MELISSA BRIGHTWELL,

Grievant,

v. **Docket No. 05-CORR-149**

DIVISION OF CORRECTIONS/
LAKIN CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant, Melissa Brightwell, filed this grievance on April 28, 2005, grieving her demotion from Corrections Program Manager (pay grade 16) to Special Projects Coordinator (pay grade 12). Grievant requests the demotion be expunged from her personnel record, she be returned to her position as Associate Warden of Programs at the appropriate salary, and that "the unfair, hostile, biased, discriminatory, arbitrary and capricious acts and harassing practices against me cease." (See footnote 1) Grievant bypassed the lower levels. A Level IV hearing was held at the Grievance Board's Charleston office on March 6, 2006. (See footnote 2)

Issues and Arguments

Grievant asserts Respondent has taken issue with who she is dating and her off- duty behavior. Grievant also argues Respondent did not follow the progressive disciplinary policy.

Respondent argues that Grievant's romantic relationship with a subordinate was a problem within the Lakin Correctional Center ("LCC"). Respondent also argues Grievant was continually tardy, absent, and unprofessional.

Findings of Fact

1. Grievant is employed by Respondent and works at LCC. In 2002, she was hired as Associate Warden of Programs. This position is classified as a Corrections Manager 1 and is Pay Grade 16. Prior to being hired at LCC, Grievant was a Correctional Counselor 2, which is a Pay

Grade 11 at Ohio County Correctional Center.

2. As Associate Warden of Programs, Grievant was responsible for the supervision of approximately twenty-five supervisory, professional and support staff, in addition to a number of other duties.

4. While in that position, Grievant had a relationship with a Corrections Officer, Scott Gardner, a subordinate directly within her chain of command.

5. During this relationship, Mr. Gardner was engaged in inappropriate activities, such as making inappropriate comments to female co-workers and possibly abusing sick leave. (See footnote 3)

6. The other employees supervised by Grievant did not feel they could approach her with their concerns about Mr. Gardner's inappropriate comments. There was a generalfeeling among the employees that Grievant was unapproachable and would retaliate if they spoke with her about Mr. Gardner. The employees never discussed their concerns with Grievant's superiors either.

7. Warden Dale Humphreys and Deputy Warden Paul Howard had concerns that Grievant's personal life was having adverse affects on the daily operation of LCC. Because Grievant was in a management position, any concerns were addressed through meetings and informal procedures.

8. On December 16, 2004, Grievant and Mr. Gardner both called in sick. An employee at LCC had seen Mr. Gardner's car outside Grievant's home that day, and rumors ensued, disrupting the efficient operation of the facility.

9. On December 17, 2004, Deputy Warden Howard had a meeting with Grievant concerning possible sick leave abuse and rumors circulating through the facility. 10. During the meeting on December 17, 2004, Grievant became angry and cried. Grievant went back to her office, slammed the door and said, “F**k this place.” She obtained approval and left the facility, returning to work on December 20, 2004. Grievant requested to take annual leave for the rest of the month of December, and her request was approved.

11. On December 17, after the meeting, Warden Humphreys sent a letter to Grievant relieving her of her duties as Associate Warden of Programs based on her conduct with Deputy Warden Howard. This did not result in a loss of pay, but only relieved her of the duties so Warden Humphreys could investigate the incident. 12. On December 28, 2004, after the investigation was concluded, Warden Howard informed Grievant she would be reinstated as Associate Warden of Programs. As scheduled, Grievant returned to work on January 3, 2005.

13. On January 10, 2005, Warden Humphreys memorialized the decision to reinstate Grievant as Associate Warden of Programs in writing. In a memorandum addressed to Grievant, he explained that, after his investigation, it was his determination that her behavior on December 17, 2004, was unprofessional. However, he was giving Grievant another opportunity to be a productive employee. He also indicated in this memorandum that Grievant was to consider herself counseled concerning inadequate job performance in the following areas: tardiness, showing up late for meetings, excessive lunch breaks, disrespectful conduct to supervisor, disruptive behavior, and unauthorized absence. Warden Humphreys also put Grievant on notice that violations such as these would not be tolerated in the future.

14. Due to a number of issues at LCC, Warden Humphreys requested a management audit. A three person audit team came into the facility and reviewed the performance of the three Associate Wardens. Part of the purpose of this audit was to obtain an outside appraisal of Grievant's performance.

15. On February 15, 2005, the audit team requested Grievant meet with them on February 16th, because they had received information that at a meeting on February 14th Grievant had appeared lethargic, with slurred speech, unable to follow the flow of conversation, and fragmented in thought process. (See footnote 4) 16. On February 16th, Grievant failed to report for work and failed to follow the established procedure for calling off from work. Instead, Grievant called a subordinate, Renae Mills, Case Manager, and told Ms. Mills to inform the Administration she was not working that day because she was going to the doctor.

17. Ms. Mills advised her superiors that she and Grievant had been drinking the night before, and when Ms. Mills went to pick Grievant up for work that morning, Grievant was still asleep. Ms. Mills got Grievant out of bed and into the bathroom, but Grievant then went back to bed. Ms. Mills could not wake Grievant up again, and Ms. Mills left and reported for work.

18. Upon hearing this, Associate Warden Goddard was sent to Grievant's house for her safety. Grievant was still asleep, but Warden Goddard was able to wake her and talk with her. He offered to stay with Grievant and drive her to work. Grievant told him she was not going into work and did not know when or if she was going back.

19. Grievant did not return to work on Thursday, Friday or Monday (a state holiday). When she returned on February 22, 2005, she met with Deputy Warden Howard and discussed being late for

training, late for work, and late for meetings. During that meeting Grievant explained, “I have some issues. I'm having a tough time right now.” She explained that she was taking three different medications, one being Xanax. Grievant also explained she was having difficulty sleeping and had gone several days without sleep. She also explained she was having anxiety attacks. Respondent's Exhibit 5

20. On February 22, 2005, Deputy Warden Howard issued a written reprimand to Grievant for failing to report for work on February 16, 2005, and for failing to follow the established procedure for reporting off work. Respondent's Exhibit 5 21. Also on February 22, 2005, Grievant received a memorandum from Warden Humphreys placing her on restricted leave status. Grievant was required to submit verification of any illness of less than three days. She was required to “submit justification for each and every occasion that you report off utilizing your sick leave benefits.” Respondent's Exhibit 7

22. On February 22, 2005, Grievant also met with the Executive Staff which consisted of Wyetta Fredricks, Deputy Commissioner for Corrections; Wayne Armstrong, Director of Human Resources; Warden Humphreys and Deputy Warden Howard. The Executive Staff attempted to discuss their perceived need for Grievant to obtain treatment and help. Grievant was resistant, and the Executive Staff decided Grievant should undergo a fitness for duty evaluation.

23. On February 25, 2005, Warden Humphreys informed Grievant she was to undergo a physical exam with Dr. Marsha Bailey on March 4, 2005. Grievant was also scheduled for a psychological examination to be conducted by Dr. David Clayman on March 1, 2005. Grievant was placed on travel restriction and was to be escorted to her appointments by either Deputy Warden Howard or Warden Humphreys. Respondent's Exhibit 8.

24. Dr. Marsha Bailey diagnosed Grievant as having anxiety and depression, stating that “an underlying mental health disorder such as bipolar disease cannot be excluded at this time.” Respondent's Exhibit 9. She also performed a drug screen, and Grievant's test was negative for the presence of amphetamines, barbiturates, benzodiazepines, Darvocet, marijuana, cocaine, PCP, opiates (narcotics) and methadone. 25. Dr. Clayman reported that in his opinion Grievant's actions demonstrated a “lack of judgement and insight as well as deficits in maturity and sophistication necessary to function in a position of authority.” Respondent's Exhibit 10. He went on to state:

If the Division is willing to work with her, it is necessary she admit to the problems she has caused herself and the facility and that she must understand that she remains under probationary status. *At this time, she is not suited for any supervisory role within the Division. It is recommended that she step back to a position without management duties.* She must demonstrate that she is willing to adhere to all terms of employment set forth by the Warden and the Commissioner. Given the circumstances, this would include off-site behavior that directly or indirectly involves other employees of the Lakin facility. Any violations of these conditions should not be tolerated and should be grounds for immediate dismissal. This would be for the protection of the facility, her coworkers and the inmates.

Respondent's Exhibit 10 (emphasis added).

26. On March 9, 2005, the management audit was complete, and after interviewing approximately 53 staff members the audit team stated in its “Summary Conclusions:”

Associate Warden-Programs Brightwell has performed in such a manner that she has significantly eroded the trust, respect and confidence of her subordinates and other employees. Department head level employees that direct-report to the AWP generally do not have confidence in her leadership abilities. The AWP is widely reported as not being approachable, having poor interpersonal communications skills, failing to provide timely guidance, frequently misplacing documents and requesting they be resubmitted, and allowing certain aspects of her personal life to have verifiable negative effects within the workplace. There is evidence of alcohol use and prescription medication use to the extent that it is having a negative effect upon her ability to dependably discharge her duties and responsibilities. Other employees report instances of inappropriate workplace behaviors based upon her dating relationship with two different subordinate employees, one of whom was in her chain of command. Staff report inappropriate delegation of authority and responsibility to the point that many subordinates have, for some time, looked to one of the two Unit Managers for leadership that should be provided by the AWP. There is some indication that inmates are aware of some of these problems. The Unit Management and Programming areas at LCFW seem to be functioning satisfactorily, thisseems to be in spite of the Associate Warden-Programs and not due to her leadership or guidance. The damages caused, by her actions and omissions, to critical relationships with her department heads, other subordinates, peers and superiors makes it suspect at best concerning whether or not she can salvage the respect necessary to exercise effective command

authority over the Programs Division at LCFW. The Warden needs to address this situation involving the AWP before it causes further disruption to the smooth operation and administration of the prison and erodes his ability to effectively exercise command authority.

Respondent's Exhibit 4.

27. Jim Wells, Assistant Director of West Virginia Division of Personnel, was brought in to consult with Respondent on what action should be taken. Mr. Wells recommended a demotion. Mr. Armstrong also agreed a demotion was appropriate given the circumstances.

28. In a meeting with the Executive Staff, termination was considered, even in light of Mr. Wells' recommendation of a demotion. However, the Commissioner decided the appropriate course of action was to demote Grievant and place her in a position without supervisory duties.

29. Warden Humphreys drafted a new position description for Grievant, and it was classified by the Division of Personnel as a Corrections Program Specialist, pay grade 12.

30. On April 15, 2005, Warden Humphreys held a predetermination meeting with Grievant, explaining the disciplinary action being contemplated. Grievant questioned why the process had taken so long and why the action was being taken. Warden Humphreys explained that these issues were brought to Grievant's attention throughout the year, and Grievant denied having been informed of them by the Deputy Warden. 31. On April 18, 2005, Warden Humphreys issued a letter to Grievant explaining the decision to demote her with prejudice. The letter stated this action was a result of “your staff having no confidence in your abilities to effectively direct and supervise the Programs function under your leadership and the Fitness for Duty Reports we received as a result of directing you to undergo evaluation.” Respondent's Exhibit 1.

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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent has clearly met its burden in this case. It is also clear Respondent has gone the extra mile for Grievant. Given Grievant's actions, Respondent could have terminated her employment. Instead, the Executive Staff worked with the Division of Personnel to craft a position suited to both Grievant and LCC. The decision to demote Grievant was not arrived at lightly nor was it based on the way Grievant conducted her personal life as she has asserted.

I. Credibility The first issue to address is witness credibility, as the testimony of Grievant and Warden Humphreys was frequently diametrically opposed. 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. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't 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. Dep't of Health and Human Resources/Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993); *Clay v. Bluefield State College*, Docket No. 02-HEPC-013 (August 29, 2002). In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's demeanor during cross-examination was different than her demeanor on direct. During direct examination she was defensive when questioned about her situation,but her facial expressions and body language indicated a willingness to answer questions posed to her. However, on cross-examination, she was surly.

Her facial expressions and body language during cross-examination can best be described by quoting Corporal Thomas Weiner, one of Grievant's subordinates, who was called to testify. He testified that he did not feel he could approach Grievant with problems because he felt some of his statements were not taken appropriately. For purposes of clarifying, the undersigned asked him to

explain exactly what he meant. His response was, “She [Grievant] wasn't rude. She wasn't nasty. A face will paint 1,000 words. When I'd say something to her I got the “Why are you talking to me? look.” The undersigned saw this look many times during cross-examination, regardless of how benign the question.

With respect to communication, Grievant clearly had the ability to communicate, but seemed to lack the ability to accurately perceive her situation. Grievant remained focused on her personal life and felt she was being attacked for dating men within LCC. She testified that she did not make her relationship with Scott Gardner a problem, that was accomplished by other female staff. While Grievant is a reasonably intelligent woman, she seems unable to understand why dating subordinates is inappropriate.

Grievant also continually voiced feelings of harassment by her superiors and others at LCC. She believed her problems came from being a young, single female. Grievant took little to no responsibility for her behavior.

This perception is incorrect. The Administrative Law Judge finds Grievant's testimony was inconsistent with the testimony presented by others. It was also inconsistent with written documentation provided during the hearing. Grievant continually testified in a manner that put her actions and comments in a favorable light. It was very clear fromher testimony and body language that she persisted in believing this demotion was brought about as a result of her personal life. Therefore her credibility in the interpretation of events must be called into question.

II. Demotion

Grievant was demoted because her staff had lost confidence in her abilities and because of the information received in the Fitness for Duty reports. Warden Humphreys determined Grievant's behavior and conduct had deteriorated. Grievant had appeared to be under the influence of some substance when meeting with Associate Warden of Security and Warden Humphreys. Respondent Exhibit 1.

In Grievant's Fitness for Duty Forensic Evaluation Report from Dr. David Clayman, Respondent was advised Grievant was better suited for a position without supervisory responsibility. Dr. Clayman also indicated Grievant “must demonstrate that she is willing to adhere to all terms of employment set forth by the Warden and the Commissioner.” Respondent's Exhibit 10.

Lastly, the Management Audit showed employees of her section had lost respect for her ability to

perform assigned duties. Grievant's subordinates had no confidence in her abilities to provide effective leadership. Respondent's Exhibit 1. Clearly, Respondent has met their burden in this matter, and the demotion must be upheld.

III. Discrimination

Grievant alleges she has been discriminated against. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." *W. Va.Code* § 29-6A-2(d). Grievant argues she has been questioned and punished over her personal life, specifically who she dates. This is not accurate. Warden Humphreys continually testified that who Grievant chose to date was not an issue, so long as personal relationships did not interfere with the daily operation of the facility. (See footnote 5) Grievant's decision to date subordinates was not appropriate, and it is clear from the testimony presented that those relationships had an adverse impact on LCC. Also, Grievant has failed to show that she is similarly situated with any other employee. Grievant's demotion was warranted and was not the result of any discrimination. The following conclusions of law support this Decision.

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). "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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.* 2. The Division of Personnel Administrative Rule 11.4 states, "[a] demotion with prejudice is a reduction of pay and/or change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct."

3. Under the Division of Corrections' Policy Directive 129.00 a demotion "shall be for cause and may be the final attempt at corrective action, prior to dismissal."

4. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." *W. Va. Code* § 29-6A-2(d).

5. There has been no showing Respondent discriminated against Grievant.

6. Respondent has met its burden in this matter and has shown by a preponderance of the evidence Grievant was unable to perform the duties of her classification.

7. Respondent violated no rule, policy or law in demoting Grievant.

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, 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 withthe civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: May 17, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

As listed relief, Grievant requested a number of documents be provided to her. Respondent provided these prior to the Level IV hearing. She also asked to be reimbursed for any costs that she may have incurred, i.e. medical costs and attorneys fees. This relief is beyond the scope of the undersigned's authority. W. Va. Code § 29-6A-10; Hall v. W. Va. Div. of Highways; Chafin v. Boone County Health Dep't., Docket No. 95-BCHD-362 (June 21, 1996).

Footnote: 2

Grievant was represented by Steven Berryman, and Respondent was represented by John Boothroyd, Assistant Attorney General.

Footnote: 3

Mr. Gardner was eventually terminated for an EEO violation. It should also be noted Grievant had a relationship with another Corrections Officer, not in her direct chain of command.

Footnote: 4

There was speculation that Grievant had a drug problem.

Footnote: 5

The undersigned feels the parties should be ever mindful that a supervisor/subordinate relationship should be discouraged. Anytime a supervisor, who has a great deal of control over subordinates, engages in a consensual relationship with an employee under his/her command questions may arise concerning how freely the consent was given.