DANIEL WOODS,

Grievant,

v. **DOCKET NO. 97-CORR-491**

DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION

On May 8, 1997, Daniel Woods, Grievant, filed this grievance stating:

> I received a letter dated 25 April 1997 suspending me for a period of three (3) days. This suspension was for the following alleged offenses: Loafing, wasting time, or inattention to duty; and Violating safety rules where there is a threat to life. There was a simple explanation for what had taken place. I had written a letter trying to explain everything but to no avail.

As relief, Grievant seeks to “have all negative documents removed from my file and to be paid for the time I was suspended.”

Grievant's supervisor was without authority to grant relief at Level I. The grievance was denied at Level II. At Level III, Grievant failed to appear at the hearing, and the grievance was again denied. A hearing was held at Level IV on December 9, 1997. (See footnote 1) The case became mature for decision on January 6, 1998, the deadline for submission of Proposed Findings of Fact and Conclusions of Law. (See footnote 2) For reasons appearing below, the grievance is denied.

ISSUES

1. Did Respondent prove the facts upon which its disciplinary suspension was based ; and

2. Was mitigation warranted?

FINDINGS OF FACT

1 1.

> Grievant is a Correctional Officer at Respondent's Mount Olive Correctional Center (MOCC). At all times pertinent to this decision, Grievant was assigned to Quilliams II, the maximum security wing of MOCC.

2 2.

Standard operating procedure at MOCC requires that inmates sign receipt forms whenever property is delivered to them. Officers are also not to enter Quilliams II while inmates are out of their cells, as the inmates are dangerous, unpredictable and assaultive, and potential hostage situations are created when an officer is with inmates.

3 3.

On February 3, 1997, Grievant delivered property, which consisted of voluminous legal documents and/or books in a laundry cart, to one of MOCC's inmates. Grievant did not see a property receipt form with the materials, and did not have the inmate sign a property receipt when he delivered the materials. Grievant did not inquire about the property receipt form, and did not inform anyone that he had not obtained a property receipt form.

4 4.

Because Grievant had not obtained a signed receipt for the property, a search of the inmate's cell was required to locate the receipt form. Only after two separate search attempts, the second with assistance from the inmate, was the property receipt form located.

5 5.

On February 4, 1997, Officer Jason Collins was delivering mail in Quilliams II, while four inmates were out of their cells, showering. Grievant was not with Officer Collins. Uponrealizing that inmates were out of their cells in the wing, Officer Collins left the area. When questioned about entering the wing when inmates were out of their cells, both Officer Collins and Grievant replied that “we do this to show the inmates we are not afraid of them,” or something substantially similar. Grievant was not in Quilliams II while inmates were out of their cells on this occasion.

6 6.

Prior to imposing disciplinary action in response to the events of February 3 and 4, 1997, Deputy Warden Howard Painter met with Grievant to discuss the above situations. Mr. Painter explained that the incidents appeared to constitute violations of Respondent's Policy Directive 400.00, and that a five day suspension was likely. Grievant read a draft suspension letter, and discussed the matters with Mr. Painter. As a result of this meeting, Mr. Painter reduced the suspension period to three days.

7 7.

On April 25, 1997, Mr. Painter issued a letter suspending Grievant for three days. The letter explained that the incident where Grievant failed to obtain a property receipt form constituted a violation of Policy 400.00, Section A 3, “Loafing, wasting time, or inattention to duty;” and that entering Quilliams II while inmates were out of their cells constituted a violation of Section C 8, “Violating safety rules where there is a threat to life.” The letter erroneously stated that Grievant was in the wing with Officer Collins, and referenced the two officers' statements about showing inmates they are not afraid. The letter additionally noted that a file review indicated to Mr. Painter that Grievant has “a level of difficulty in conforming to the acceptable standards expected of a Correctional Officer.” Mr. Painter referenced wearing the black transportation hat,

instead of the current issue hat, with his uniform; that Grievant had "conducted [himself] while on duty at outside hospitals in such a fashion that has causedattention to be drawn" to Grievant; and that an evaluation in 1996 indicated concern with Grievant's lack of knowledge of Policy Directives, Operational Procedures, and Post Orders.

8 8.

By letter dated May 2, 1997, Grievant explained in writing that he had not entered Quilliams II while inmates were out of their cells, and that often his shift finishes passing out property for the earlier shift and the earlier shift has already obtained the property receipt forms. He wrote that he assumed the property he delivered February 3, 1997, was previously signed for by the earlier shift. He also stated that he always attempts to look his best on duty.

9 9.

By letter dated May 2, 1997, Mr. Painter corrected the error in the suspension letter, by specifically acknowledging that Grievant had not actually entered Quilliams II while inmates were out of their cells. Mr. Painter noted that, in his meeting with Grievant, Grievant had read the recitation of facts underlying the charge of violating safety rules, and understood Mr. Painter wanted to hear his explanation of events, and still Grievant failed to correct Mr. Painter's clear belief that Grievant had been in the wing with Officer Collins. Mr. Painter specifically ratified the three day suspension, writing: "Despite the fact that ... you were not in the unit with Officer Collins at the time of the incident as I had originally thought, I believe your overall action in failing to inform me of this information when you had the opportunity and your admitting to making the statement that you delivered the mail with inmates out to show the inmates you were not afraid of them, still warrants the three (3) day suspension."

10 10.

Had Mr. Painter realized, prior to April 25, 1997, that Grievant had not entered Quilliams II while inmates were out of their cells, he would still have imposed the three day suspension based upon Grievant's failure to obtain the property receipt. 11 11.

Policy 400.00 allows a three day suspension as disciplinary action for a first violation of "inattention to duty." The range of appropriate disciplinary action is from a written reprimand to a five-day suspension.

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, Grievant admitted he had not obtained the property receipt form when he delivered the property to the inmate; he merely sought to explain his action. Respondent carried its burden of proof with regard to Grievant's failure to obtain a property receipt.

Grievant sought to excuse his failure to obtain the property receipt form signature by asserting

that his shift often finishes distributing property for the prior shift. He indicated that sometimes the prior shift obtains the signed property receipt form, and then his shift delivers the rest of the property involved. He stated that he thought this situation had occurred when he delivered the property on February 3, 1997, and did not see a property receipt form on top of the laundry cart.

It seems a highly questionable practice that, in a correctional institution, it would ever be permissible for an officer to make a partial delivery of property without meticulously noting which property was and was not delivered on the property receipt form. However, Respondent did not challenge Grievant's testimony on this point, so it is accepted that such may indeed occur. Even so, Grievant's conduct is not excused by the practice. Clearly, in the factual situation presented to Grievant, conscientious conduct required Grievant to verify that no property receipt form was needed, that one had previously been obtained, or that there was some other basis for a variance from the standard operating procedure. Absent some affirmative action on Grievant's part to ensure compliance with requirements, no deviation from the standard procedure of requiring a receipt for property delivered to an inmate can be countenanced. Grievant's excuse is not acceptable.

Respondent's policy clearly permitted a five-day suspension on the basis of the first charge alone. (See footnote 3) However, Respondent's initial suspension action was based on additional grounds, which were later shown to be in error. Thus, the issue becomes partly one of mitigation, where some reasons given for the suspension are removed.

Mitigation of the penalty may be in order where some grounds upon which a disciplinary action was based are not proven, or where other factors show that the penalty is clearly disproportionate to the misconduct. See e.g.,Hercules v. W. Va. Div. of Highways, Docket No. 97- DOH-006 (Apr. 17, 1997). Often, in such cases, the penalty is imposed without the employer's awareness of factual errors. Here, Respondent was unaware of the factual error initially, but then ratified its initial suspension (which had itself been mitigated as a result of Mr. Painter's meeting with Grievant) after Mr. Painter became aware of the true facts. It is appropriate, in these circumstances, to treat the three-day suspension as having been imposed based upon the single, property receipt violation.

Policy 400 clearly allows a range of disciplinary actions up to and including a five-day suspension for the property receipt violation. Mr. Painter verified that he would have imposed a three-day suspension for this violation alone, and indeed did so by virtue of his May 2, 1997 (See footnote 4) clarification letter. While I may not have done exactly the same thing in these circumstances, I cannot

say that Mr. Painter's decision was in violation of any legal requirement, nor that it was arbitrary or capricious or clearly disproportionate to the offense proven. The grievance is denied.

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).

2 2.

Respondent proved that Grievant failed to obtain a property receipt upon delivering property to an inmate, and that the three-day suspension was within the guidelines established by Respondent's Policy Directive 400.00 for that offense alone.

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 failed to establish a valid defense to the charge of inattention to duty, in failing to obtain a property receipt when delivering property to an inmate, and failed to prove that mitigation of the disciplinary action was warranted.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: January 14, 1998

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JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

This hearing was originally scheduled for December 15, 1997. At the joint request of the parties, communicated by letter of Respondent's counsel dated December 2, 1997, the hearing was moved forward on the docket to December 9, 1997. At the hearing, Respondent moved for a continuance, as two of its witnesses were unable to appear due to scheduled medical and annual leave. The motion was denied, as Respondent had requested the earlier hearing date and should have verified the availability of its witnesses before doing so.

Footnote: 2

Respondent moved for an extension of time in which to make its post-hearing submission, by motion dated January 6, 1998, and received on January 9, 1998, on grounds that counsel "needs additional time" in which to prepare the submission. As the issues herein may be easily resolved without post-hearing submissions, and no good cause for the extension has been shown, the motionis denied.

Footnote: 3

Policy 400.00 (Nov. 10, 1987), Section 7.00(A) provides that, for Class A offenses, a first offense may be addressed through "Official reprimand to a five (5) day suspension." It also lists "A3. Loafing, wasting time, or inattention to duty" as a Class A offense.

Footnote: 4

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