TONY WALTON,

Grievant,

v. **DOCKET NO. 03-CORR-109**

DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

D E C I S I O N

On March 10, 2003, Grievant, Tony Walton, filed a grievance at Level II against his employer, Respondent, Division of Corrections/Mount Olive Correctional Complex ("Corrections"), challenging discipline imposed upon him as being excessive. The discipline was a 10 day suspension, as well as a demotion with a pay cut. As relief Grievant requested that one or more of the disciplinary actions be rescinded, as he felt the discipline was excessive. (See footnote 1) The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant was hired by Corrections on September 19, 1994. Prior to March 3, 2003, Grievant was employed by Corrections as a Correctional Officer IV, at an annual salary of $26,436.00. He had been promoted from a Correctional Officer III to Correctional Officer IV on February 16, 2000.

2. A female co-worker filed a complaint alleging Grievant had intentionally touched her, brushing her hair back and kissing her on the neck. Grievant admitted he had placed his arm around the complainant's shoulder.

3. An investigation into the complaint was conducted. The investigation concluded that “inappropriate contact did take place and this contact was unwelcome and inappropriate in the workplace.”

4. By letter dated March 3, 2003, Grievant was suspended without pay for 10 days, demoted to

a Correctional Officer III, and his annual salary was reduced to $25,128.00.

5. On March 7, 2001, Grievant was suspended for five days without pay after an investigation concluded that he had made inappropriate comments of a sexual nature to a female co-worker, and that he had engaged in “unwanted touching” of the female co- worker. The suspension letter stated, “I am giving you final warning that you will be immediately dismissed if any future violation by you involves prohibited verbal or physical sexual behaviors with another employee.”

Discussion

Grievant did not contest the charges against him. The primary issue presented is whether the discipline Grievant received was too severe. “The argument a disciplinary action 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).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). 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); Huffstutlerv. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

In support of his belief that the punishment was too severe, Grievant pointed to the fact that an

employee of St. Mary's Correctional Center had received only a 10 day suspension after an EEO complaint was filed against him. However, Grievant did not present any evidence that his fellow employee had committed a second offense, nor was there any evidence as to exactly what this other employee had done.

The undersigned cannot conclude that the discipline imposed upon Grievant was clearly excessive or an abuse of discretion, given that Grievant had previously engaged in a similar act only two years before, and had been disciplined at that time and warned that Corrections considered such acts to be serious offenses.

Grievant also alleged that Corrections did not follow the Division of Personnel's Rules for reducing an employee's salary upon demotion, arguing his pay should have been reduced to what it was before he was promoted to a Correctional Officer IV. Personnel's Rule 5.6 addresses “Pay on Demotion,” providing as follows:

> The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification, or, if the demotion is to a formerly held classification, his or her last pay rate in the formerly held classification, whichever is greater. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

This Rule does not address Grievant's situation. Grievant acknowledged that his salary was not at the maximum pay rate for the Correctional Officer III classification when he was demoted.

> While Rule 5.06 clearly requires the salary of an employee being demoted to be reduced to at least the maximum rate of the lower salary range, it also gives the employer the discretion to reduce the employee's salary to a lower pay rate within the new range.

McCauley v. W. Va. Div. of Corrections, Docket No. 98-CORR-088 (July 10, 1998).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. “The argument a disciplinary action 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)." Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

2. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[M]itigation 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)." Meadows, supra.

3. The discipline imposed upon Grievant was not clearly excessive, or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: July 22, 2003

Footnote: 1

The Level II response, issued on March 11, 2003, stated the disciplinary action was issued by the Commissioner of the Division of Corrections, and the Level II grievance evaluator had no authority to grant the relief requested. The matter was advanced by Grievant to Level III, where a hearing was held on April 7, 2003. A Level III decision denying the grievance was issued on April 8, 2003. Grievant appealed to Level IV on April 17, 2003. The parties agreed to submit this grievance for decision on the record developed at Level III. Grievant was represented by Jack Ferrell, and Respondent was represented by Charles Houdyschell, Jr., Esquire. This matter became mature for decision upon receipt of the Level III transcript on July 11, 2003.