MARK McMILLION,

Grievant,

v. Docket No. 00-CORR-208

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

Grievant, Mark McMillion, is employed by the Division of Corrections ("CORR") at the Anthony Correctional Center ("ACC"). He filed this grievance on April 26, 2000. (See footnote 1) **His Statement of Grievance reads:**

> **I was given a written reprimand for being disrespectful to a supervisor. This did not show progressive discipline under P.D. 129**
>
> **Relief Sought: Remove written reprimand from files[.] [U]se Policy Directive at a level no higher than a counseling statement.**

Grievant received a written reprimand for confronting his supervisor over an unannounced schedule change.

This grievance was denied at all lower levels. However, the Level III Hearing Examiner also stated it was a poor management decision for the Unit Manager to announce changes to the residents about the staffs' schedule without prior discussion with the staff in question. Grievant appealed to Level IV on June 23, 2000. There were two continuances for good cause, and then the parties agreed to submit this case on the record developed below. This case became mature for decision on November 17, 2000, the deadline for the submission of the parties' proposed findings of fact and conclusionsof law. Both parties declined to present these proposals. (See footnote 2) **This case was assigned to the undersigned Administrative Law Judge on December 28, 2000, for administrative reasons.**

Issues and Arguments

Respondent maintains Grievant's actions warranted a written reprimand as he was aggressive and physically confrontive in a conflict with his second level supervisor. CORR notes that, per Policy, a more severe penalty may be given if the behavior warrants it. CORR also notes Grievant had received, in the recent past, a verbal counseling for similar behavior. Grievant argues CORR did not follow progressive discipline, and the punishment of a written reprimand was too severe for the offense committed. Grievant believes his actions warranted a verbal counseling.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by CORR at ACC as a Counselor.

2. On April 4, 2000, without prior notice to the counseling staff, Jonathan White, Unit Manager, told the ACC residents that in response to their complaints the counselors would be available later in the evening to work with them.

3. This comment upset Grievant, and he asked one of his first level supervisors, Tammy Alderson, Case Manager, if this announcement was correct. Ms. Alderson statedthis change had been discussed, but as far as she knew no final decision had been reached. Grievant informed Ms. Alderson he would not work later hours.

4. While Grievant was discussing this issue with Ms. Alderson, Mr. White walked past. Grievant left Ms. Alderson's office and approached Mr. White in a more public area. Grievant questioned Mr. White about the change, and Mr. White told him it was probably going to happen.

5. During this discussion, Grievant raised his voice and leaned over the desk where Mr. White was sitting. Mr. White felt somewhat threatened by this behavior as he did not know what Grievant intended to do.

6. Mr. White told Grievant he was not going to argue and started to leave the room.

7. Mr. White pulled out his pen and told Ms. Alderson he wished to see her.

8. Grievant asked Mr. White what he was doing with his pen and stated, "You are not

going to write me up. I didn't do anything." Mr. White responded, "It is my pen."

9. On April 5, 2000, Mr. White sent a memo to Grievant's first line supervisor, David Delp, recounting the episode.

10. On April 12, 2000, Grievant received a written reprimand from Mr. Delp and Ms. Alderson, noting his behavior during the confrontation and giving directions as to what the proper behavior should be, if Grievant again disagreed with management's decisions.

11. Mr. White's supervisees have complained about his management style in the past, and he has received verbal counseling from his supervisors about his interactionswith his supervisees. Mr. Delp once submitted his resignation, in part, because of difficulty in his interactions with Mr. White, his immediate supervisor.

12. Grievant received verbal counseling within the past two years for similar behavior.

(See footnote 3)

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

It this case Grievant does not dispute that he engaged in a verbal altercation with his supervisor; what he does contest is the level or severity of the punishment. He argues CORR did not follow Policy Directive 129, and CORR did not comply with the requiredprogressive discipline plan. Thus, the issues are whether CORR followed Policy Directive 129, and whether the punishment should be mitigated.

Policy Directive 129 allows for the increase of the punishment "when a more serious infraction" takes place. Additionally, Grievant recently received verbal counseling for similar behavior. Accordingly, progressive discipline has been followed in this incident. The argument that Grievant's written reprimand was excessive given the facts of the situation, is

an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also includeconsideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge finds Grievant knew his actions were inappropriate.

He had received verbal counseling in the past, and after this confrontation it was clear he was worried he would receive a reprimand for his action because he told Mr. White he couldn't write him up.

In this instance, CORR believed Grievant acted inappropriately when he confronted his supervisor in a somewhat public area, raised his voice, and leaned across the desk. The undersigned Administrative Law Judge cannot find this disciplinary action is "so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." Overbee, supra. Accordingly, the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. Additionally, as noted in note 1, supra, a supervisory group did look at Grievant's two written reprimands, and it reduced one to a verbal counseling. This action demonstrates this particular written reprimand was reconsidered and found to be warranted, while the other was considered too severe and was decreased. Therefore, CORR's action do not appear arbitrary and capricious. However, the undersigned Administrative Law Judge agrees with the Level III Evaluator that decisions affecting the welfare and schedule of employees should be discussed and explained to staff prior to their implementation, and Mr. White's failure to do so demonstrated poor management skills.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. CORR's issuing of a written reprimand to Grievant in this situation fell within the guidelines of Policy Directive 129. 3. The argument that Grievant's written reprimand was excessive is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent

disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

4. Grievant did not meet his burden of proof and demonstrate the punishment he received in this matter was excessive, clearly disproportionate, or an abuse of discretion.

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." 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 9, 2001

Footnote: 1

Grievant had received two written reprimands. At his request, several supervisors met to discuss them. One of the written reprimands was reduced to a verbal counseling. The other written reprimand, this one, was not reduced.

Footnote: 2

Grievant was represented by Jack Ferrell from the Communications Workers of America at Level IV, and he was pro se at Level III. Respondent was represented at Level III by Adrian Hoak, and by Attorney Leslie Tyree at Level IV.

Footnote: 3

Grievant testified he had received a written reprimand in the past when he worked at Denmar. Apparently, he did not report this written reprimand to the federal Bureau of Prisons when he applied for and received a position with them, because he had been told by CORR that it would be removed from his file. When the Bureau of Prisons found out about the written reprimand, Grievant was forced to resign from his federal position.

Apparently, Grievant's key concern with this written reprimand is his desire to reapply for a position with the Bureau of Prisons, and he believes this disciplinary action will thwart his chances.