DENNY R. MORRIS,

Grievant,

v. **Docket No. 02-CORR-137D**

DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Denny R. Morris, employed by the Division of Corrections (DOC or Respondent) as a Correctional Officer II at the Northern Regional Jail and Correctional Facility (NRJCF), filed a level one grievance on March 24, 2002, seeking the reduction of a two day suspension to a verbal warning and counseling. The parties agreed to waive consideration at level one, and a level two conference was conducted on April 11, 2002. Grievant alleged a default occurred at level two when a decision was not provided until April 19, 2002. A level four hearing on the issue of default was conducted on June 27, 2002, and an Order Granting Default was issued on July 17, 2002. A subsequent hearing was conducted on August 21, 2002, for the purpose of determining whether the remedy requested by Grievant was clearly wrong or contrary to law. Grievant was represented by Correctional Counselor Greg Yahnke, and DOC was represented by counsel, Heather Connolly. The parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for consideration at the conclusion of the hearing.

The following findings of fact are based upon the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a Correctional Officer II at the Northern Regional Jail and Correctional Facility at all times pertinent to this grievance. 2. On February 22, 2002, two inmates of the DOC were patients at the Ohio Valley Medical Center. One patient was located on the first floor, while the other was in the Intensive Care Unit located on the fourth floor.

3. Grievant was assigned a double shift beginning at 11:00 p.m. on February 22, 2002. At this time Grievant was assigned to guard the patient on the first floor. No incidents occurred during this first shift.

4. At the end of the first shift, Grievant reported to the fourth floor for the second shift. The inmate was not cuffed or shackled, and Grievant did not observe any post orders at this location.

5. NRJCF Operational Procedure #4.10-3 requires that hospitalized inmates "will be shackled at all times." Should a physician order that an inmate not be shackled a specific procedure is to be followed which requires that the physician sign the log maintained by the NRJCF stating the name of the inmate and the reason for the action.

6. Following an investigation of the incident, Major Rick Lohr recommended that Grievant receive a five day suspension; however, Warden Evelyn Seifert elected to impose a two day suspension.

7. DOC follows a progressive discipline policy for classified employees which begins with a verbal warning followed by a written warning, suspension, demotion, and dismissal. This policy does not require that a verbal warning be given for a first offense, but provides that the level of discipline should be determined by the severity of the violation. Progressive discipline is applied as appropriate and required.

Discussion

Because Grievant is presumed to have prevailed by default, the burden of proof is upon DOC to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

NRJ&CF Operational Procedure #4.10-3 provides that "[i]nmates transferred to Reynolds Memorial Hospital for admission will be shackled at all times." (See footnote 1) The only exception to this requirement is when ordered by a physician, who must provide the reason for the action. Respondent asserts that Grievant's failure to comply with the policy and shackle a hospitalized inmate jeopardized the safety of hospital personnel, his fellow officers and himself.

Grievant asserts that the level of discipline should be reduced, consistent with Respondent's progressive discipline policy, and in consideration of mitigating circumstances. Those circumstances are that; (1) there were no post orders at the ICU; (2) the inmate was not cuffed or shackled when he assumed the assignment; and, (3) he relied upon the direction of the officer previously on duty that

he only needed to handcuff the inmate if he went to the restroom. (See footnote 2) DOC Policy Directive 129.00 “Progressive Discipline” establishes levels of discipline which may be imposed when an employee exhibits initial or continuing unacceptable work behavior or performance. These levels range from a verbal warning, when the deficiency is not of a serious or repetitious nature, to dismissal when the deficiencies continue after the employee has had adequate opportunity for correction or commits a singular offense of such severity that dismissal is warranted. Suspensions are issued in cases of continuing infractions or when a more serious singular incident occurs.

Respondent has provided evidence sufficient to meet the clear and convincing standard for establishing that further reduction of the two day suspension imposed upon Grievant would be clearly wrong. As a Correctional Officer, Grievant is responsible for maintaining inmate security, wherever the location. When an inmate is outside the institution, the Correctional Officer must be particular diligent in maintaining the security of civilians, and for that reason, DOC Policy requires that inmates remain shackled. Warden Seifert apparently considered the mitigating circumstances when she did imposed a two day suspension rather than the recommended five day suspension, and to further reduce the discipline to a verbal warning would be clearly wrong.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Once a grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. Luzadder v. W. Va. Dep't of Transp./Div. ofHighways, Docket No. 02-DOH-025 (Aug. 12, 2002); Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. Respondent has proven by clear and convincing evidence that the relief requested by Grievant, reduction of the discipline to a verbal warning, would be clearly wrong.

Accordingly, the 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 §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 19, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Although the policy refers to Reynolds Memorial Hospital a number of times, in an earlier section it states that it refers to a number of hospitals. Reynolds is simply the most frequently used medical facility.

Footnote: 2

Respondent's administrators indicated that other officers were disciplined as a result of this incident.