

LARRY D. HAMLIN,

Grievant,

v. Docket No. 00-CORR-180

**WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,**

Respondent.

DECISION

Larry D. Hamlin (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer (CO) at the Mount Olive Correctional Complex (MOCC). He grieves a written reprimand issued on March 28, 2000. Grievant seeks the removal of the reprimand from his personnel file

This grievance was denied at Level I, on April 17, 2000, by Associate Warden of Programs Teresa Waid; and at Level II, on May 4, 2000, by Warden Howard Painter. A Level III hearing was held on May 19, 2000, before Hearing Evaluator Paula K. Gardner. CORR was represented at this hearing by Cathy Dillon, and Grievant represented himself. This grievance was denied at Level III, on May 24, 2000, by Commissioner Paul Kirby.

A Level IV hearing was held on July 5, 2000, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant again represented himself, [\(See footnote 1\)](#) and CORR was represented by Leslie Kiser Tyree, Esq. The parties were given until August 21, 2000, to submit proposed findings of fact and conclusions of law, neither party did so, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by CORR as a CO at MOCC.
2. On March 28, 2000, CORR issued a written reprimand to Grievant, alleging that he left his office unlocked and an inmate clerk, William Gatewood (Gatewood) unattended in MOCC's chapel; that he let inmates use the Chaplain's telephone without authorization; and that he let Gatewood watch movies all day.
3. Gatewood is a sex offender.
4. It was Gatewood's job to preview video tapes of religious programming for MOCC's closed circuit television system.
5. CORR's disciplinary action against Grievant was based solely upon a memo by Office Assistant II Sue Sharp (Sharp), who was concerned about being alone with Gatewood in the chapel area.
6. Sharp was not sworn as a witness at the Level III hearing in this grievance. The Level III hearing transcript reflects that the Level III Hearing Evaluator swore CORR's representative Cathy Dillon, Grievant, Rita Albury, and Religious Services Coordinator Chaplain Lewis Childers (Chaplain)(Chaplain Childers), but does not reflect why Sharp was not sworn.
7. Sharp did not testify at Level IV.
8. Chaplain Childers and Grievant let inmates use the Chaplain's telephone during their family emergencies.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

CORR based Grievant's written reprimand upon provisions of its Policy Directive 129.00

(December 1, 1999)(Policy 129), entitled Progressive Discipline, which replaces Policy Directive 400.00 (Policy 400), entitled Employee Standards of Conduct and Performance. Policy 129 is designed “to maintain a mechanism that ensures progressive discipline for employees in the classified service of the Division and is consistent with applicable policies, regulations, and statutes[.]” Policy 129 provides that “[t]he Chief Administrator has the responsibility to apply these Guidelines in a fair and equitable manner to all employees, Documenting the facts of each case[.]” that “management must demonstrate just cause for discipline[.]” and embodying “the concept of like penalties for like offenses and relationship of penalty to conduct/violation.”

Policy 129 provides a continuum of disciplinary actions, ranging from a least severe verbal warning, through written warning, suspension, and demotion, to the most severe, dismissal, and contains a list of 47 offenses which, unlike the former Policy 400, are not categorized by severity.

[\(See footnote 2\)](#)

Specifically, CORR alleges that Grievant violated § 129-V (J)(41), “[r]efusal to obey security-related instructions[.]” and (45), “[b]reach of facility security or failure to report any breach or possible breach of facility security[.]” when he allegedly left his office unlocked and an inmate clerk unattended in MOCC's chapel; when he let inmates use the Chaplain's telephone without authorization; and when he let his inmate clerk watch movies all day. Grievant denies that he left his office unlocked and his inmate clerk Gatewood unattended in MOCC's chapel; denies that Gatewood watches movies all day; admits that he let inmates use the Chaplain's telephone, but denies knowing that this violated MOCC policy; and argues that these charges are the result of animus of the part of Sharp and others. Each of CORR's charges will be addressed in turn.

With respect to the charge that Grievant left his office unlocked and an inmate clerk unattended in MOCC's chapel, Grievant stated in a letter responding to his discipline that he is very security conscious; that he checks all three doors of the chapel each time he leaves; and that he has no specific memory of what happened on March 1, 2000, because that day was 34 days before he received his written reprimand. Grievant also testified under oath at Level III that he has never left his office unattended, and that Gatewood did not have access to any confidential documents in his office.

CORR relies on the Level III testimony of Sharp, who testified that she was alone in the chapel area with inmate Gatewood, a sex offender; that Gatewood had access to confidential documents in Grievant's office; and that Gatewood watched videos and read books during his work time. [\(See](#)

[footnote 3\)](#)

However, the Level III hearing transcript reveals that Sharp was not sworn as a witness at the Level III hearing, and her unsworn testimony, which included hearsay within it, is itself hearsay. Furthermore, CORR relied on this information in its Level III decision and based most of its argument at Level IV upon her statements, as if they were established facts. [\(See footnote 4\)](#) See Bailey v. Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

Under W. Va. Code § 29-6A-6(e), formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, *supra*.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

With respect to Sharp's simple hearsay testimony, Sharp was present at Grievant's office at various times pertinent to this grievance. Other persons with first-hand knowledge who could testify included Grievant and Chaplain Childers. Her out-of-court statement was neither signed nor in affidavit form, but was transcribed. CORR gave no explanation for failing to obtain a sworn statement

from her. Her statement was not routinely made, but was the cause of CORR's investigation into this incident. Sharp's statement was inconsistent with those given by Grievant and Childers. No corroboration for her statement was offered from CORR's records; her statement was contradicted by the sworn testimony of Grievant and Childers; and the credibility of the declarant when she made the statement could not be assessed. Applying these factors, the undersigned determines that Sharp's Level III simple hearsay testimony is entitled to little weight. Applying these factors to Sharp's double hearsay Level III testimony, the undersigned determines that it is entitled to no weight.

Also at Level III, CORR presented the testimony of Chaplain Childers, who was sworn. Childers testified that he directed Gatewood to leave the chapel area when Grievant was away, and that Gatewood followed his directions.

At Level IV, CORR presented the testimony of MOCC Associate Warden of Programs Teresa Waid, who had heard from her subordinate Rita Albury, who had heard from Sharp, that Grievant left his office unlocked and Gatewood unattended in MOCC's chapel. This is triple hearsay, devoid of probative value.

CORR presented no reason for its failure to call Sharp at Level IV. It is CORR's responsibility to call critical witnesses in support of its disciplinary case. Hundley v. W. Va. Div. of Corrections, Docket No. 97-CORR-197A (May 12, 1999); Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). The sworn testimony of Grievant and Childers outweighs CORR's tide of hearsay, and CORR has failed to meet its burden of proof on this charge.

With respect to the charge that Grievant let inmates use the Chaplain's telephone without authorization, Grievant credibly testified under oath at Level III that both he and Chaplain Childers let inmates use the Chaplain's telephone during their family emergencies, and that he was not aware that he needed permission to do that. Chaplain Childers also credibly testified under oath at Level III that he let inmates use his telephone during their family emergencies, such as when he let inmate Jimmy Gardner call a Georgia hospital to inquire about a hospitalized relative. [\(See footnote 5\)](#)

CORR established that MOCC Operational Procedure #1.50 XXII (B) provides that "[i]nmates are not permitted to use a telephone designated for staff use unless specifically authorized by senior management[;]" that this policy defines senior management as "[t]he Warden, Deputy Warden, Executive Assistant and Associate Wardens[;]" and that Grievant had received in-service training in

Operational Procedure #1.50. Accordingly, CORR has established that both Grievant and Chaplain Childers violated Operational Procedure #1.50.

As noted above, Policy 129 provides that “[t]he Chief Administrator has the responsibility to apply these Guidelines in a fair and equitable manner to all employees, Documenting the facts of each case[;]” and that Policy 129 embodies “the concept of like penalties for like offenses[.]” In seeking to punish only Grievant, and not Chaplain Childers, for this improper telephone use, CORR is failing to apply Policy 129 in a fair and equitable manner to all employees, to document the facts of each case, and to apply the concept of like penalties for like offenses. Accordingly, it would be inequitable and a violation of Policy 129 to discipline Grievant for this offense without similarly punishing Chaplain Childers.

With respect to the charge that Grievant let inmate Gatewood watch movies all day, the evidence established that it was Gatewood's job to preview video tapes of religious programming for MOCC's closed circuit television system. CORR produced no testimony, other than the unsworn testimony of Sharp at Level III, discussed above, to support this charge. To the contrary, CORR submitted, at Level IV, a memo from Deputy Warden Michael Coleman to Associate Warden of Programs Waid, dated May 5, 2000, stating “William Gatewood #14302 is currently assigned as the inmate clerk for the college program[;]” noting that he was “reviewing religious tapes for possible broadcast on the inside TV channel[;]” and eliminating his position. CORR failed to establish this charge by a preponderance of the evidence.

Throughout this grievance, Grievant has contended that the charges against him resulted from some sort of animus by Sharp and others relating to a previous grievance. Certainly, the weakness of these charges and their proof; CORR's scattershot attempt at Level III to link Grievant with any possible wrongdoing in his vicinity, whether he was charged with that alleged wrongdoing or not; CORR's discipline of Grievant but not of another employee who committed the same offense; and Sharp's spiriting documents from his office while he was absent, copying them, and forwarding them on to Grievant's superiors, tends to support Grievant's view. However, this issue need not be decided, as CORR has failed to meet its burden of proof in this Grievance. Grievant's written reprimand will be rescinded and removed from his file.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. CORR's Policy Directive 129.00 (December 1, 1999)(Policy 129), entitled Progressive Discipline, is designed "to maintain a mechanism that ensures progressive discipline for employees in the classified service of the Division and is consistent with applicable policies, regulations, and statutes[.]" Policy 129 provides that "[t]he Chief Administrator has the responsibility to apply these Guidelines in a fair and equitable manner to all employees, Documenting the facts of each case[;]" that "management must demonstrate just cause for discipline[;]" and embodying "the concept of like penalties for like offenses and relationship of penalty to conduct/violation."

3. Policy 129 provides a continuum of disciplinary actions, ranging from a least severe verbal warning, through written warning, suspension, and demotion, to the most severe, dismissal, and contains a list of 47 offenses which, unlike CORR's former Policy 400, are not categorized by severity.

4. Under W. Va. Code § 18-29-6, formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

5. There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing;

whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

6. CORR's simple hearsay evidence in this grievance is entitled to little weight.
7. CORR's double and triple hearsay evidence in this grievance is entitled to no weight.
8. Respondent CORR failed to prove, by a preponderance of the evidence, that Grievant committed two of the offenses charged.
9. Respondent CORR proved, by a preponderance of the evidence, that Grievant committed one of the offenses charged. However, CORR violated its Policy 129 when it punished only Grievant, and not another equally guilty employee.
10. CORR failed to apply Policy 129 in a fair and equitable manner to all employees, to document the facts of this case, and to apply the concept of like penalties for like offenses.

Accordingly, this grievance is **GRANTED**, and Respondent CORR is **ORDERED** to rescind Grievant's written reprimand and to remove all reference to it from his personnel file.

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. Any 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: August 30, 2000

[Footnote: 1](#)

Grievant called no witnesses at Level IV, stating that he relied on the Level III record.

[Footnote: 2](#)

Policy 129 requires that written reprimands contain "[a] description of. . . expected changes in performance or behavior[.]" "[a]n offer of assistance to the employee[.]" and "[a]n opportunity to respond in person or to respond in writing[.]" Grievant's written reprimand contained none of these.

[Footnote: 3](#)

Sharp also testified that she heard Grievant tell Gatewood that he could record his own time worked. However, Grievant was not charged with this possible offense. Grievant established that Sharp had seen Gatewood's Inmate Payroll Sheet in his office; had removed it from his office without his knowledge or permission, had copied it and passed it on to his superiors. The evidence established that Grievant rejected this Inmate Payroll Sheet, and that he later submitted a corrected one.

[Footnote: 4](#)

CORR's Level III decision contains a Hearing Narrative that fails to note that Sharp was not sworn.

[Footnote: 5](#)

CORR's representative at Level III focused her questions on Chaplain Childers's practice of allowing inmates to use his telephone during family emergencies.