STEVEN BERRYMAN,

Grievant,

v.

Docket Nos. 99-CORR-443

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Steven Berryman (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer (CO) VI/Captain at the Mount Olive Correctional Complex (MOCC), until his dismissal on September 20, 1999. He filed this action directly at Level IV on or about September 29, 1999, alleging that CORR engaged in discrimination, favoritism, harassment, arbitrary and capricious decision making, retaliation, unethical practices, and defamation in dismissing him. (See footnote 1) Grievant seeks reinstatement, back pay, reimbursement of his medical expenses and other costs, attorney fees, and otherwise to be made whole. (See footnote 2)

A Level IV hearing was held on November 23 and 24, 1999, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant representedhimself, and CORR was represented by Joe Wittington, Esq. and Leslie Kiser Tyree, Esq. The parties were given until January 20, 2000, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. (See footnote 3) 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 was employed by CORR as a CO VI/Captain, for a period of approximately seven years, until his dismissal on September 20, 1999.

2. On May 14, 1997, Grievant received a counseling session for entering a restricted area without proper authorization.

3. On February 11, 1998, Grievant received a verbal reprimand for interrupting a class taught by another CO.

4. On February 25, 1999, Grievant was assigned as Shift Commander. At approximately 4:40 p.m., Grievant requested Key #28, which was for a storage room on MOCC's fourth floor.

5. The storage room contained inmate property and mattresses.

6. A short time later CO II Teresa Brown (Brown) requested Key #28, but was told that Grievant had the key.

7. A short time later Grievant and Brown were seen by Richard Barker (Barker), manager of MOCC's Mental Health Unit (MHU), leaving the elevator beside the fourth floorstorage room.

8 As it was unusual for the Shift Commander to visit the MHU, Barker and another MHU employee, Frank Fragale (Fragale), searched the MHU for Grievant, but could not find him.

9. A short time later, Grievant emerged from the storage room.

10. Grievant talked with Barker and Fragale for approximately 20 minutes.

11. Barker and Fragale positioned themselves near the MHU door, which gave them a direct view of the fourth floor elevator. They saw Grievant call the elevator to the fourth floor, and hold his hand out towards the storage room door with a gesture that implied “wait.”

12. When the elevator arrived, Brown exited the storage room and got on it with Grievant.

13. Grievant and Brown were traveling to the storage room, in the storage room, returning from the storage room, and absent from their respective duties for approximately 45 minutes (storage room incident).

14. MOCC's Investigator, Charles B. Hudson (Hudson), investigated the storage room incident, and prepared a detailed and thorough report of his findings.

15. As part of his investigation, Hudson questioned Grievant.

16. Before questioning Grievant, Hudson administered MOCC's Administrative Rights Warning to Grievant. This warning stated that “[a]nswering questions untruthfully is a violation of the West

Virginia Code and Operational Policy and Procedures. If you elect to be untruthful, you may be discharged from employment."

17. Grievant denied to Hudson that the storage room incident took place. 18. Grievant's answers were untruthful.

19. On or about April 2, 1999, CO Larry Hamlin (Hamlin) allowed 48 inmates out of their cells simultaneously during a lockdown. Hamlin received a written reprimand for this incident.

20. On a date not reflected in the record of this grievance, Hamlin allowed several Quilliams 2 inmates out of their cells simultaneously, in violation of MOCC policy. Quilliams 2 is the maximum security unit within MOCC. This resulted in the death by strangulation of inmate Blankenship. Hamlin received no disciplinary action for this incident.

21. On or about August 24, 1999, Lieutenant Howard Shifflet (Shifflet) brought a loaded .357 Magnum revolver into the Northern Regional Jail and Correctional Facility in Moundsville and left it in an unlocked locker. This gun was found by an inmate, who gave it to authorities without incident. Shifflet was not dismissed for this incident.

22. On or about August 16, 1999, CO Kevin Higginbotham (Higginbotham) left a loaded shotgun locked in a gun rack in his vehicle, with the vehicle's windows open, outside of MOCC's administration building. This made the shotgun accessible to an inmate, convicted of murder and serving a life sentence without mercy, who works in that area. Higginbotham received a written reprimand for this incident.

23. West Virginia Division of Personnel Administrative Rule 12.5 states: "[i]n dismissals for cause and other punishments, appointing authorities shall impose like penalties for like offenses."

24. CORR's Policy Directive 400.00 (Policy 400) mandates that CORR distinguish between less serious and more serious actions of misconduct and provide corrective actionaccordingly.

25. Grievant is a grievance representative for MOCC employees.

26. On April 9, 1999, Grievant was called to a meeting in the office of MOCC Warden Howard Painter (Painter). Grievant, Painter, Associate Warden for Security William Vest (Vest), and Deputy Warden Michael Coleman (Coleman) were present at the meeting.

27. Coleman asked Grievant where he saw his career going in the next few years. Grievant responded. Coleman then stated that he saw Grievant's career going nowhere, that it was over, until he learned to be a team player and stop representing people in grievances against the

administration, and that he was either a part of the administration or out.

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 itsburden of proof. Id.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

CORR based its decision to terminate Grievant upon provisions of its Policy Directive 400.00 (Policy 400), entitled Employee Standards of Conduct and Performance. Policy 400 is “designed to protect the well-being and rights of all employee[s][,] to assure safe, efficient government operations and to assure compliance with public law[;]” to “[e]stablish a fair and objective process for correcting or treating unacceptable conduct or work performance;” and to “[d]istinguish between less serious and more serious actions of misconduct and provide corrective action accordingly[.]”

Policy 400 provides three levels of disciplinary offenses. A Class A offense includes “types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” A Class B offense includes “acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal.” A Class C

offense includes “acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspensionor removal.”

Specifically, CORR alleges that Grievant violated § 407-C-4 by lying when questioned about the storage room incident; § 407-B-23 by demonstrating favoritism to Brown; and § 407-B-2 by disobeying instructions to keep a professional distance from Brown. Each of CORR's charges will be addressed in turn.

§ 407-C-4: “Falsifying any records whether through misstatement, exaggeration or concealment of facts.”

CORR alleges that Grievant violated this section by lying during Hudson's investigation of the storage room incident. (See footnote 4) See Keesucker v. W. Va. Div. Of Corrections, Docket No. 92-CORR-234 (Feb. 25, 1993). CORR argues that its Administrative Rights Warning put Grievant on notice that he could be dismissed for answering Hudson's questions untruthfully, that Grievant's answers were untruthful, and that it properly dismissed Grievant for his misstatements and concealment of facts.

CORR established, by a preponderance of the evidence, that the storage room incident took place substantially as CORR says it did. Barker's and Fragale's credible testimony to that effect, summarized above in Findings of Fact four through thirteen, was corroborated by photographic and other documentary evidence establishing the physical layout of the MHU, storage room, and elevator areas, as well as by the testimony of three other witnesses.

COs Jeffrey and Tristie Williams credibly testified that Grievant came to CentralControl and got Key #28; and that they observed, from their two separate posts, Grievant and Brown using the elevator to access the fourth floor. MOCC Warden Howard Painter credibly testified that Grievant, as Shift Commander, was in charge of MOCC and needed to remain accessible to subordinates but was not while in the storage room; that the storage room was not a duty post for any CO; that Grievant's being alone in a storage room with a female subordinate was inappropriate; that he expects total honesty from his ranking officers; and that he concluded from Hudson's investigation that Grievant's answers to Hudson's questions were untruthful.

Grievant did not dispute either the underlying storage room incident or that he was untruthful during Hudson's investigation. Grievant instead chose to focus on minor procedural flaws of Hudson's investigation, and minor inconsistencies in the testimony of CORR's witnesses. Given the

credible and generally consistent testimony of CORR's several witnesses, described above; given the fact that no evidence placed Grievant anywhere within the tightly monitored MOCC other than the storage room at the time in question; and given that CORR produced some evidence of an intimate relationship between Grievant and Brown, CORR's charge that Grievant misstated and concealed facts by answering Hudson's questions untruthfully, a Class C offense, is established by a preponderance of the evidence.

§ 407-B-23: "Other actions of a similar nature and gravity. To wit, you demonstrated favoritism towards an employee, CO II Teresa Brown."

CORR alleges that Grievant violated this section by spending too much time talking on the telephone with Brown; by spending too much time at her various duty posts; by givingher more breaks to eat and/or smoke than other COs; by bringing meals to her; and by sitting with her in a vehicle while they attended firearms training.

COs Jeffrey Williams, Glen Ellison, Scott Howard and Unit Manager Mary Harper credibly testified for MOCC that Grievant demonstrated favoritism to Brown, as described above. COs Steven Caudill, James Brown, Brian Browning, Sherri Cook, James Vaught, Sr., and Lieutenant Steven Hale partially corroborated some parts of MOCC's witnesses' testimony, but credibly testified that Grievant did not show favoritism to Brown. Grievant did not dispute that he demonstrated favoritism to Brown.

Given that a preponderance of the testimony tended to establish that Brown's lot at MOCC was not as difficult as other officers', and bearing in mind that the undersigned has already concluded that the storage room incident took place, it is concluded, by a preponderance of the evidence, that Grievant committed this Class B offense. (See footnote 5)

§ 407-B-02: "Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy or procedures."

CORR alleges that Grievant violated this section when he failed to maintain a professional distance from Brown after being told to do so by Vest. However, CORR produced no evidence, and called no eyewitnesses, to prove that such a discussion tookplace. Given that Vest credibly testified that it did not, it is concluded that Grievant was not ordered by Vest to keep a professional distance from Brown.

At the Level IV hearing, CORR introduced a memo, dated February 10, 1999, in support of this charge. In that memo, Vest instructs Grievant that his duties are in the Medical Unit, and not in the

Operations Office, and that he should only get involved with the Operations Office in life and death situations. However, this memo does not mention Brown, and plainly does not rise to the level of an order from Vest that Grievant keep a professional distance from Brown.

Accordingly, CORR has failed to establish, by a preponderance of the evidence, this Class B offense.

CONCLUSION

CORR has established that Grievant committed one Class C offense and one Class B offense under Policy 400. Grievant argues that the punishment imposed for these offenses, dismissal, is so disproportionate to the discipline imposed by CORR for similar and greater offenses committed by other COs as to constitute discrimination under W. Va. Code § 29-6A-2(d), and alleges that he was the victim of retaliation for his activities as a grievance representative for MOCC employees.

W. Va. Code § 29-6A-2(d) defines "discrimination" 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." To establish a prima facie case of discrimination, Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

The record in this grievance reflects that Grievant was similarly situated, in a pertinent way, to other COs who were subject to CORR and MOCC policies, committed violations of them, and were subject to discipline under Policy 400. Grievant further established that he was, to his detriment,

treated by his employer in a manner that other COs were not, in a significant particular; by being charged with several offenses, and by being dismissed, when other COs who violated CORR and MOCC policies were not.

Grievant has also established that the difference between his treatment by CORR and the treatment CORR afforded other COs who violated CORR and MOCC policies was unrelated to their actual job responsibilities, (See footnote 6) because he established, by a preponderance of the evidence, that other COs committed violations of CORR and MOCC policies far more serious than his yet received little or no discipline from CORR. Warden Painter briefly reiterated his credible testimony, given the day before in Stone v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 99- CORR-390 (February 10, 2000), that CO Larry Hamlin (Hamlin) allowed several Quilliams 2 inmates out of their cells simultaneously, in violation of CORR policy, which resulted in the death by strangulation of inmate Blankenship, and that Hamlin received no disciplinary action for this incident although he should have been fired; that Hamlin allowed 48 inmates out of their cells simultaneously during a lockdown, and that Hamlin received a written reprimand for this incident; that CO Kevin Higginbotham (Higginbotham) left a loaded shotgun locked in a gun rack in his vehicle, with the vehicle's windows open, outside of MOCC's administration building, which made the shotgun accessible to an inmate, convicted of murder and serving a life sentence without mercy, who works in that area, and that Higginbotham received a written reprimand for this incident; and that CO Howard Shifflet (Shifflet) brought a loaded .357 Magnum revolver into the Northern Regional Jail and Correctional Facility in Moundsville and left it in an unlocked locker, where it was found by an inmate, who gave it to authorities without incident; and that Shifflet was not dismissed for this incident.

It must be noted that the Higginbotham incident described above had the direct effect of placing an inmate incarcerated for murder in the vicinity of a loaded shotgun. The Shifflet incident had the direct effect of placing a loaded gun in an inmate's hand, and one of the Hamlin incidents directly resulted in the death of an inmate. (See footnote 7) In contrast, Grievant'suntruthfulness had the less serious effect of causing Warden Painter to lose faith in Grievant's honesty.

Grievant has established a prima facie case of discrimination. Because CORR has not offered or proven a legitimate, nondiscriminatory reason for its decision to dismiss Grievant while failing to similarly discipline other COs for similar and greater offenses, Grievant has established that he was

the victim of discrimination by CORR with respect to the punishment, dismissal, imposed by CORR. This is also a plain violation of West Virginia Division of Personnel Administrative Rule 12.5, which states: "[i]n dismissals for cause and other punishments, appointing authorities shall impose like penalties for like offenses," See Stone, supra, as well as Policy 400's direction to "[d]istinguish between less serious and more serious actions of misconduct and provide corrective action accordingly[.]"

Grievant also asserts that he was the victim of retaliation or reprisal for his activities as a grievance representative for MOCC employees. A citizen has the right to be free from retaliation by a public official for exercising his First Amendment right to speak, "because retaliatory actions may tend to chill individuals' exercise of constitutional rights." A.C.L.U. v. Wicomico County, Md., 999 F.2d 780 (4th Cir. 1993). Retaliatory acts are "a potent means of inhibiting speech." Pickering v. Bd. Of Educ., 391 U.S. 563 (1968). By engaging in retaliation, public officials restrain speech, impermissibly interfering with constitutional rights. Perry v. Sinderman, 408 U.S. 593 (1972). The purpose of statutes prohibiting retaliation is to make it unlawful for an employer to punish an employee for his protected activity, such as filing a grievance and pursuing it vigorously. See Harvey v. Merit Systems Protection Bd., 802 F.2d 537 (D.C. Cir. 1986).

Under West Virginia's statutory scheme, "[r]eprisal" means the retaliation of anemployer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p). "No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination." W. Va. Code § 29-6A-3(h). CORR's Policy 400 § 407-B-13 makes "any reprisal action taken against an employee for filing a discrimination complaint or grievance" a Class B offense.

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time

that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 365 S.E.2d 251 (W.Va. 1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (Dec. 1992).

The undersigned can take administrative notice that Grievant represented other MOCC employees in grievance procedure, a protected activity, and that CORR knew of his status as a grievance representative, because the undersigned has conducted Level IV grievance hearings where Grievant and CORR's attorneys presented grievances for decision. As noted above, Grievant was subsequently treated in an adverse manner byCORR, by being dismissed.

Grievant argues that a memo, dated April 9, 1999, helps prove that this adverse treatment was motivated by CORR's desire to retaliate against Grievant for his protected grievance activity. Grievant wrote this “To Whom it May Concern” memo to memorialize what occurred in a meeting in Warden Painter's office, attended by Grievant, Painter, Vest, and Coleman. Grievant's memo states that Coleman asked him where he saw his career going in the next few years; that Grievant responded; that Coleman then stated that he saw Grievant's career going nowhere, that it was over, until he learned to be a team player and stop representing people in grievances against the administration, and that he was either a part of the administration or out. Grievant's memo is hearsay.

Under W. Va. Code § 29-6A-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 Jennings v. Wyoming County Bd. Of Educ., Docket No. 98-55-379 (Mar. 10, 1999); 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 tohearsay 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 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).

Applying these factors, the undersigned determines that Grievant's memo is entitled to some weight. Grievant was present at the meeting that was the subject of the memo, as was another witness, Vest, but did not testify. His out-of-court statement was, of course, in writing, bore his name but not his signature, and was not in affidavit form. Grievant gave no explanation for failing to offer a signed or sworn statement in place of his memo. He also could not reasonably be seen as a disinterested witness to the event, having just allegedly been threatened. As to being routinely made, his memo appears to be a reasonable attempt to memorialize an extraordinary incident. Ample corroboration for his statement was offered from Vest, discussed below, his statement was only slightly contradicted by the testimony of Painter; and the credibility of the declarant when he made the statement could not be assessed.

Particularly significant to the determination that Grievant's hearsay evidence is entitled to some weight is the testimony of Associate Warden of Security Vest. Vesttestified that the meeting took place as reflected in Grievant's memo; that Grievant was threatened with retaliation for his role as a grievance representative; and that Grievant was told to become a team player or his career would not progress.

If credible, this testimony not only bolsters the weight given to Grievant's hearsay evidence under the Borninkhof factors, set forth above, but provides independent corroboration, from one of the four men in the room, that Coleman threatened to end Grievant's career in retaliation for his protected grievance activity.

Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ

should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Applying these factors to Vest's testimony, the undersigned concludes that his demeanor was straightforward; that he answered questions directly but with some reluctance; that he had an excellent opportunity to perceive the events of the April 9, 1999, meeting and communicate them; that his reputation for honesty is unknown; that his attitude towards what was said in the meeting was one of concern, as he testified, that he himself might be subjected to retaliation; and that he made no admission of untruthfulness. Further,no bias, interest, or motive was apparent. Vest had made no prior statements regarding the meeting; the existence of Coleman's threat of retaliation was corroborated by Grievant's memo memorializing it; and that Vest's testimony regarding Coleman's retaliation threat was plausible, both because of the testimony of several witnesses regarding retaliation at MOCC, described below, and because claims of retaliation and anti-union animus are common at CORR. Hundley v. W. Va. Div. of Corrections, Docket No. 97-CORR-197A (May 12, 1999); Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 31, 1997); Hindman v. W. Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Ferrell v. W. Va. Div. of Corrections, Docket No. 96-CORR-194 (Jan. 31, 1997). Vest's testimony is deemed credible.

The fact that the April 9, 1999, meeting took place substantially as Grievant said it did was also partially corroborated by the testimony of Warden Painter. Painter testified that the meeting took place, but that Coleman told Grievant that he would not rise above the rank of Captain, and told him that he was a member of the administration and should be loyal. It is also significant that CORR did not call Coleman, or indeed any witness, to say that Grievant was not the victim of the retaliation threat described in his memo.

CORR presented no reason for its failure to call Coleman to rebut the evidence of a threat of retaliation by Coleman. 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); Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97- BOD-497 (June 15, 1998); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Retaliatory motivation need not be

inferred in this grievance, Frank's Shoe Store, supra, because the record provides direct evidence of it. Accordingly, Grievant has established a prima facie case of retaliation. As CORR has failed to offer any theory to rebut this prima facie case, the undersigned finds that Grievant has proven, by a preponderance of the evidence, that he was the victim of retaliation or reprisal by CORR.

Deputy Warden Coleman's threat to Grievant, made in the meeting of April 9, 1999, and his subsequent dismissal, represents perhaps the clearest case of retaliation for protected grievance activity ever seen by this Grievance Board, which has decided more than 4,100 grievances. See Blake v. Dep't of Transportation/Div. Of Highways, Docket No. 97-DOH-416 (May 1, 1998); Lopez v. Bd. Of Trustees/W. Va. Univ., Docket No. 97-BOT- 441 (Mar. 20, 1998); Burchell v. Bd. Of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997); Conner v. Barbour County Bd. Of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Myers v. W. Va. Dep't of Natural Resources, Docket No. 90-DNR-455 (Mar. 28, 1991); Webb v. Mason County Bd. Of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Wyatt v. Marshall Univ., Docket No. BOR2-87-044-1 (Sept. 29, 1987); Miller v. Berkeley County Bd. Of Educ., Docket No. 30-86-068 (Mar. 31, 1986); Scott v. Jackson County Bd. Of Educ., Docket No. 18-86-009 (Mar. 21, 1986).

Coleman, in Warden Painter's office and presence, threatened to end Grievant's career because Grievant is a grievance representative for MOCC employees. Grievant continued to represent MOCC employees in their grievances, and five months later Grievant was fired. A grievant dismissed in an act of retaliation may be reinstated. Burchell, Myers, supra. It is unthinkable that Grievant's dismissal should stand in the face of the discrimination and blatant retaliation proved in this grievance. The undersigned was presented with a picture of a MOCC rife with retaliation and factionalism. Chief Correctional Officer/Major Paul Parry credibly testified that he was afraid of retaliation, and that the three days of hearings in this grievance and the Stone grievance were the most difficult of his career. Vest credibly testified that he fears retaliation from anyone, including Grievant; that you don't know who to trust at MOCC; that he worries most about the people he works with; and that, as noted above, Coleman threatened to end Grievant's career if he continued to be a grievance representative. Lieutenant Steven Hale credibly testified that he was afraid of retaliation by MOCC for his testimony on behalf of Grievant. Edrice Stalker demanded to make a statement on the record that she believed retaliation from Grievant for her testimony on behalf of CORR was a certainty. Fragale credibly testified that he was scared to death to testify due to Grievant's position and intimidating manner.

Some officials at CORR and MOCC do not seem to grasp the value of the grievance procedure for public employees, by which many disputes have been resolved fairly and quickly, without resort to the courts, to the benefit of public employers, public employees and the citizens of this State. The grievance procedure helps to resolve disputes quickly by offering a channel for communications, helps to prevent improper actions against public employees involving a broad range of personnel matters, including questions of discipline, reductions in force, promotion, transfer, compensation, discrimination and favoritism. The procedure helps prevent costly litigation in the courts involving current and former employees, and is intended to benefit the administration as well as employees, by providing a resolution process for disputes that might otherwise lead to more costly litigation or degenerate into disorder in the high-pressure environment of a correctional facility. It is not disloyal to participate in the grievance process. CORR and MOCC are advised to respect the grievance procedure for state employees set forth in W. Va. Code § 29-6A-1, et seq., for the benefit of administration and employees alike.

Ordinarily, the undersigned could not sustain a disciplinary action in the face of the degree of discrimination and retaliation present in the record of this grievance. However, this disciplinary action concerns a very serious breach of trust by Grievant. Lying to an employer, particularly in such a boldfaced manner, is the kind of breach of trust that grievously undermines an employer's confidence in an employee. See FMC Corp. v. W. Va. Human Rights Comm'n, 184 W. Va. 712, 403 S.E.2d 729 (1991). Under these extraordinary circumstances, CORR's discrimination and blatant retaliation will not stand as a complete bar to discipline.

Therefore, the only issue remaining to be resolved is what discipline should be imposed. W. Va. Code § 29-6A-5(b) provides that "[h]earing examiners may provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article[.]" In construing the virtually identical language of W. Va. Code § 18-29-5, regarding the grievance procedure for education employees, the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), held as follows: “[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.”

Under Policy 400, a first Class B offense warrants a suspension of from five to fifteendays, and a first Class C offense warrants a suspension of from 16 to 30 days. (See footnote 8)

Respondent CORR has failed to meet its burden of proving, by a preponderance of the evidence, that Grievant should have been dismissed. Consistent with this Board's authority to fashion relief, and bearing in mind the seriousness of both Grievant's dishonesty and favoritism, and CORR's discrimination and retaliation, the following relief is deemed fair and equitable in this grievance. Respondent CORR will be ordered to suspend Grievant for the maximum period of time under the range of penalties set forth in Policy 400 for one Class C first offense, 30 days, and one Class B first offense; 15 days, for a total of 45 days suspension without pay. (See footnote 9) CORR will be required to reimburse him for his lost wages and benefits, including any overtime that he would have worked had he not been dismissed, with interest; to remove any reference to his dismissal from his file; to grant him any promotions to which he would have been entitled had he not been dismissed, and to restore his seniority.

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. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Discrimination is defined 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." W. Va. Code § 29-6A-2(d).

4. To establish a prima facie case of discrimination, Grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his 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.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

5. Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6 6.

Grievant established a prima facie case of discrimination.

7. Respondent CORR failed to offer a legitimate reason to rebut the presumption of discrimination created by Grievant's prima facie case.

8. Grievant established, by a preponderance of the evidence, that he was the victim of discrimination when CORR dismissed him while failing to similarly discipline other COs for similar and greater offenses.

9. In dismissals for cause and other punishments, appointing authorities shall impose like penalties for like offenses. West Virginia Division of Personnel Administrative Rule 12.5.

10. CORR's Policy Directive 400.00 (Policy 400) mandates that CORR distinguish between less serious and more serious actions of misconduct and provide corrective action accordingly.

11. Respondent CORR failed to impose like penalties for like offenses, and to distinguish

between less serious and more serious actions of misconduct and provide corrective action accordingly.

12. Respondent CORR proved, by a preponderance of the evidence, that Grievant committed one Class C first offense by lying during Hudson's investigation of the storageroom incident, and one Class B first offense by showing favoritism to Brown.

13. “Reprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W.Va. Code § 29-6A-2(p).

14. To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that grievant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 365 S.E.2d 251 (W.Va. 1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

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15. Grievant established a prima facie case of retaliation.

16. Respondent CORR failed to offer a legitimate reason to rebut the presumption of retaliation created by Grievant's prima facie case.

17. Grievant proved, by a preponderance of the evidence, that he was the victim of retaliation and/or reprisal by CORR.

18. No reprisals of any kind shall be taken by any employer or agent of the employer against any participant in the grievance procedure by reason of such participation. Any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination. W. Va. Code § 29-6A-3(h).

19. W. Va. Code § 18-29-5(b) authorizes the undersigned to provide such reliefas is fair and equitable.

20. Grievant's dismissal cannot be upheld, when balanced against the discrimination and blatant retaliation proved in this grievance.

Accordingly, this grievance is **GRANTED IN PART,** and Respondent CORR is **ORDERED** to suspend Grievant for 45 days without pay, to reinstate Grievant; to reimburse him for his lost wages and benefits; including any overtime that he would have worked had he not been dismissed, with interest; to remove any reference to his dismissal from his file; to grant him any promotions to which he would have been entitled had he not been dismissed, and to restore his seniority.

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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: March 10, 2000

Footnote: 1

1 Due to the outcome of this Decision, Grievant's claims of favoritism, harassment, arbitrary and capricious decision making, unethical practices, and defamation need not be decided.

Footnote: 2

2 Attorney fees are not awarded by this Grievance Board, Smarr v. Wood County Bd. Of Educ., Docket No. 54-86-062 (June 16, 1986), and Grievant was not represented by an attorney. Grievant also failed to establish that he had any medical expenses as a result of his dismissal.

Footnote: 3

3 Grievant submitted his own proposals, and CORR's were submitted by paralegal Cindy L. Quillen. CORR's proposals did not address Grievant's claims of discrimination and retaliation.

Footnote: 4

4 CORR's letter dismissing Grievant does not charge him with any violation of Policy 400 for the storage room incident itself, but only for allegedly lying about it during Hudson's investigation.

Footnote: 5

5 As noted in Stone v. W. Va. Div. Of Corrections, Docket No. 99-CORR- (February 10, 2000), the portion of Policy 400 relied upon by CORR does not appear to exist. The list of Class B offenses in the copy of Policy 400 introduced as Respondent's Exhibit Seven ends with B-22: "[s]leeping during working hours while at non-security posts." However, the undersigned accepts, for the purposes of this decision, that a "catch-all" disciplinary provision was employed by CORR, similar to Policy 400 §§ 407-A-11 and 407- C-24: "[o]ther actions of similar nature and gravity."

Footnote: 6

6 No evidence was presented to show that Grievant agreed to this difference in treatment in writing.

Footnote: 7

7 CO Hamlin reasonably should have foreseen that releasing more than one Quilliams 2 inmate at a time, in violation of CORR policy, could result in an inmate being murdered, as numerous inmates have been murdered in Quilliams 2. See Ferrell v. W. Va. Div. Of Corrections, Docket No. 96-CORR-194 (Jan. 31, 1997).

Footnote: 8

8 CORR did not rely upon Grievant's previous counseling session or verbal reprimand in dismissing him.

Footnote: 9

9 In making this determination, the undersigned is aware that Policy 400 permits increased penalties when aggravating circumstances exist. Policy 400 § 4.02-A states "[w]hen in the judgment of the Commissioner, and/or the appointing authority, aggravating circumstances exist specified corrective action or sanctions may be increased." However, because CORR made no finding of aggravating circumstances in its letter dismissing Grievant, because CORR did not argue, either at the Level IV hearing or in its proposed findings of fact and conclusions of law, that aggravating circumstances exist, and due to the egregious nature of the discrimination and retaliation proved, Grievant's penalty will not be increased beyond the range of penalties set forth in Policy 400.