BECKY WOOD,

Grievant,

v. **Docket No. 03-CORR-306**

DIVISION OF CORRECTIONS/
LAKIN CORRECTIONAL FACILITY,

Respondent.

DECISION

Becky Wood ("Grievant") initiated this proceeding on July 29, 2003, challenging a written reprimand she received on July 9, 2003. The grievance was denied at level one on August 5, 2003, and at level two on August 14, 2003. A level three hearing was conducted on September 19, 2003, and the grievance was denied by decision dated September 23, 2003. Grievant appealed to level four on October 2, 2003. After a level four hearing was scheduled, the parties elected to forego a hearing and have this matter submitted for a decision based upon the lower level record. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 16, 2004. (See footnote 1)

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

Findings of Fact

1. Grievant is employed at Lakin Correctional Facility ("Lakin") as a correctional officer (corporal) and is in charge of the visitation unit. She supervises lower-rankingofficers who process visitors of inmates, and she is responsible for ensuring that policies and procedures of the facility are followed in that department.

2. In early 2003, Lakin had just opened, and many operational procedures had not yet been finalized, including visitation procedures.

3. By March of 2003, Operational Procedure 5.05 regarding visitation procedures had been drafted, but had not been officially adopted. The policy was finally approved and implemented on June 1, 2003, and the final version was identical to the draft, which had been circulated to some staff in March.

4. Operational Procedure 5.05 requires that all visitors undergo a criminal background check prior to visiting an inmate. Each inmate has a list of visitors who have been approved by the facility. Any deviations from the policy must be approved by the warden or his designee, and are initially referred to Grievant. Grievant must then ask for approval of the visit from her supervisor, Associate Warden for Programs Melissa Brightwell, or from the warden.

5. When Lakin initially opened, some visitors were allowed in prior to completion of background checks. However, by the spring of 2003, Grievant knew that a procedure was in place, which she followed. After referring a request for a special visitor to the warden, Grievant received either verbal or written approval for the visit.

6. On June 24, 2003, an inmate requested that her sister be allowed to visit on June 29, 2003. The written request was referred to Grievant, but there is no record that the request was approved by the warden or associate warden. The visit took place on June 29, although the visitor's background check had not been completed, and she wasnot on the list of approved visitors. Grievant had no recollection of who might have approved the visit.

7. As with all state correctional facilities, contraband is prohibited at Lakin. In accordance with this policy, visitors are not allowed to bring in unauthorized items, and approved items are contained in Operational Procedure 5.05. Visitors are not allowed to bring cameras into the facility, because contraband could be hidden inside them.

8. In approximately May of 2003, Grievant asked Warden Humphreys about the policy regarding visitors and cameras, because many inmates were requesting that pictures be allowed during visits. Warden Humphreys informed Grievant that visitors could not bring in cameras, but that a policy for having pictures taken with a facility camera was being discussed by the administration. Grievant and the warden discussed obtaining a Polaroid camera for the facility, which could be used by visitation staff for pictures.

9. During the month of June, 2003, Grievant approved disposable cameras to be brought in by visitors, if they were unopened and checked by visitation staff upon arrival. Warden Humphreys did

not approve this deviation from policy.

10. Grievant received a formal reprimand for the two violations described above, along with two other incidents. However, at level two, Warden Humphreys ordered that the other two incidents should be removed from Grievant's reprimand.

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proofthat a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

Respondent contends that Grievant directly violated the provisions of Lakin's operational procedure regarding visitation by allowing an unapproved “special visit” to occur and by allowing cameras to be brought into the facility. Both of these occurrences are clear violations of Lakin's policy. In addition, Grievant was cited for violating various provisions of the Division of Correction's (“DOC”) Policy Directive 129.00 regarding discipline, including unsatisfactory job performance, failure to follow supervisor's instructions and established procedures, and breach of facility security or failure to report a possible breach.

Grievant counters that she was unaware of the provisions of Lakin's operational procedure, because it was never provided to her, even after its official adoption on June 1, 2003. While Grievant's supervisor, Ms. Brightwell, testified that she gave Grievant the “draft” copy of the policy in March and directed her to follow it until finalized, Grievant maintains that this did not occur. Additionally, Grievant testified that, when she questioned Warden Humphreys regarding cameras in visitation, he “gave her the impression” that disposable cameras would be fine. However, Warden Humphreys testified that he and Grievant never discussed disposable cameras, but only whether the facility should acquire a Polaroid camera for the visitation unit, which was “being worked out.” Clearly, Grievant's testimony directly contradicts that of Ms. Brightwell and Warden

Humphreys. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

In this case, Grievant's testimony, if true, would mean that both her supervisor and the warden of the facility gave untruthful testimony. Associate Warden Brightwell's testimony at level three was consistent with the statements made in the written reprimand to Grievant. When confronted about the unapproved visitation which occurred on June 29, 2003, Grievant told Ms. Brightwell that it had been approved, but she could not find the paperwork. Then at the level three hearing, Grievant testified that it is common practicefor her to only see the initial request for approval of such a visit, but never see the final decision from her superiors. However, she later testified that it is *her* responsibility to get the visit approved, either verbally or in written form, which is inconsistent with her contention that she told the inmate to “go through Ms. Brightwell,” and to let her know what Ms. Brightwell's decision was. It simply does not make sense that, if Grievant were the person who needed to seek the approval, she would assume an approval had been made without her involvement. Her testimony is also inconsistent with her initial statements to Ms. Brightwell that the visit *had* been approved, but the paperwork was lost.

As to the issue regarding cameras in visitation, again Grievant's testimony is directly in conflict with that of Warden Humphreys, and her own testimony. Warden Humphreys testified unequivocally that he did not give approval for disposable cameras, as Grievant has contended. In addition, after

first testifying that Warden Humphreys “gave her the impression” that disposable cameras would be fine, she later testified that he explicitly said “yes, that would be fine.” There does not appear to be any motivation for the warden to testify falsely, while Grievant clearly would be motivated to prove that she has done nothing wrong.

As to Grievant's contention that she was never provided with a copy of Operational Procedure 5.05, I find this to be irrelevant to the outcome of this case. Whether or not she saw the policy in writing, Grievant's statements and actions clearly reflect that she knew that there were procedures to be followed regarding approved visitors and contraband, such as cameras, being brought into the facility. Even if she had not been provided withthe written policy, she clearly knew that certain procedures had to be followed. (See footnote 2) Grievant received a written request for approval of a special visitor, pursuant to established procedures, which she either failed to pursue, or approved without directing it to her superiors, as she knew was required. Grievant's conversation with Warden Humphreys regarding the cameras also reflects her knowledge that such items were not permitted, prompting her to seek permission. Although Warden Humphreys does not recall any conversation regarding disposable cameras, even Grievant's version of this conversation would reflect her understanding that cameras would not be permitted without specific approval.

In view of the entire record of testimony in this case, the undersigned finds Grievant's statements to not be credible. There has been no established or implied motive for her superiors to “make up” different versions of this story, and Grievant's motivation is obvious. Accordingly, the undersigned finds that Respondent has proven by a preponderance of the evidence that Grievant committed two violations of established procedure, disobeyed the instructions of her superiors, and contributed to potential breaches of security by her actions. Under these circumstances, a written reprimand was appropriate.

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in the conduct contained in her written reprimand.

Accordingly, this grievance is **DENIED**. (See footnote 3)

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: March 29, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Jack Ferrell of CWA, and Respondent was represented by John Boothroyd, Assistant Attorney General.

Footnote: 2

Nevertheless, the undersigned finds it quite incredible that, as the officer in charge of visitation, Grievant would never have been provided with any version of the policy regarding visitation. In addition, Grievant testified that she would have refused to comply with an unsigned or unofficial version of the policy, even if provided to her.

Footnote: 3

*Grievant contended at level four that her initial reprimand had still not been modified pursuant to the warden's level two decision. If this has still not occurred, Respondent is hereby **ORDERED** to immediately replace the initial reprimand with a modified version, in compliance with that decision.*