THE WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS R. CUMMINGS, JR.,
Grievant,

v. **Docket No. 2013-2072-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.

DECISION

Grievant, Thomas Cummings, is employed by Respondent, the West Virginia Division of Corrections at the Mount Olive Correctional Complex, as a Correctional Officer 3, which position holds the rank of Corporal. Grievant was suspended for five days because of his asserted failure, as Supervisor of his Unit, to have an inmate's cell decontaminated. On June 10, 2013, Cpl. Cummings filed this grievance challenging his suspension by Respondent. The statement of grievance is:

> "Biological hazard cleanup kit was not provided as directed in operational procedures. No formal supervisory training has been offered (LEADS 1 or any DOP classes). Multiple untrained subordinates at the time[;] investigation was not completed in a timely manner. "

As relief, Grievant seeks "[to] expunge all record of suspension from all personal [sic] records and [the] repayment of time lost. "

This grievance was filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4) and the level three hearing was held on August 14, 2013.[1] Grievant appeared *pro se*. Mr. John Boothroyd, Assistant Attorney General, represented Respondent, West Virginia Division of Corrections/Mount Olive Correctional Complex. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on September 18, 2013. This matter became mature for decision on that date.

Synopsis

Grievant was suspended for five days for his asserted failure, as Supervisor of his Unit, to have a cell decontaminated after the removal of an inmate who was found injured and bleeding in a cell. Grievant argues that his suspension was improper because neither he nor his subordinates at the time of the incident were properly trained, and the Unit was understaffed. Grievant further asserts that he ordered his subordinates to disinfect the cell and they did not, and that a biohazard kit for cleanup was either unavailable or not fully equipped. Grievant also contends that the officers and staff involved in the incident could not properly recall the facts surrounding the incident because the investigation was improperly delayed. Respondent proved that Grievant reviewed the relevant procedures mandating decontamination and cleaning of the cell a

[1] W. VA. CODE § 6C-2-4(a)(4) authorizes an employee to file an expedited grievance at level three when contesting a suspension without pay.

week prior to the incident, staffing was adequate to allow the decontamination, and fully equipped biohazard kits were available, if they had been sought out. The Respondent proved that Grievant did not ensure decontamination of the cell.

Grievant further asserts that a five-day suspension was unjustified and inappropriate. Respondent proved that the discipline was justified and appropriate. The grievance is DENIED.

The following facts are found to be proven by preponderance of evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Thomas Cummings, is employed by Respondent, the West Virginia Division of Corrections ("DOC") at Mount Olive Correctional Complex. ("Mount Olive") as a Correctional Officer 3 ("CO 3"), which position ranks as Corporal ("Cpl. Cummings") and was so employed at all times relevant to this grievance.[2]

2. On March 8, 2013, Grievant was the assigned Supervisor of the Quilliams I Unit ("Quilliams I") for the night shift, from 7:00 P.M. to 7:00 A.M, at Mount Olive.

3. On March 8, 2013, at approximately 10:10 P.M., Grievant and Correctional Officer 1, Austin Bowyer ("Officer Bowyer"), found inmate C.C. in Cell Number 432, (sometimes hereinafter "cell") with a large cut on his left temple.[3] When inmate C.C. could not respond coherently to the officers and

[2] The date upon which Grievant began employment at Mount Olive was not provided at hearing.

[3] The names of the inmates involved were omitted to protect their privacy.

appeared to have urinated on himself, Grievant called medical and central control for assistance. LPN Tom White ("LPN White") and Lieutenant Daryl Simpson, the Shift Commander, arrived on the Unit at approximately 10:20 P.M. During LPN White's examination, inmate C.C. appeared to have a seizure and began to struggle violently and without control. Two more officers were called to the Unit to help. Inmate C.C. subsequently became more alert and was able to be placed in a wheelchair and taken by Lt. Simpson, LPN White, and another officer to the infirmary for observation. According to the log for Quilliams I, inmate C.C. was taken off the Unit at 10:38 P.M.[4] At approximately 11:46 P.M., inmate C.C. was removed from the inmate count of Quilliams I.

4. In the Grievant's March 9, 2013, Incident Report, concerning the incident of March 8, 2013, he reported that he and Officer Bowyer found inmate C.C. with a large cut on his left temple, in a dazed and confused condition. In his report, Grievant detailed how inmate C.C. was treated and removed from his cell.

5. Grievant made no reference, either in the body or in the "Action Taken" section of his Incident Report, to the fact that Cell Number 432 needed to be decontaminated and/or that he directed his subordinate officers to do so.

6. The log for Quilliams I does not reflect that any action was taken during the March 8, 2013, night shift to decontaminate Cell Number 432 or that the following shift was informed that the cell needed to be decontaminated. After the incident, there were over eight hours remaining in the night shift.

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[4] Each Unit maintains a log of all significant events occurring on the Unit.

7. On March 12, 2013, inmate R.W. was moved into Cell Number 432 in Quilliams I. Cell Number 432 had not been re-assigned to another inmate since inmate C.C. had vacated it several days before, on March 8, 2013.

8. On March 13, 2013, during a morning "pill call," inmate R.W. asked officers, “who was going to clean up all this blood in my cell[?]” Inmate R.W. further noted that the blood was there when he was moved into Cell Number 432.

9. Afterward, LPN April Horrocks ("LPN Horrocks") observed blood on the floor of the cell and soiled linens. LPN Horrocks notified Correctional Officer 2, Lyle Lesher ("Officer Lesher") that inmate R.W. had been placed in a cell contaminated with inmate C.C.’s blood.

10. Officer Lesher notified his shift commander of this fact and was instructed to move inmate R.W. to Cell Number 311, take photos of the cell and complete an Incident Report. Officer Lesher confirmed that there was blood in Cell Number 432.

11. Officer Lesher and LPN Horrocks prepared Incident Reports on or about March 13, 2013, concerning the contaminated cell.

12. Captain Ronnie Williams was assigned to investigate this incident. As part of the investigation, Captain Williams reviewed Incident Reports prepared by Grievant, LPN Horrocks and Officer Lesher, as well as the log for the Quilliams I Unit for the March 8, 2013, night shift.

13. Captain Williams also interviewed Grievant on April 12, 2013, concerning the March 8, 2013, incident. Grievant did not remember the incident at that time. When asked why the cell was not decontaminated, Grievant

responded that he would have instructed the officers assigned to Quilliams I to clean the cell, but the officers must have either forgotten to do it or simply chosen not to clean the cell.[5]

14. Grievant was the Supervising Officer for the Unit and had a duty to order his subordinate officers to decontaminate the cell and, if they did not timely act upon his order, to initiate possible discipline for failure to do so. Grievant did not initiate any disciplinary action against his subordinate officers who were working on the night of the incident.

15. The Unit had been on "lockdown status" because staffing on Quilliams I was at a minimum level. Lockdown status prevents inmates from leaving their cells.[6]

16. Mount Olive's Operational Procedure # 4.50 "Employee Post-Exposure to Bloodborne Pathogens & Bio-Hazard Clean-Up Procedures" states that:

> D. Bio-hazard Clean-Up Procedures: Unit staff of the area in which the blood/fluid spill occurred will be responsible for proper cleaning and sanitizing of the affected area...
>
> 6. All staff involved in an incident involving exposure to, and subsequent clean-up of, an incident involving bio-hazard substances *will document their involvement and actions taken on an Incident Report.* (Emphasis added.)

Grievant last reviewed this operational procedure on March 1, 2013.[7]

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[5] These officers did not testify at the level three hearing.

[6] Level three testimony of Captain Williams.

[7] Respondent's Exhibit No. 10, "Unit Manual Signature Sheet" signed by Cpl. Cummings, reflecting that he reviewed this policy.

17. Mount Olive's Post Order 3D-07 "Quilliams 1 & 2 Security/Staff Responsibilities" states that:

08(d) Empty Cells: …

1) When a cell becomes vacant, that cell will be cleaned as soon as possible after being vacated. Vacant cells, once cleaned, will be closed and remain closed and secure until it is to be occupied again by another inmate.

Grievant last reviewed this Post Order on March 1, 2013.[8]

18. A biohazard kit was not always available on Quilliams I, and when available, it was not always fully equipped. However, Mount Olive had fully equipped biohazard kits elsewhere in the facility, available within a couple of hours, when requested.[9]

19. Prior to the discipline in question, Grievant had been suspended on April 26, 2013, for three days for discussing a use of force incident with an inmate, referring to another inmate's genitalia and, for telling the inmate that "when inmates act like a**holes, I treat them like a**holes." Grievant had also received a written reprimand on November 12, 2012, for failure to follow instructions while at the Corrections Academy.

20. As a result of Captain Williams' investigation, a request for discipline was issued and on May 15, 2013, pursuant to DOP Policy Directive 129.00 "Progressive Discipline," which establishes levels of discipline which may

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[8] *Id.*

[9] Level three testimony of Officer Lesher. However, there was no evidence that anyone either looked for a bio-hazard kit on the Unit on the night of the incident, or requested a kit from another part of the facility.

be imposed when an employee exhibits initial or continuing unacceptable work behavior or performance. Pursuant to that policy, Grievant was suspended for five days.

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 & Human Res.,* 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). "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).

Respondent asserts that Grievant failed in his duty as Supervisor to have the cell properly decontaminated and cleaned, in violation of Mount Olive's Operational Procedure # 4.50 "Employee Post-Exposure to Bloodborne Pathogens & Bio-Hazard Clean-Up Procedures," and Post Order 3D-07 "Quilliams 1 & 2 Security/ Staff Responsibilities" at 08(d), "Empty Cells," which

mandates that cells will be cleaned as soon as possible after being vacated. Grievant does not dispute that the cell was not timely cleaned.

Grievant responds that, though he did not specifically recall having done so, he would have instructed the officers assigned to Quilliams I to decontaminate the cell. Grievant believed that the officers must have either forgotten to do it, or simply chose not to clean the cell. Assuming that Grievant did order his subordinate officers to decontaminate the cell, Grievant was the Supervising Officer for the Unit and it was his duty to ensure that his subordinate officers carried out this assigned task and, if it was not carried out, to initiate possible discipline for failure to do so. He did neither. Moreover, Operational Procedure # 4.50 clearly specifies that, "All staff involved in an incident involving exposure to, and subsequent clean-up of, an incident involving bio-hazard substances *will document their involvement and actions taken on an Incident Report."* (Emphasis added.) According to Grievant's Incident Report, he did not direct his subordinates to decontaminate the cell or request the supervisor of the subsequent shift to do so. Based upon the conspicuous absence in Grievant's incident report of any mention that he directed his subordinate officers to clean the cell, the undersigned finds that he did not give this direction.

Grievant asserted that the officers working on his shift on the night of the incident were uncertified and untrained, which made it, "impossible to perform the normal/routine duties that are required on a nightly basis, let alone anything extra. I had to perform training for officers that had no experience on the floor nor in the tower, which is the main door control for the entire Unit including ourselves

[sic]. Having to run the entire Unit without any senior staff to support me on the Unit, while the shift commander had the entire prison to oversee, made it very difficult to accomplish any extra tasks outside of the normal routine." There was insufficient evidence to establish that the officers on Grievant's shift were uncertified and untrained.

In addition, Grievant avers that, "No formal supervisory training has been offered (LEADS [sic] 1 or any DOP classes)."[10] The undersigned assumes that Grievant is asserting that he was not properly trained as a Supervisor, particularly with regard to appropriate procedures for clean up/decontamination of areas contaminated by blood. There was limited evidence offered at hearing concerning the general supervisory training Grievant received. However, the evidence demonstrates that Grievant was recently informed of the pertinent procedures regarding contamination and clean up, which is of primary importance to this grievance. Respondent's records show that Grievant reviewed both Mount Olive's Operational Procedure # 4.50 "Employee Post-Exposure to Bloodborne Pathogens & Bio-Hazard Clean-Up Procedures" and Post Order 3D-07 "Quilliams 1 & 2 Security/ Staff Responsibilities," only one week before the incident. Therefore, the undersigned finds Respondent adequately trained Grievant on its procedures mandating decontamination and cleaning of the cell.

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[10] This argument was not fully developed at hearing or in Grievant's Proposed Findings of Fact and Conclusions of Law. The undersigned assumes that Grievant is referring to "LEEDS," an environmental certification program , which includes training on clean up/decontamination of areas contaminated by blood.

In addition, Grievant asserts that time constraints due to insufficient staffing prevented the officers on duty from decontaminating the cell. The inmates were on "lock down" and, therefore, prevented from leaving their cells. Given that Quilliams I was on “lockdown” and eight hours remained on the shift after inmate C.C. was removed from the cell, the undersigned concludes that the officers on duty on the evening of the incident had adequate time and opportunity to clean the cell. Assuming that those eight hours were too busy to allow any of the officers to comply with an order to decontaminate the cell, Grievant should have requested the supervisor of the next shift to undertake this duty, but neglected to do so.

In addition, in an attempt to defend his omission to have the cell cleaned, Grievant elicited testimony at hearing establishing that bio-hazard kits on Quilliams I were, at times, either unavailable or not fully equipped. However, Grievant did not demonstrate that he and/or his subordinate officers were prohibited from cleaning the cell because they could not locate a complete bio-hazard kit. In fact, there was no evidence that on the night of the incident anyone even attempted to locate a kit to clean the contaminated cell. Moreover, Officer Lesher's testimony established that if Grievant and/or his staff had attempted to locate a bio-hazard kit, a fully equipped kit would have been available within a couple of hours.

Finally, Grievant asserts that the investigation into the incident was not completed in a timely manner because it took three months to complete. Grievant asserted that “[b]y the time all the staff was interviewed, they had forgotten the

incident." The investigation was actually completed within approximately nine and one half weeks following the incident, as the incident occurred on March 8, 2013, and Grievant was informed on May 15, 2013, that he was being suspended for five days. The inquiry was delayed because Captain Williams was on annual leave and "on assignment" at another facility for training during March and early April of 2013. However, Captain Williams interviewed Grievant on April 12, 2013, approximately one month following the incident, to investigate the matter. During the same time period, Captain Williams also interviewed the other staff who were involved to investigate what took place. While it was not ideal that the investigation did not commence more promptly, the staff involved prepared Incident Reports immediately following the incident. If those employees did not clearly recall all of the events related to the incident when interviewed by Captain Williams, their written reports were sufficient to refresh their memories and document what took place. Respondent reasonably relied upon its interviews of the staff involved in the incident, and their incident reports, to determine that Grievant failed to request his subordinate officers to decontaminate the cell.

Grievant further asserts that he should not have been suspended because, "[t]he discipline doesn't fit the accusation at all, no security policies were broken, no one was hurt, and the safety and security of the inmates and facility were not compromised." The Department of Personnel's Policy Directive 129.00 "Progressive Discipline," establishes levels of discipline which may be imposed when an employee exhibits initial or continuing unacceptable work behavior or performance. These levels range from a verbal warning, when the

deficiency is not of a serious or repetitious nature, to dismissal when the deficiencies continue after the employee has had adequate opportunity for correction or commits a singular offense of such severity that dismissal is warranted. An argument that the punishment was excessive is an affirmative defense and Grievant bears the burden of showing that the punishment 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); *Ward v. W.Va. Div. of Corr.,* Docket No. 2009-0408-MAPS (July 27, 2009). "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). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.,* Docket No. 93-45-105 (March 31, 1994).

Grievant seems to fail to appreciate the potentially very harmful conditions to which the inmates and staff of the facility were exposed due to his failure to ensure that the cell was properly decontaminated and cleaned. Blood and other bodily fluids may be positive for HIV or Hepatitis or other communicable disease, and should staff or an inmate inadvertently come into contact with blood or other bodily fluids, serious medical consequences can occur. Mount Olive's Operational Procedure # 4.50 and Post Order 3D-07 clearly mandated the procedures that should have been followed to decontaminate and clean the cell after the injured inmate C.C. was removed. Grievant's omission to do so put the staff and inmates at unnecessary risk. The failure to have the cell cleaned is a serious singular incident for which a suspension may be warranted under Policy Directive 129.00. In addition, in the year preceding the subject incident, Grievant received a written reprimand and a three-day suspension. Both of those incidents also involved a failure to follow instructions and written procedure. The five-day suspension was not disproportionate to the gravity of the offense, particularly as Grievant has been disciplined in the recent past by the Department of Corrections. Therefore, Grievant has not shown that mitigation is warranted.

For the above reasons, the grievance is denied. 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 the preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board, 156 C.S.R. § 1-3; *Ramey v. W. Va. Dep't. of Health*, Docket No. H-88-005 (1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Resources,* Docket No. 92-HHR-486 (1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra.*

2. Respondent has shown by a preponderance of the evidence that Grievant failed to ensure that the contaminated cell was decontaminated and cleaned in compliance with Mount Olive's clearly defined policies at Operational Procedure # 4.50 "Employee Post-Exposure to Bloodborne Pathogens & Bio-Hazard Clean-Up Procedures" and Post Order 3D-07 "Quilliams 1 & 2 Security/ Staff Responsibilities," regarding the proper cleanup of cells after they are vacated. Respondent further demonstrated that Grievant had recently reviewed these policies.

3. Under the West Virginia Division of Corrections' Policy Directive 129.00, a suspension may be issued "where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs."

4. Respondent has shown that Grievant's infractions/deficiencies had continued beyond written warning and that Grievant's conduct was a serious singular incident, which warranted a five-day suspension without pay.

5. Mitigating circumstances are generally defined as conditions that support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections,* Docket No. 95-CORR-252 (1996).

6. 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).

7. The evidence does not show that Respondent's five-day suspension was an abuse of discretion.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance the 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/ the Grievance the Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared

and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 31, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE