ROBERT KNIGHT,

Grievant,

v. **Docket No. 02-CORR-268**

DIVISION OF CORRECTIONS/
NORTHERN REGIONAL JAIL
AND CORRECTIONAL FACILITY,

Respondent.

DECISION

Robert Knight ("Grievant") initiated this proceeding on August 7, 2002, challenging a 40-day suspension and demotion, with corresponding 10% pay cut, imposed upon him on July 24, 2002. Grievant seeks reinstatement to his status as sergeant, back pay, and reversal of the suspension. The grievance was denied at levels one and two on August 15, 2002, and August 22, 2002, respectively. A level three hearing was held on August 30, 2002, and the grievance denied in a decision dated September 4, 2002. Grievant appealed to level four on September 9, 2002. After the parties unsuccessfully engaged in mediation, the grievance was reassigned to the undersigned on March 6, 2003. After several continuances granted for good cause shown, a level four hearing was held in Wheeling, West Virginia, on July 28 and August 13, 2003. Grievant represented himself, and Respondent was represented by Assistant Attorney General Charles Houdyschell, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 7, 2003.

The undersigned finds that the following facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ("DOC") for over 20 years. As of June, 2002, he was employed as a Correctional Officer IV, i.e. sergeant, at the Northern Regional

Jail and Correctional Facility ("NRJ").

2. As a sergeant, Grievant supervised lower-ranking correctional officers.

3. On June 17, 2002, "pat-down" (See footnote 1) searches were being conducted on all employees as they entered NRJ.

4. Pat-downs are conducted periodically at all correctional facilities in order to prevent contraband from being brought into the facility. All DOC employees are informed and aware that such searches may be conducted at any time, and that refusal to submit to the search may result in discipline. However, the searches conducted on June 17, 2002, were for the specific purpose of recovering a wallet which had been stolen from an inmate. Employees were not informed of the reason for the search.

5. The searches on June 17, 2002, were conducted by Lieutenant Paul Simmons, Lieutenant John Nash, and Correctional Officer Linda Wayman.

6. Grievant and Lieutenant Simmons had a history of not getting along with each other.

7. As Grievant entered the facility on June 17, 2002, Lieutenant Simmons informed Grievant that he needed to be searched. Grievant responded that he "was noton the clock yet," and wanted to smoke a cigarette before he was searched. Grievant then punched his time card. (See footnote 2)

8. After Grievant clocked in, Lieutenant Simmons again told him he needed to be searched, and that Grievant would be disobeying an order if he did not allow it. Grievant stated that he was going to smoke a cigarette first, and Lieutenant Simmons could watch him through the window while he did so. (See footnote 3)

9. After being told by Lieutenant Simmons at least twice that he needed to be searched and not doing so immediately would be construed as a refusal, Grievant stated something like "fuck this, this is bullshit." He proceeded to go outside and smoke, where he remained for approximately 3 to 5 minutes.

10. Grievant was agitated during his discussion with Lieutenant Simmons and did not act respectfully.

11. Upon reentering the facility after smoking, Grievant complied with the pat- down search. He was then escorted into the Warden's office by Lieutenant Simmons, who informed Grievant that he would be written up for his conduct.

12. Grievant reported to his unit after the pat-down incident, and his subordinate officers were

all in the unit office joking and laughing. None of the officers were at thepodium in the hallway, where a correctional officer is supposed to be stationed at all times in order to provide adequate security.

13. Grievant entered the unit office and asked the officers “is this how you provide security”, chastised them for not having someone at the podium, then slammed the door behind him on his way out. Grievant was clearly angry.

14. After Grievant slammed the office door, Officer Scott Parsons opened the door and asked Grievant what was wrong. Grievant responded that they were being too loud, and he couldn't hear in the hallway. With the door open, the officers resumed their talking and laughing, and Grievant slammed the door again.

15. Unit Manager Vic Butler heard the door slam, and came out of his office to find out what had happened. He described the door slam as so loud that he believed a firearm had been discharged.

16. Grievant's performance evaluations during 2000 and 2001 noted problems with failing to maintain a professional demeanor and be a good role model, along with problems with interpersonal communication skills. It was noted on June 4, 2001, that "Sgt. Knight tends to be outspoken, and at times, comes across to subordinate officers as overbearing. Needs to learn to be a team member."

17. By letter dated July 26, 2002, Warden Evelyn Seifert informed Grievant that his conduct on June 17, 2002, warranted discipline, and that he would be suspended for 40 working days without pay and demoted from Correctional Officer IV to Correctional Officer II with a 10% decrease in pay. Warden Seifert cited violations of Policy Directive 129.00, including disrespectful conduct, failure or delay in following a supervisor'sinstructions, and disruptive behavior. Grievant was also cited for violating operational Procedure 2.06-5 concerning random pat-downs and searches.

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.

Respondent's post-hearing argument focuses on two main points. First, it contends that, pursuant to various opinions issued by state and federal courts across the nation, the day-to-day management of corrections facilities is to be accorded extreme deference, beyond that normally given to other state agencies. Pursuant to Respondent's reasoning, because Grievant's alleged refusal to be searched implicates the fundamental safety of correctional employees and inmates, the undersigned can review its decision only while assuming that “correctional officials know what is best for their prisons.” Second, Respondent contends that the severe discipline imposed upon Grievant was necessary because “Grievant is a loose cannon with a short fuse” and cannot be allowed to “make his own rules.” DOC further contends that the warden “cut Grievant a break” by not discharging him for his conduct. The evidence in this case is largely undisputed, except for minor variations in witnesses' recounting of events which notably took place well over a year ago. However, where the parties vary is in their interpretation of Grievant's conduct and the seriousness of the offenses he committed. As Grievant reiterated throughout the level four hearing, he did not believe he “refused” to be searched, as DOC has contended throughout, but that he “delayed” being searched, which is technically correct. The only other issue in contention is whether or not Grievant used profanity while addressing the officers in the unit office prior to slamming the door. Some of the witnesses recalled him using profanity, and others did not (even as recently as a few days after the incident), but the undersigned does not find this to be of moment. All witnesses agreed that Grievant was angry and conducting himself in an unprofessional manner on the day in question, both at the pat- down search and in the unit office. The question remains, though, whether his conduct warranted the extreme punishment he received.

DOC Policy Directive 129.00 provides for a progressive discipline system, with a continuum of penalties, ranging from the least severe verbal warning to the most severe dismissal. While the policy lists a variety of offenses which may warrant discipline, it does not specify what penalty is to be imposed for each type of offense. Suspensions may be imposed after prior lesser disciplinary measures have been imposed, or for “a more serious singular incident.” Demotions under the policy “shall be for cause and may be the final attempt at corrective action, prior to dismissal.” Clearly demotion is an extremely serious punishment which should be reserved for serious offenses.

Contrary to DOC's various assertions that the undersigned has little, if any, authority to question

its judgment in this case, the West Virginia legislature has seen fit topromulgate a grievance procedure whereby employment disputes may be resolved. Moreover, the Grievance Board's administrative law judges are bestowed with the statutory authority to “provide relief as is determined fair and equitable,” pursuant to W. Va. Code § 29-6A-5(b). Accordingly, the undersigned has the authority, and is required, to assess whether or not DOC's discipline of Grievant was justified under the circumstances presented, and whether it 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).

"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). “[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said actionmay be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984).” Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[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). Although DOC has argued that

"determining the severity of an offense the [sic] jeopardizes security is within the exclusive domain of corrections," mitigation of Grievant's punishment is, unquestionably, in the hands of the undersigned.

Grievant's conduct was undeniably unprofessional, difficult, and should not be tolerated in a high-ranking correctional officer. However, while DOC has consistently characterized Grievant's actions as a "security breach" and reversal of its decision as a "license to commit crime" on the part of contraband smugglers, the evidence submitted in this case simply does not support this extreme position. While Grievant was definitely uncooperative when confronted by Lieutenant Simmons with the pat-down search, the undersigned is not persuaded, nor did any witness in this case testify, that anyone involved honestly believed that Grievant was smuggling contraband or attempting to hide something. Indeed, Grievant's conduct on the day in question was all about a personality conflict with Lieutenant Simmons and a general "bad attitude," which Grievant has apparently exhibited before. The bottom line is that, although he did not cooperate at first,Grievant had stated from the beginning of the altercation that he wanted to smoke first, then be searched, and that is exactly what happened. While the undersigned certainly does not condone Grievant's conduct, it is misplaced to characterize this issue as a serious security breach. If the evidence established that there had been past problems with Grievant from a security standpoint, or that anything occurred on the day in question which truly raised serious security concerns for the institution, that characterization may be more appropriate. On the evidence presented, it is not.

Warden Seifert testified that the bulk of Grievant's punishment was for his conduct at the pat-down search, and that only ten days of the suspension was for the "door- slamming incident." Therefore, the question remaining is whether Grievant's uncooperative conduct was worthy of a demotion of two ranks, with a corresponding pay cut of 10 percent, along with a lengthy suspension. The undersigned does not believe so. Indeed, the instant case has all the trappings of an overreaction to the conduct of an employee who had a tendency to exhibit unpleasant behavior. Indeed, DOC has tacitly admitted that the penalty in this case could easily be construed as an overreaction. Note the following statement from Respondent's brief: "Without a fundamental understanding of what can be at stake it is easy for a non-correctional professional to prematurely dismiss the actions of correctional officials over reacting and issue a well intended decision that may eventually get a prison guard or prisoner killed."

Without question, correctional employees must understand that security of the facilities is

paramount, and that any conduct compromising that security will be punished. Under the circumstances presented, the undersigned finds that Grievant's unprofessional, difficult, and disrespectful conduct was worthy of a 40-day suspension. However, thedemotion and resulting pay cut, effectively stripping a devoted employee of 20 years of hard-earned seniority, seems quite extreme for the actual offense committed. Therefore, Grievant should be reinstated to his rank of sergeant.

The following conclusions of law support the decision reached.

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).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in disruptive, unprofessional conduct on the day in question, for which discipline was warranted.

3. "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).

4. Under the circumstances presented, the penalty of suspension and demotion of two ranks was too severe for Grievant's offense.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reinstate Grievant to the rank of Correctional Officer IV, with all corresponding back pay. The 40-day suspension will stand, and any further relief is hereby **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, and 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.

Date: October 22, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As demonstrated at the level four hearing, a pat-down involves touching the exterior of the individual's clothing, all over the body, to make sure nothing is being concealed underneath. Employees are also asked to empty their pockets prior to a pat-down search.

Footnote: 2

Testimony at the level four hearing indicated that an employee's shift begins at the scheduled time, and the time clock is only used to verify that the employee was not late for work. Therefore, an employee does not necessarily begin working when he punches the time clock.

Footnote: 3

This statement was made because of the concern that an employee who has not been searched could dispose of contraband before reentering.