WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLOTTE VICTORIA FURPHY,
Grievant,

v. **Docket No. 2013-1827-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX.
Respondent.

D E C I S I O N

Charlotte Victoria Furphy, Grievant, filed a grievance against the Division of Corrections/Mount Olive Correctional Complex ("Mt. Olive"), Respondent, on April 29, 2013, challenging the termination of her employment as a Correctional Officer. The relief requested includes, reinstatement, back pay, lost benefits, and assignment in central control day shift with no repercussions.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on September 11, 2013, at the Grievance Board's Beckley, WV office. Grievant appeared *pro se*. Respondent was represented by counsel John H. Boothroyd, Assistant Attorney General. This case became mature for decision on October 7, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed as a Correctional Officer II at Mount Olive Correctional Complex. Grievant's employment was terminated after she disobeyed instructions from

the Associate Warden of Programs to not bring a personal dispute she had with another employee into the workplace, to address any issues with the other employee through her chain of command and to keep the contents of the matters discussed with the Associate Warden confidential. Respondent avers Grievant was dismissed due to continued unsatisfactory work performance, and continued failure to follow the instructions of her superiors at work. Within the last year Grievant had received several disciplinary actions for unsatisfactory performance, alleged failure to follow instructions, and disruptive workplace behavior. Respondent's decision to terminate Grievant's employment is not inconsistent with the principles of progressive discipline. It is not established that mitigation is warranted by the facts, circumstances or severity of the discipline levied. Respondent's disciplinary action is not clearly excessive or an abuse of discretion. Accordingly, this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was hired as a Correctional Officer I at the Mount Olive Correctional Complex ("Mt. Olive") in or about September 2011. At all times relevant to the issues in discussion, Grievant held the position of Correctional Officer I or II at Mt. Olive.

2. Mt. Olive is a maximum security prison for adult males sentenced to Corrections.

3. Major Robert Rhodes is the Chief Correctional Officer at the Mount Olive Correctional Complex. Major Rhodes works in a supervisory capacity to Grievant.[1] Judicial notice is taken of *Furphy v. Division of Corrections/Mount Olive Correctional Complex*, Docket No. 2013-1128-MAPS. (Oct 2, 2013), a Public Employees Grievance Board decision voiding a ten-day suspension of Grievant.[2]

4. Grievant and Lori Bounds both worked at Mt. Olive, but not in the same capacity. Ms. Bounds is an Office Assistant II working in administration.

5. During the time period relevant to this grievance, Grievant and Ms. Bounds had been feuding. Comments were made on Facebook. Respondent does not know all the details of this "feud," including who started it, what was said and who is ultimately at fault for escalating matters. Respondent is concerned about the "feud" only in as much as it had adverse consequences in the workplace.

6. On March 1, 2013, Major Rhodes received a memorandum from Office Assistant II Lori Bounds, R. Ex. 2, which set forth:

> The purpose of this memo is to advise you of an Incident that occurred in Control on March 1, 2013. As I left the security wing I approached CO Furphy showed her my badge and went to the door toward the scan line, as I got to the door CO Furphy just stood there looking at me and wouldn't open the door till several minutes later. I went to the Deputy Warden's Secretary to take her some papers and returned

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[1] Major Rhodes and Grievant worked together, but they did not necessarily have an ideal working relationship. *See Furphy v. Division of Corrections/Mount Olive Correctional Complex*, Docket No. 2013-1128-MAPS (Oct 2, 2013).

[2] The decision determined as a finding of fact (FOF) that "As grievant was being processed through the scan line, she mentioned to Officer Cobb that she had just been to the doctor and that he had put her off work for a couple of weeks due to work stress. Grievant explained that her doctor put her off work because she had told him, something to the effect of, 'if I had a gun, I would shoot Major Rhodes in the face." Officer Cobb "thought Grievant was only 'venting.'" See Finding of Fact 7 and 10, *Furphy v. Division of Corrections/Mount Olive Correctional Complex*, Docket No. 2013-1128-MAPS (Oct 2, 2013).

> back to scan line, once again CO Furphy looked at me but wouldn't open the door. After waiting several minutes I asked the Count Officer if she would call her and ask her to let me in, the Count Officer advised me that she had a button she could push so that Officer Furphy would open the door which she did, still the door wasn't opened. The Count Officer then called control with no answer. I still waited for the door to be opened but it wasn't until another CO stepped up to the door then CO Furphy opened the door. I then approached the Control window and handed CO Furphy my ID at which time she threw it across the counter to where I couldn't reach it.

7. In order for a person to get from the administrative area to the secure areas at Mt. Olive, an employee must pass through a set of secure doors or sally-port[3] which are controlled by Central Control. The employee cannot pass through the doors until an officer at Central Control opens the doors for the employee. Upon entering the secure area through the doors, an employee must hand his/her I.D. to the officer at Central Control, who inspects the I.D. and then returns the I.D. to the employee. The opening to place the I.D., and the shelf underneath the opening, are over six feet off the ground. The I.D. is handed back to the officer by placing it out on the metal shelf underneath the opening. Due to the height of the shelf, shorter employees cannot reach an I.D. which is not placed on the edge of the shelf. As such, it is common practice for the officer working the Central Control to place the I.D. at the edge of the shelf so that the employee can reach it.

8. An officer assigned to Central Control, in addition to controlling the secure doors, monitors video cameras and radio traffic throughout the facility and the post requires an officer to concentrate on the multiple security tasks.

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[3]An employee is first "buzzed" through the first secure door and enters into a short hallway area. When the first door is secured, the second door leading out of the port/hallway can be opened. This prevents an inmate from rushing an open door to access an unsecured area; if an inmate does succeed in getting through one secure door, he will find himself trapped in the port.

9. No official action transpired as a result of Ms. Bounds' March 1, 2013 memorandum; however, Captain Steven Caudill was instructed to monitor the situation. During the time period in discussion, Captain Steven Caudill was the day shift commander overseeing staff and daily operations.

10. On March 8, 2013, Major Rhodes received another memorandum from Ms. Bounds, R. Ex. 3, which set forth:

> The purpose of this memo is due to continuing circumstances from a previous memo with COII Charlotte Furphy. On 7 March 2013 I OAII Lori Bounds was leaving my office which is located in the Magistrate's office at Mount Olive Correctional Center, Mount Olive, West Virginia 25185. At which time COII Furphy was walking to the scan line, as COII Furphy seen me she stood and waited at the end of scan line by the count room till I entered the area at which time she loudly stated "Well hello Lori, How are you?" and I did not respond. As I walked up the hall way COII Furphy followed me and stood as I put up my keys, I continued walking down the hallway to clock out an COII Furphy was still lingering in the hallway. At this time I exit the hallway and COII follows behind me, I stop to get my ID from the front desk and she is still behind me, as I go to exit the front desk area I am walking out the front door and COII Furphy stated very loudly again "You have good evening Lori" and once again I did not respond. I feel as though COII Furphy was doing these actions to get me to react to her but I never stated a word or even made eye contact with COII Furphy. This is the second incident that has occurred with COII Furphy in a week's time.

11. This memorandum was noted "will monitor" by Major Rhodes. R. Ex 3.

12. On March 21, 2013, Major Rhodes received a third memorandum from Ms. Bounds, R. Ex. 4, which set forth:

> The purpose of this memo is to let you know of the continuing issues with COII Charlotte Furphy. I OAII Lori Bounds came to work the morning of 21 March 2013, as I went through the scan line and approached the door I could see COII Furphy standing in control looking at me. As I stood there waiting on her to open the door she just looked at me smiling. I was the only one waiting at the door and COII Furphy would not open the door. I stood there a long period of time and finally another officer came in and let me in. This is not the first time this has happened; COII Furphy has done this before with the door or catches me alone saying snide comments or following me down the hallway saying things. Never have I said or reacted to her but I do not think it is fair that she is allowed to continuously do this to me and others and nothing is being done about it.

13. The reports were forwarded to Warden David Ballard with a recommendation to mediate. The Warden ordered Jason Collins, Associate Warden of Programs, and Tonya McClease-Harrison, Human Resources Manager, to hold a meeting with Grievant and Ms. Bounds in an effort to resolve the workplace conflict.

14. On March 26, 2013, Mr. Collins and Ms. Harrison met with Grievant and Ms. Bounds as ordered by Warden Ballard. Grievant denied the conduct and maintained that she had been busy and could not get to the doors right away. An argument between Grievant and Ms. Bounds over Grievant's conduct and intent ensued and then subsequently the argument went into the outstanding personal issues. Mr. Collins and Ms. Harrison instructed the two that personal issues or conflicts were to be kept out of the workplace and that they needed to behave in a professional manner. Mr. Collins and Ms. Harrison also instructed the two that if any issues arose between the two, they were to use their chain of command. Towards the end of the meeting, which remained heated, Grievant stated to everyone that, "this isn't over." Both parties were instructed to not discuss the contents of the meeting or the outcome of the meeting.

15. Mr. Collins and Ms. Harrison did not believe that the meeting was successful and issued a memorandum the same day to Warden Ballard:

> Sir, Mr. Collins and I held a meeting with Officer Furphy and OAII Lori Bounds to attempt to resolve workplace behaviors. Both parties were instructed not to discuss contents or outcome of meeting. In addition they were both instructed to keep personal issues out of the workplace and to interact with each in a professional manner.
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> Mr. Collins and I are in agreement that these issues will be ongoing with these two individuals as they were not willing to speak in a civil manner during this meeting.

R. Ex. 5

16. On March 27, 2013, Grievant was placed on an improvement period for thirty days due to attendance issues. See R. Ex. 13, more specifically:

> On 11 February 2013, Lt. Margaret Clifford met with you in regards to being late for work. You stated that you would correct these issues. On 15 February 2013, you reported for work at 0800 hours which made you one hour late. On 25 March 2013, you reported at 0730 hours which made you late a half an hour. You are required to report for roll call no later than 0655 hours. You are going to be placed on 30 day improvement period where report times will be closely monitored. Failure to report on time could result in progressive discipline.

17. On March 27, 2013, it was noted with frustration that Grievant had chosen to address an issue regarding another employee making disparaging remarks about her by forwarding a memorandum to Ms. Harrison, Human Resource Manager, but failed to notify anyone in her chain of command about the issue she was having.[4]

18. On March 29, 2013, three days after the meeting with Associate Warden Collins and Ms. Harrison, Heather Arthur was working at the front desk at Mt. Olive when Grievant came in from the smoke shack with Corporal Scott Hall. Grievant went behind the front desk to put her cigarettes in a drawer. Grievant then pulled out the drawer of I.D. cards located in the front desk. Ms. Arthur asked Grievant what she was doing. Grievant replied looking for something and went into the "B" file. Grievant pulled out two I.D. cards, one of which fell to the floor. Grievant showed the other I.D. card to Cpl. Hall and stated, "this is her." Cpl. Hall replied that he did not know the person on the I.D. card. Grievant replied that, "well that's her" and put the two I.D. cards back together and put them in the

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[4] Grievant viewed the issue as an equal employment issue under which an employee can file matter with an Equal Employment Opportunity (E.E.O.) Counselor. It is understandable that some confusion might exist if a complaint is filed regarding a direct supervisor, as to who the employee would then report a separate complaint; however, it is not necessary for the undersigned to make a definitive ruling on that issue to prudently consider the instant dismissal grievance.

drawer. After Grievant left, Ms. Arthur looked in the drawer and found out that the I.D. card which had been shown by Grievant was the I.D. card of Ms. Bounds. Ms. Arthur normally worked in the Human Resources office at Mt. Olive and had knowledge of the past events involving Grievant and Ms. Bounds. Ms. Arthur, on the following Monday, sent a memorandum to Ms. Harrison informing her of the incident at the front desk.

19. On April 3, 2013, Investigator Jonathan Frame was asked to meet with Cpl. Hall and take a statement from him regarding what had happened at the front desk. Cpl. Hall admitted that the Grievant had shown him the I.D. card of Ms. Bounds and that Grievant had done so after he asked her to point Ms. Bounds out because he did not know who she was. Cpl. Hall also recalled the conversation which prompted his request to have Ms. Bounds pointed out. Grievant and Cpl. Hall had a conversation on March 29, 2013, regarding Grievant and Ms. Bounds interaction with one another at Mt. Olive.

20. On April 15, 2013, a predetermination meeting was held with Grievant, and Deputy Warden Terry regarding potential disciplinary actions. Grievant informed Deputy Warden Terry that she had told Cpl. Hall about her [Ms. Bounds] saying she kept her in the sally-port and that Cpl. Hall indicated that he didn't know who she [Ms. Bounds] was so she went in and showed him Ms. Bounds' identification card and that she did not remember being told not to discuss it further.

21. Grievant was informed that she was being dismissed, and was informed in the subsequent dismissal letter that she had a continued unsatisfactory level of performance and that "[t]he cumulative effect of your behavior is such that it cannot be allowed to continue. On several occasions, both formally and informally, your disruptive behavior has been addressed with you and issues continue to occur on a frequent basis.

In addition you continue to exhibit failure to follow your chain of command. Unfortunately, you have demonstrated no significant success in improving your work performance; therefore I [Warden Ballard] have no reason to believe that additional management intervention would bring your performance to an acceptable standard." April 15, 2013 Dismissal Letter, R. Ex. 1.

22. Respondent presented evidence of Grievant's prior disciplinary history with respect to progressive discipline and three performance appraisals. See R. Exs. 8, 9, 10, 12, 13, 14, and 15. Grievant's disciplinary history reflects multiple suspensions, written reprimand and numerous counseling sessions for failure to comply with Policy Directives, Operational Procedures or Post Orders.

23. An example of Grievant's disciplinary history highlighted by Respondent provided that on November 26, 2012, Grievant received a five-day suspension for unsatisfactory job performance and breach of facility security. The specific conduct, which was uncovered in an investigation initiated on October 1, 2012, and completed on November 14, 2012, was:

> On different occasions while working the security post in Elm Hall Pod 1, you did allow inmates #49829 and #48767 to enter the unit. These inmates were not assigned to this housing unit.
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> You permitted inmates #49829 and #48767 to sit within the Elm Hall Pod 1 security post, which is an area restricted to [sic] inmates.
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> You engaged in extended periods of conversation with inmates #49829 and #48767, neglecting your duties and responsibilities within the Elm Hall Pod 1 housing unit.
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> You engaged in playing a card game at the security post in Elm Hall Pod 1, further neglecting your duties and responsibilities within the Elm Hall Pod 1 housing unit.
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> You propped open the entrance door to Elm Hall Pod 1, which is a security door, thus constituting a breach of facility security. When you noticed an officer approaching Elm Hall housing unit, you had the inmates leave and secured the pod entrance door.

R. Ex. 9.

24. On July 10, 2012, Grievant was given a written reprimand for the following conduct:

> On 28 June 2012 at approximately 2330 hours, Lt. Daryl Simpson observed you leaving Central Control and going to the Quilliams II unit. Sgt. Payne was instructed to call the Quilliams II tower and instruct the officer on duty to have you return to Central Control. Previously, Major Rhodes had restricted you to the Central Control and Administrative area, due to issues with your hair. Upon your return to Central Control, you became emotional and stated that you would speak to the Chief in the morning. You then stated that you were tired of Lt. Simpson's and Sgt. Payne's shit and you would be turning in a memo in the morning to the Chief. Captain McCloud explained that you needed to follow your chain of command and turn the memo in to him. You stated that you would go straight to the Chief. At 600 hours on the 29th of June 2012, you spoke to Major Rhodes about your memo and he instructed you to follow your chain of command. Captain McCloud spoke to you that morning and asked that you turn in the memo to him. You stated that you would as long as his lap dog wasn't around.
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> On 01 July 2012 at approximately 1850 during roll-call, you made the statement "If they are going to fuck with me, then I am going to fuck with them and be in the unit for an hour." You were later relieved from your post to go home due to your daughter being in the hospital.

The written reprimand informed Grievant that "Per Policy Directive 129.00, 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 initial or continuing unacceptable work behavior or performance." *See* R. Ex. 12.

25. On January 2, 2013, Grievant after discussing with Cpt. Steve Caudill her refusal of a work assignment, went directly to Deputy Warden, Ralph Terry. On the same day, Lt. Scott Rogers conducted a coaching/counseling session with Grievant. Lt. Rogers explained the proper chain of command and directed Grievant to follow her chain of command in the future. Grievant informed Lt. Rogers that she was not going to follow that chain of command, that she did not feel comfortable following it due to past experiences

with those people in her chain, that she had an E.E.O. complaint against Major Rhodes, and that she only felt comfortable talking with Lt. Rogers and Cpt. Ronnie Williams.

26. Among the information conveyed in the four page April 15, 2013 Dismissal Letter, is Respondent's finding that Grievant is in violation of Policy Directive 129.00 "Progressive Discipline" Section V-J. *See* R. Ex. 1. Conduct that is subject to discipline under Corrections', Policy Directive 129.00 (Progressive Discipline), Section J includes:

> 5. Instances of inadequate or unsatisfactory job performance.
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> 6. Disruptive behavior.
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> 14. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.
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> 28. Unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Respondent avers it dismissed Grievant as a result of her continued disruptive behavior. Respondent maintains Grievant was in violation of Policy Directive 129.00 "Progressive Discipline" Section V-J, in that Grievant was again found to be involved in an instance of inadequate or unsatisfactory job performance; disruptive behavior and failing to follow a supervisor's instructions and/or not complying with applicable policy or procedure, e.g., West Virginia Division of Personnel Policy 15 *"Workplace Security*," Threatening or Assaultive Behavior.

Respondent has established by a preponderance of the evidence that the conduct which formed the basis of the termination took place. After three memoranda from an employee, Lori Bounds, regarding Grievant's alleged harassment, the Warden ordered that Grievant and Ms. Bounds meet with the Associate Warden of Programs and the Human Resources Manager regarding the allegations for the purpose of resolving any inappropriate workplace behaviors. At the March 26, 2013 meeting, both Grievant and Ms. Bounds were instructed that any ongoing feud or dispute was to be kept out of the workplace, and that the matters and content discussed during the meeting were to be kept confidential. It was communicated that any issues between the two of them were to be addressed via their respective chain of command. See testimony of Jason Collins, Associate Warden of Programs, Tonya McClease-Harrison, Human Resources Manager and R. Ex. 5. Mr. Collins and Ms. Harrison issued a memorandum immediately after the meeting which reflected that these instructions were given to both employees. R. Ex. 5. It is noted that both Grievant and Ms. Bounds displayed strong opinion and heartfelt behavior at the counseling session; these two women do not like one another. Grievant had made it clear at the conclusion of the March 26, 2013 meeting, that the matter

between her and Ms. Bounds would not be resolved and was not over. Three days later, Grievant brought up the subject matter of the meeting with Cpl. Hall, who was not in her chain of command and, as he admitted, had no work-related reason to be involved with matters between Grievant and Ms. Bounds.

The actions of Grievant were in violation of the instructions given by Associate Warden Collins and Ms. Harrison to keep her personal feud with Ms. Bounds out of the workplace and to keep the contents of the meeting confidential. Respondent highlights that on several occasions Grievant's behavior had been disruptive and this is yet another example of her failure to conform and modify her behavior as reasonably directed by supervising personnel.[5] Pursuant to West Virginia Division of Corrections' Policy Directive 129.00 Section V, Subsection G 4, dismissal "[m]ay be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular offense of such severity that dismissal is warranted."

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical

[5] The April 15, 2013 Dismissal Letter, signed by Warden Ballard, in relevant part states: "The preceding is representative of your continued unsatisfactory level of performance. The cumulative effect of your behavior is such that it cannot be allowed to continue. On several occasions, both formally and informally, your disruptive behavior has been addressed with you and issues continue to occur on a frequent basis. In addition you continue to exhibit failure to follow your chain of command. Unfortunately, you have demonstrated no significant success in improving your work performance; therefore, I have no reason to believe that additional management intervention would bring your performance to an acceptable standard. For this reason, I believe it is in the best interest of this agency that I take this personnel action." R. Ex.1.

violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. Dep't of Finance & Admin., 164 W.Va. 384, 264 S.E.2d 151 (1980). Respondent established that Grievant has demonstrated to her superior officers and administration that they cannot expect her to follow their instructions or to handle her work in a non-disruptive manner. At a maximum security prison, rogue behavior places the safety of staff and inmates at risk and makes it difficult for Mt. Olive to maintain order with its staff. Security requires that its Correctional Officers be able to follow instructions, follow their respective chain of command and focus on providing security.

Grievant is of the opinion that the penalty imposed 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). The 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 Res./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 can not substitute his 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.*

Mitigation of a penalty is considered on a case-by-case basis. Respondent established that Grievant engaged in disruptive conduct. Grievant failed to follow the instructions of the Associate Warden of Programs and the Human Resources Manager to keep the feud between Grievant and another employee out of the workplace. Further, in addition to the failure to follow the instructions given, the preponderance of the evidence also tends to indicate it is more likely than not that Grievant was intentionally harassing Ms. Bounds while at work. No opinion is presented by the undersigned as to whether the off-site comments by Ms. Bounds were enraging. The undersigned is sympathetic to Grievant's plight, and would be inclined to reduce the disciplinary action; however, it is Respondent's assessment of the seriousness of the misconduct which generates pause. During her short employment with Mt. Olive, Grievant had repeated issues with following instructions and conforming her work conduct in a satisfactory manner. Mt. Olive is a maximum security prison. Understandably, Respondent requires that its Correctional Officers be able to follow instructions as opposed to carrying out disputes with other staff. Grievant has demonstrated to her superior officers and the administration that they cannot

expect her to follow their instructions or to handle her work in a non-disruptive manner. At a maximum security prison, such rogue behavior places the safety of staff and inmates at risk and makes it difficult for Mt. Olive to maintain order. Grievant's conduct impacts negatively on the ability of Mt. Olive to carry out its mission and thus is not trivial or inconsequential. Accordingly, due deference is afforded Respondent's assessment of the seriousness of Grievant's conduct.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. Dep't of Finance & Admin.*, 164 W.Va. 384, 264 S.E.2d 151 (1980).

3. Under the West Virginia Division of Corrections' Policy Directive 129.00 Section V, Subsection G 4, dismissal "[m]ay be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular offense of such severity that dismissal is warranted." Respondent has demonstrated pursuant to a preponderance of the

evidence that Grievant has had adequate opportunity to correct her failures to follow instructions and failure to provide adequate, satisfactory, non-disruptive job performance.

4. Respondent established by a preponderance of the evidence that during Grievant's short employment with Mt. Olive, Grievant had repeated issues with following instructions and conforming her work conduct in a satisfactory manner.

5. Respondent has shown that the continued failure of Grievant to follow the instructions given to her and to provide adequate, satisfactory, non-disruptive job performance is not a trivial or inconsequential matter.

6. "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).

7. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia State Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Grievant failed to demonstrate that the disciplinary measure levied was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

9. 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).

10. Respondent's decision to terminate Grievant employment is not inconsistent with the principles of progressive discipline. It is not established that mitigation is warranted by the facts, circumstance or severity of the discipline levied.

11. Respondent's decision to terminate Grievant's employment has not been established to be either excessive or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 22, 2013

Landon R. Brown
Administrative Law Judge