DONNA NICHOLS,

Grievant,

v. **DOCKET NO. 97-DJS-536**

WEST VIRGINIA DIVISION
OF JUVENILE SERVICES,

Respondent.

DECISION

Grievant, Donna Nichols, challenges her suspension and subsequent dismissal from employment as a Cook at the West Virginia Industrial Home for Youth (IHY). She seeks reinstatement, back pay with benefits, and attorney fees. (See footnote 1) This grievance was filed directly at level four on December 5, 1997, pursuant to the expedited grievance process of W. Va. Code §29-6A-4(e). After several continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on October 16, 1998. Grievant was represented by counsel, Ron Tucker, and the Division of Juvenile Services ("DJS") was represented by Assistant Attorney General Scott McKinney. This matter became mature for consideration on November 16, 1998, upon receipt of the parties' written proposals.

The facts in this matter are essentially undisputed and are set forth in the following findings of fact.

Findings of Fact

1. Grievant has been employed as a Cook at IHY since early 1995.

2. Grievant was rated as "very good" on her employee performance evaluations for the first two years of her employment at IHY.

3. IHY is a maximum security, juvenile correctional facility, which houses male offenders ages 10 to 18, and female offenders ages 12 to 18.

4. The Division of Corrections (See footnote 2) has identified potential offenses an employee

may commit and separated them into categories based on their severity. Class A offenses are "the least severe in nature but require correction in the interest of maintaining a productive and well-managed work force." Class B offenses are "more severe in nature and are such that a [t]hird Class B offense should normally warrant removal." Class C offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal.” See Joint Exhibit 1, "Policy Directive 400.00," Sections 5.01, 5.02 and 5.03.

5. Policy Directive 400.00 recommends either a lengthy suspension or dismissal for a third Class A or Class B offense.

6. On October 18, 1996, Grievant was suspended without pay for 21 days for providing cigarettes and matches to residents of IHY. Along with violation of the “Smoke Free Workplace Policy” and statutory prohibitions regarding use of tobacco by minors, Grievant was found to have committed the following Class B offenses from Policy Directive400, Section 7: (See footnote 3)

B14. Acceptance of any gift or favor from an inmate, parolee, ex-inmate, their families or friends.

B15. Giving or offering an unauthorized article or favor to an inmate, parolee, ex-inmate, their families or friends.

B3. Violation of Safety Rules.

See Joint Exhibit 1, Suspension letter dated October 18, 1996.

7. On September 10, 1997, Grievant received a written reprimand for bringing a stuffed teddy bear to a resident without asking for prior approval to do so. Again, the charge was for violation of Section 7, Paragraph B15. (See footnote 4) Grievant was not suspended, because of mitigating circumstances, i.e., she believed she followed proper procedure by asking, upon her arrival to work, for permission from the shift supervisor to give the gift to the resident.

8. After the “teddy bear incident,” Superintendent James Ielapi instructed Grievant “in no uncertain terms that [she] was not to bring in anything for an inmate.” See Joint Exhibit 1, Grievant's statement.

9. Earl Fair was an adult inmate trustee at IHY. He performed maintenance and

groundskeeping duties for the institution, along with delivering groceries to the kitchen every week. Mr. Fair frequently did odd jobs for IHY employees, but the employees were required to get administration approval prior to using Mr. Fair for personal projects orpaying him for this work.

10. On November 8, 1997, Grievant purchased bread dough with her own money, brought it to IHY, and made pepperoni rolls for Mr. Fair. The pepperoni was the property of IHY, and Grievant prepared the pepperoni rolls while on duty at IHY.

11. Grievant prepared the pepperoni rolls only for Mr. Fair without permission from any superior.

12. On November 13, 1997, Mr. Ielapi met with Grievant, and informed her that she was being suspended, pending an investigation. He specifically explained to her that bringing in bread dough and making pepperoni rolls for an inmate was a policy violation. Grievant received a letter of the same date from Mr. Ielapi, informing her of the suspension and her right to respond to the charges.

13. Grievant asked to have a representative present during the meeting on November 13, 1997, but Mr. Ielapi did not believe that was necessary.

14. A recorded interview of Grievant was conducted by Captain Roger Elder, Chief Correctional Officer at IHY, on November 17, 1997, as part of the investigation of the pepperoni rolls incident. Grievant requested that a witness be present, which request was denied by Captain Elder.

15. Grievant's statements during the recorded interview with Captain Elder were consistent with her testimony at the level four hearing.

16. On December 4, 1997, Grievant was dismissed from her employment for the following violations of Policy Directive 400, Section 7:

A2. Abuse of state time.

B7. Unauthorized possession or use of, loss of, or damage to records,state property, or property of others.

B15. Giving or offering an unauthorized article or favor to an inmate, parolee, ex-inmate, their families or friends.

C18. Refusal to obey security-related instructions.

Discussion

Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant readily admits that she committed the act alleged, i.e., she brought in bread dough from home, prepared pepperoni rolls using her employer's property on her employer's time, and gave them to an inmate. However, she contends that her termination was, nevertheless, wrongful for a number of reasons.

First, she contends that she had no specific knowledge of the provisions of Policy Directive 400 and was not specifically warned that the conduct she engaged in was wrong. She maintains that she was given a “huge pile” of documents to read and sign at herorientation when she began employment with the institution and did not have time to read any of it. Therefore, she contends that, although she signed a document indicating her understanding of Policy Directive 400, this was not the case. Unfortunately, the vast weight of the evidence in this case contradicts Grievant's argument.

Beginning over a year prior to her dismissal, Grievant was disciplined for conduct which violated the prohibition of Policy 400 regarding giving of gifts or favors to inmates. She received discipline on two occasions, in writing, explaining to her why her conduct was wrong, and was told verbally, by her own admission, that she was never, under any circumstances, to give anything to an inmate. Then, in spite of these warnings, she brought in unauthorized items and made pepperoni rolls, which she gave to an inmate as a favor and for no other reason.

Moreover, Grievant's statements during her recorded interview with Captain Elder exhibit her

complete and thorough understanding of the policies she violated. During that interview, the following exchanges occurred:

Elder:

> . . . While you attended the WV Corrections Academy did you attend a class called supervision and discipline of an inmate . . . [?]

Nichols:

> In that class they teach you not to supervision [sic], not to show preferential towards a resident, not to put yourself in a position where you are doing favors or no uh where you can be manipulated you don't want the residents to know your weaknesses or your downfalls or that's about all I that I have to say.

Elder:

> When your [sic] talking about preferential treatment, what do you think that meant when you were taught that?

Nichols:

> Not to do anything special for anyone.

Elder: Why?

Nichols: Because it can be misconstrued as many things.

Elder: Such as?

Nichols: Well, favoritism.

* * * * *

Elder:

> While you were a member for that Basic Class did you have opportunity to read a book titled “Games Criminals Play?”

Nichols:

Yes Sir.

Elder:

Can you explain to me that book and the contents of it?

Nichols:

The book was very detailed about inmates are looked up and how they use employees to get their games and then manipulate employees into doing favors for them where they jeopardize their positions.

* * * * *

Elder:

Would it be safe to say that over the course of your employment that you have been taught on numerous times or numerous periods that you have been taught about favoritism, giving personal property to residents? Whether it be cigarettes, coffee, teddy bear, pepperoni rolls, that that is all a violation of a Divisional Policy Directive?

Nichols: Yes.

* * * * *

Elder: . . . Do you understand the seriousness of bringing in bread dough?

Nichols: Yes.

Elder: What is the seriousness of it?

Nichols:

That is because of what I did I have shown favoritism toward someone.

Elder:

What else did you do in this violation, what else consisted within this violation?

Nichols:

Violating Policy Directive for giving inmates anything from the outside.

* * * * *

Elder:

And you have read Policy Directive 400 which is Employee Standards of Conduct, correct?

Nichols: Yes.

As the foregoing exchange demonstrates, Grievant thoroughly understood the provisions of Policy Directive 400, specifically with regard to giving favors to inmates. Also, she exhibited a complete understanding of the logic behind this prohibition and the safety concerns which motivated it. Therefore, in light of all of the above information, it is nonsensical for Grievant to now claim that she was not given sufficient notice that her conduct was wrong.

Grievant's second defense to these charges is essentially “everyone was doing it.” Both Grievant and Mr. Fair testified that the other cooks at IHY frequently brought in food from the outside to give to Mr. Fair. They contend that all of the cooks either bought or cooked food and brought it in only for Mr. Fair as favors and as compensation for work he did for them. Another example from Grievant's interview with Captain Elder:

Elder:

And you already stated that you did not receive authorization to make pepperoni rolls, correct?

Nichols: Yes.

Elder:

Would you consider that an abuse of state time from utilizing your assigned duties?

Nichols: Yes.

Elder: From doing your assigned duties?

Nichols: Yes.

Elder: In making the pepperoni rolls?

Nichols: No not in making the pepperoni rolls.

Elder: So that would be unauthorized time away from your work area?

Nichols: Correct, **this has been done routinely in the past though.**

Elder: **By you?**

Nichols: **And other cooks.**

Although not specifically articulated, it is assumed that Grievant's contention in this regard is that she has been treated in a discriminatory fashion by being punished for something “everybody” did. “Discrimination” is defined by W. Va. Code § 29-6A-2(d) 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”. A prima facie case of discrimination requires the grievant to prove the following:

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

(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.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

The missing element in this case is proof that other employees have been treated differently for similar conduct. Captain Elder testified that no other cooks have been caught engaging in this type of activity. He knew of many instances when permission had been asked and granted to bring in various items for Mr. Fair or to have him perform odd jobs. However, there is no evidence to support the allegation that, with the institution'sknowledge, other cooks brought in unauthorized items or gave favors to Mr. Fair and were not punished. Just because other employees have engaged in misconduct and not been caught does not justify Grievant's actions. Moreover, she has freely admitted that she knew her conduct was a violation of policy. She has not established a prima facie case of discrimination.

Another issue raised by Grievant was Superintendent Ielapi's refusal to allow her to have representation during the November 13, 1997, meeting when she was informed she was being suspended pending investigation. Grievant has not explained why she believes she was entitled to representation at that time. If she is claiming a constitutional right to counsel, it certainly would not have been implicated here. Grievant had not been accused of any criminal act and was not being interrogated. Therefore, a right to counsel would not apply. She does not contend that she was deprived of any due process rights, and the undersigned finds no violation of any law or policy in the Superintendent's decision.

Policy Directive 400 clearly provides that removal is normally warranted when an employee commits his or her third Class B offense. Undeniably, Grievant committed three violations of Section 7, B15, by giving unauthorized items and favors to an inmate. Grievant argues that the punishment in this case was severe, and Policy Directive 400 allows consideration of mitigating circumstances to reduce the penalty in some cases. However, the policy clearly places this decision within the discretion of the employer. Section 4.02 of the policy states:

1. Mitigating circumstances include those conditions related to a given offense that would otherwise serve to support a reduction of correction

action in the interest of fairness and objectivity.

2. Mitigating circumstances may also include consideration of anemployee's long service with a history of otherwise satisfactory work performance.

While Grievant did receive very good evaluations during her first two years of employment, she had been an employee of IHY for less than three years at the time of her dismissal. Moreover, she had already been disciplined twice for misconduct within the year prior to her discharge, so this could hardly be described as a “long” history of satisfactory work performance. In his dismissal letter to Grievant, Superintendent Ielapi stated, after noting Grievant's prior misconduct:

> While any of the aforementioned occurrences, when viewed singularly, would not necessarily demonstrate inadequate performance which would warrant dismissal, the cumulative effect is one of a pattern of substandard work performance which does warrant this personnel action.

Factors to be considered in the mitigation analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, and whether the employee was warned about the conduct. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). Security is a major, inherent concern of this state's correctional institutions. Grievant has admitted that she knew her conduct violated DJS policies which are specifically directed toward maintaining security, yet she continued her pattern of familiarity with residents of IHY. Accordingly, the undersigned cannot find any mitigating circumstances which would warrant reduction of the penalty in this case.

Respondent has proven that Grievant engaged in the conduct alleged, and that dismissal was appropriate under the provisions of Policy Directive 400. Unless aggravating circumstances exist, the agency must not deviate from the policy recommendations. See Hammer v. Division of Corrections/Huttonsville Correctional Center, Docket No.94-CORR-1084 (Nov. 30, 1995). In addition, Respondent has established that Grievant was terminated for “good cause,” and it has complied with all pertinent regulations of the Division of Personnel. See Buskirk, supra.

Consistent with the foregoing discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. Pursuant to W. Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Division of Corrections' Policy Directive 400 provides that dismissal is an appropriate punishment for a third Class B offense under that policy.

4. Respondent proved by a preponderance of the evidence that Grievant violated Policy Directive 400, Section 7, Paragraphs A2, B7, B15 and C18, in bringing bread dough and making pepperoni rolls for an inmate. 5. Grievant committed at least three Class B offenses under Policy Directive 400 by giving gifts and favors to inmates.

6. Grievant was fully aware of the provisions of Policy Directive 400 regarding its prohibitions against giving gifts and favors to inmates prior to her dismissal for making pepperoni rolls for an inmate.

7. Factors to be considered in deciding whether to mitigate punishment include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, and whether the employee was warned about the conduct. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

8. Grievant has not provided evidence which would warrant mitigation in this case.

9. Grievant did not establish a prima facie case of discrimination, as that term is defined by W. Va. Code § 29-6A-2(d)

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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 toappeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: November 30, 1998 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Footnote: 2

Juvenile services and facilities were formerly within the Division of Corrections. However, the Division of Juvenile Services ("DJS") was created in early 1998, and DJS continues to utilize all former policies of the Division of Corrections.

Footnote: 3

Section 7 lists examples of types of misconduct and recommended sanctions.

Footnote: 4

Upon inspection, it was discovered that the metal tip of a playing dart had been inserted into the "butt" of the bear, which raised security concerns for the institution. Grievant's explanation was that her young daughter had placed the dart tip in the bear without Grievant's knowledge.