance notice. It is clear that the threat leveledat Officer Ballard, his failure to advise Officer Williams and/or Officer Sanford that the inmates would be nearby, unrestrained, and allowing the inmates to cuff themselves were the grievant's most serious offenses.

All witnesses who expressed opinions regarding the propriety of giving an inmate handcuffs, stated without hesitation that it was a most serious breach of security. Deputy Warden Painter opined that it was one of the most serious breaches he had encountered at MOCC; there was no evidence to rebut his or any other witness' assessment. The above- cited CORR policy confirms that the agency has necessarily taken a rigid stand on security- related matters, and that it has communicated to all employees that providing an inmate access to a potential weapon can result in dismissal. As noted, the grievant concedes the gravity of such an act.

It is somewhat troubling that Officer Ballard's complaint was not immediately investigated and that the grievant was not interviewed on that matter. Nevertheless, the charge was proven and, since the investigation began prior to the incident involving White and Lassiter, the delay is not supportive of any claim that MOCC officials “sat on” the charge and waited for the grievant to engage in other misconduct. Deputy Warden Painter's assertion that his responsibilities in other investigations caused the delay is accepted. The record also supports his conclusion that the threat was a breach of facility security and a violation of the CORR policy cited in the dismissal letter. Notice is taken, see, n. 4, that the case in which Officer Ballard ultimately testified involved a Correctional Officer charged with

egregious conduct. CORR prevailed in the case on clear and convincing evidence thatthe officer made at least several and perhaps numerous racial slurs against other officers. See, Smith v. W.Va. Dept. of Corrections, Docket No. 95-CORR-547 (June 28, 1996).

The record does not establish that CORR otherwise abused its discretion to dismiss. On the question of whether the punishment imposed is commensurate with an employee's conduct, considerable deference is afforded the employer's assessment of the seriousness of the conduct and the prospects for rehabilitation. Overbee v. W.Va. Dept of Health and Human Resources, Docket No. 96-HHR-183 (October 3, 1996). Generally, there must be a showing that the disciplinary measure was “clearly disproportionate to the offense.” Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (November 7, 1991). These rules are particularly applicable here.

The testimony of Deputy Warden Painter and Executive Assistant to the Warden Michael Coleman reflects that the security of Quilliams II inmates, and ultimately, MOCC, requires something more than rote adherence to a set of safety regulations. It is clear that officers and administrators in the corrections field must adopt and maintain an attitude toward security which a lay person cannot fully appreciate. This outlook necessarily influences the administrator's decision on what punishment to impose for a breach of security. Any review of the propriety of the penalty should take into account that within a correctional facility, personnel and security issues are interrelated, and that the manner in which CORR responds to a violation of safety practices is, in and of itself, a matter of security.

The grievant's conduct reflected a careless and, therefore, dangerous attitude toward two inmates who have proven their capacity for extreme violence on numerous occasions. It is incredible that he did not view them as a threat; his Level IV testimony suggests that he continues in that belief. The manner in which he described his relationship generally with the prisoners indicated a casual attitude toward their histories. The grievant's threat to Officer Ballard was reprehensible. Causing another officer to fear for his safety was perhaps his most serious breach of security. In short, it was reasonable for CORR to conclude that the grievant's continued employment was not in the best interests of the facility, and that dismissal was otherwise the most appropriate punishment to impose. CORR has demonstrated that the the grievant's actions were “of a substantial nature directly affecting the rights and interests of the public.”

Accordingly, the grievance is **DENIED**.

January 31, 1997 **JERRY WRIGHT**

ALJ

Footnote: 1 To demonstrate the degree to which the prisoner has advanced in devising weapons from materials obtainable within the facility, CORR produced a "zip" gun which was discovered in his anus during a routine search. The weapon was probative evidence in that its rather intricate construction tends to show that the inmate is quite resourceful. It can be inferred from his rather ingenious use of fountain pen and typewriter parts and other seemingly harmless objects, that he is also a deliberate and determined individual. The testimony of MOCC Executive Assistant to the Warden Michael Coleman supports that the inmate was most likely contemplating an escape attempt when he made the device. Mr. Coleman indicated that for assaults against other inmates, a "shiv" orhomemade knife is the preferred and more easily manufactured weapon. There is no evidence of record which indicates that inmates White or Lassiter were plotting an escape during the times involved herein.

Footnote: 2 CERT members are specially trained Correctional Officers who respond to crisis situations within MOCC; they are essentially the prison's police force.

Footnote: 3 The undersigned Administrative Law Judge presided over the hearing; the case was styled Smith v. W.Va. Dept. of Corrections, Docket No. 95-CORR-547.

Footnote: 4 It is noted that the letter alleged violations of several provisions of "Policy Directive 400," CORR's rules for officer conduct, but did not set forth the conduct which formed the basis for the investigation and suspension. The notice most likely would not satisfy the due process standards set forth in Wirt v. Mercer County Bd. of Educ., 192 W.Va. S.E.2d 568 (1994), and cases cited therein. While the grievant cites these deficiencies in the letter as generally supportive of his contentions, he does not make an independent, due process-based claim. It is difficult to make specific findings of fact on the issue since it was not litigated to any degree at the Level IV hearing. The letter alone will not support the legal conclusion that the grievant was denied his procedural due process rights.

Footnote: 5 Officer Yoakum was assigned to the Q II control room on the date in question and was the officer responsible for unlocking and locking the various doors in the area as prisoners were released for recreation time. Since he was not in the multi-purpose room during any relevant time, he was able to provide the investigator with little, if any, pertinent information on the incident.

Footnote: 6 It appears that this was a reference to a caliber of rifle.

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