JOHN CROWDER,

Grievant,

v.

Docket No. 04-CORR-252

WEST VIRGINIA DIVISION OF CORRECTIONS/WEST VIRGINIA CORRECTIONAL INDUSTRIES,

Respondent.

DECISION

The grievant, John Crowder ("Crowder"), challenges the action of his employer, respondent West Virginia Division of Corrections/West Virginia Correctional Industries ("Correctional Industries"), in suspending him for five days. In his statement of grievance submitted at Level IV, Crowder summarized the matter, in part, as follows:

> I wish to grieve the suspension given to me by George Hampton III the director of Prison Industries. In his letter to me informing me of my suspension, Mr. Hampton quoted WV Division of Corrections Policy Directive 129.00 "Progressive Discipline", dated January 1, 2004, Section V, Article J, Paragraph 5, 13, 16 and 31. "Instances of inadequate or unsatisfactory job performance; careless workmanship or negligence resulting in spoilage or waste of materials or delay in work production; . . . loss of or damage to records, state property or property of others; willfully or negligently damaging or defacing state records, state property or other person's property."
>
> I stand accused of losing two 3.5 computer disks and 150 sheets of specialty paper[.]

> [I]t wasn't special, it was discontinued, [sic] However the total value of this property is less than two dollars. I feel that a suspension is unwarranted.

Crowder further asserted that the suspension did not comport with his employer's policy of progressive discipline. As relief, Crowder requested that "[t]he suspension [b]e vacated and all pay and benefits be restored." He wanted any record of the incident removed from his personnel file. He also requested that "no retaliation for this be permitted." (See footnote 1)

Procedural Background

Crowder's grievance was denied at Level I on May 25, 2004, and at Level II on June 4, 2004. A Level III hearing was conducted on June 14, 2004. Thereafter, on June 15, 2004, Jim Rubenstein, Commissioner of Corrections, adopted the hearing examiner's recommended decision denying Crowder's grievance at Level III. As noted, Crowder submitted a grievance form at Level IV, which was received by the West Virginia Education and State Employees Grievance Board on June 29, 2004. A Level IV hearing was conducted on August 2, 2004, in the hearing room of the West Virginia Education and State Employees Grievance Board at Charleston. At the Level IV hearing, Crowder represented himself. Correctional Industries was represented by Charles Houdyschell, Jr., Assistant Attorney General. This grievance matured for decision on September 1, 2004, which was the deadline for submission of proposed findings of fact and conclusions of law. Crowder declined the opportunity to submit post-hearing proposals.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Correctional Industries is a component of the West Virginia Division of Corrections. In addition to a civilian staff and administrative supervisors, CorrectionalIndustries employs inmates in correctional facilities to make various products that can be sold to state government and political subdivisions.

2 2. Correctional Industries does not receive any legislative appropriations. Instead, Correctional Industries must sustain itself through profits on the sale of its products.

3 3. In 1999, the Quick Copy Center and an offset printing operation were transferred to Correctional Industries from the Division of Administration. At the time the two operations were

transferred, they brought with them approximately 2.5 million dollars of debt.

4 4. Certain Correctional Industries operations, such as the Quick Copy Center, are not located within a correctional facility. Instead of incarcerated inmates, the Quick Copy Center employs work release inmates to assist the civilian staff.

5 5. Crowder is a civilian who has been employed by Correctional Industries as a Supervisor I in the Quick Copy Center since 1999.

6 6. Crowder's immediate supervisor is George Dewey Hampton, III, Director of Correctional Industries, (“Director Hampton”).

7 7. The Quick Copy Center can provide quick turnaround copying and some printing services to state government and political subdivisions. The Quick Copy Center is prohibited from providing services to the private sector.

8 8. As part of Correctional Industries, the Quick Copy Center must generate sufficient revenue to sustain itself. Unfortunately, in the last three years the Quick Copy Center has lost 1.6 million dollars.

9 9. Correctional Industries has made a concerted effort to place the Quick Copy Center into a financially secure posture. However, a plan to lay off four employees has been formulated as a fall-back measure.

10 10. Crowder and his fellow supervisor were counseled on several occasions by Director Hampton regarding the need to maintain a clean, uncluttered work area. Director Hampton considered this important, not only for the safety of employees and visitors, but because the professional appearance of a tidy, well-organized shop could help attract business to the Quick Copy Center. Director Hampton's objective in attracting business was to improve the productivity and profitability of the Quick Copy Center, thereby avoiding employee lay-offs.

11 11. Crowder has been counseled orally and in writing regarding areas of needed improvement in terms of the operation of the Quick Copy Center and in terms of Crowder's role as a supervisor.

12 12. In or about April 2004, Director Hampton received a complaint from the Consolidated Public Retirement Board (“Retirement Board”) regarding the length of time it was taking the Quick Copy Center to complete four print jobs.

13 13. Upon inquiring into the status of the print jobs for the Retirement Board, Director

Hampton was told that Crowder had thrown away materials, such as computer disks and paper stock, that were needed for those projects.

14 14. An administrative investigation ensued.

15 15. After the administration investigation was completed, Crowder met with Director Hampton. Crowder acknowledged that he had thrown away some materials but could not say what they were.

16 16. Director Hampton issued a letter, dated May 5, 2004, suspending Crowder for five days. In suspending Crowder, Director Hampton noted that the investigation revealed that Crowder "'acted in an unprofessional and irresponsible manner not consistent with the position of supervisor, by carelessly, negligently and recklessly removing and clearing items from the copy machine normally operated by Muriel Smith and causing those items to be discarded into a trash receptacle and later thrown away and destroyed without first assuring as to whether items had any value, be it personal or property of the state.'" Respondent's Exhibit 1 at Level IV.

17 17. The disposal of the materials in question arose as part of Crowder's efforts to comply with the directive to clean up the Quick Copy Center. On or about April 5, 2004, Crowder indiscriminately disposed of materials on Muriel Smith's work station because it appeared she had not complied with directions to tidy up the area. Crowder had forgotten that Muriel Smith was absent from the workplace on that day because of jury duty.

18 18. Crowder was not even cognizant of the type of material that he disposed of in this manner. However, it came to light that he had thrown away computer disks belonging to State Police. The disks contained information that was to be included in informational brochures from the Retirement Board about the State Police retirement plans. When the loss of the disks came to light, there was a concern about whether the State Police or the Retirement Board had retained the needed information in some format or whether the information would have to be reconstructed.

19 19. The items discarded by Crowder also included a quantity of paper stock that had been selected by the Retirement Board for use in producing brochures for theretirement plans for judges. The paper in question was a color that was no longer available.

20 20. At a time when he was trying to build a good customer base for the Quick Copy Center, Director Hampton had to inform the customer, the Retirement Board, about the problems with the print jobs. The computer disks had to be replaced. In addition, a new paper stock had to be selected

for the judicial retirement system brochure.

21 21. The monetary value of the materials Crowder threw away was not great. Crowder asserted, without contradiction, that it was less than two dollars.

22 22. Correctional Industries is subject to the Division of Corrections progressive disciplinary policy. “Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct/prevent an employee's intentional or continuing unacceptable work behavior or performance.” Respondent's Exhibit 2 at Level IV at 2-3.

23 23. Disciplinary measures, which range in severity, include verbal warning, written warning, suspension, demotion, and dismissal. Respondent's Exhibit 2 at Level IV.

24 24. The progressive discipline policy provides, in part, that a suspension may be issued on the basis of on-going infractions “or when a more serious singular incident occurs.” Respondent's Exhibit 2 at Level IV at 4. The suspension in this case was based upon the “more serious singular incident” involving Crowder throwing away materials from Muriel Smith's work station.

25 25. Director Hampton's decision to discipline Crowder was made against the backdrop of concerns about the continued viability of the Quick Copy Center operation, his on-going efforts to encourage Crowder to live up to his potential as a supervisor, and theneed for supervisory employees such as Crowder to serve as positive role models for the employees under their supervision. Director Hampton did not believe that a reprimand would be an adequate response to Crowder's actions in indiscriminately disposing of the property in question.

Discussion

This grievance arises out of a disciplinary action. Therefore, Correctional Industries bears the burden of substantiating, by a preponderance of the evidence, the basis for the discipline. *Oiler v. Dep't of Health & Human Res.*, Docket No. 02-HHR-074 (Aug. 28, 2002) (“In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence.”).

There is no question that Crowder discarded property that belonged to the State Police when he took it upon himself to throw away materials on Muriel Smith's work station. This step was drastic and irresponsible. Crowder did not examine the material before he threw it away. He did not know what it was, to whom it belonged, whether it was valuable, or whether it was irreplaceable. Luckily for all

concerned, the computer disks Crowder threw away could be replaced. Otherwise the situation would have been worse.

Crowder argues that a five-day suspension is too harsh in light of the minimal monetary value attributable to the computer disks and the paper stock. He values those items at less than two dollars. This argument misses the point. Crowder's calculation does not include the cost of customer good will, the loss of time and productivity resulting from having to obtain duplicate disks and replace the lost paper stock, and the potential loss of business that may well flow from Crowder's irresponsible behavior at a time when theQuick Copy Center is facing employee lay-offs if it does not improve its performance. Indiscriminately disposing of items from an employee's work station reflects a cavalier attitude on the part of Crowder about both the materials entrusted to the Quick Copy Center and the personal belongings of a fellow employee. Director Hampton correctly stated that Crowder “did not meet a reasonable standard as an employee of West Virginia Correctional Industries” and that he “caused [the] loss of state property[.]”

Crowder complained below that he was “punished not for what he did, but for what might have happened.” There is some truth to this assertion. However, it would be more accurate to say that the disciplinary suspension resulted from Crowder's lack of good judgment in acting without regard to the potential consequences of his behavior to the Quick Copy Center and its employees. This is particularly troubling in light of the fact that Director Hampton had been encouraging Crowder to live up to his perceived leadership potential in his role as a supervisor at the Quick Copy Center.

Crowder's attitude and actions, far more than the actual consequences, provide a predicate for the imposition of discipline relating to the April 5 incident. This does not dispose of the question raised by Crowder as to whether the discipline imposed was excessive. “'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 Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).” *Perry v. Dep't of Health & Human Res.*, Docket No. 04-HHR-192 (Aug. 17, 2004). Crowder bearsthe burden of proving, as an affirmative defense, that “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.”

Knight v. Div. of Corr., Docket No. 02-CORR-268 (Oct. 22, 2003) (citing *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)).

Director Hampton maintains a belief that Crowder has the potential to be an excellent supervisor. However, Director Hampton has been frustrated in his efforts to help Crowder fulfill his potential. The record reflects that, from as early as October 2003, Crowder has been counseled about the importance of improving the appearance and the performance of the Quick Copy Center and, as a supervisor, providing leadership and a positive role model for the employees in the Quick Copy Center. Crowder has also been provided with written direction relating to these same concerns. Nonetheless, Crowder's conduct on April 5, 2004, flew in the face of all of the things Director Hampton had been asking Crowder to achieve.

Given the seriousness of Crowder's misconduct, Director Hampton determined that a reprimand would not be a sufficient response. Although he initially contemplated imposing a ten-day suspension, calm reflection led Director Hampton to impose a five-day suspension instead. The earlier efforts at counseling Crowder and providing written documentation of the areas in which Crowder needed to demonstrate improvement did not have the desired effect. Therefore, it is not possible to fault Director Hampton's decision to suspend Crowder.

Crowder's argument that Director Hampton skipped a number of steps in the progressive discipline policy is not supported by the policy or the record. As noted, DirectorHampton had provided guidance and feedback to Crowder, both orally and in writing, without achieving the desired effect. Even if these less harsh steps had not been taken, the progressive discipline policy does not require the employer to utilize every available step in the progression. Rather, the policy recognizes that a single incident can rise to the level where a more stringent measure, such as a suspension, is the appropriate initial response to the employee's misconduct. This was the case with Crowder's behavior on April 5, 2004.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 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[.]" *McGraw v. Dep't of Transp*., Docket No. 03-DOH-079 (Aug. 22, 2003)(citing *Broughton v. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992)).

2 2. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

3 3. Correctional Industries proved, by a preponderance of the credible evidence,that Crowder did not behave in an appropriate manner for a supervisor when he carelessly disposed of state property.

4 4. Correctional Industries met its burden of establishing an appropriate predicate for the disciplinary action.

5 5. Crowder bears the burden of proving, as an affirmative defense, that "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." *Knight v. Div. of Corr.*, Docket No. 02-CORR-268 (Oct. 22, 2003) (citing *Meadows v. Logan County Bd. of Educ*., Docket No. 00-23-202 (Jan. 31, 2001); *Martin v. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)).

6 6. Crowder failed to meet this burden. He did not prove that the suspension was disproportionate to his misconduct, that it was excessive, or that it constituted an abuse of discretion.

Accordingly, this grievance is **DENIED** . Any party 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 West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party mustalso provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 12, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Of course, any reprisal for filing a grievance would provide an independent predicate for another grievance.