THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLOTTE FURPHY,

Grievant,

v. **Docket No. 2013-1128-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant, Charlotte Furphy, filed this expedited level three grievance on January 29, 2013, against her employer, Respondent, Division of Corrections/Mount Olive Correctional Complex, challenging a ten-day suspension she received. As relief sought, the Grievant requests the following: "[p]aid for my suspension plus overtime as I volunteer on my days off, compensation for emotional stress, 4hrs pay for filing grievance time. I require these to make me whole again also protection from other further abusive behavior or any other actions from all involved."

A level three hearing was held on May 1, 2013, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, *pro se.* Respondent appeared by counsel, Cynthia R. M. Gardner, Assistant Attorney General. This matter became mature for decision on June 6, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a Correctional Officer II at Mount Olive Correctional Complex. On December 17, 2012, Grievant commented to a co-worker that her doctor had put her off

work due to work stress after she had told the doctor, something to the effect of, “if I had a gun, I would shoot Major Rhodes in the face.” The co-worker did not perceive Grievant’s statement as a threat; therefore, she did not report the comment. Days later, the co-worker decided to report Grievant’s comment to her supervisor. After Mount Olive administration received the report, an inquiry was initiated. Grievant admitted making the comment, but insisted that she did not mean it as a threat. Grievant was charged with violating the Workplace Security Policy and various provisions of DOC Policy Directive 129. Grievant was suspended without pay for eighty hours, or ten traditional working days. Grievant denies Respondent’s allegations. Respondent failed to prove by a preponderance of the evidence that Grievant violated the Workplace Security Policy or DOC Policy Directive 129. Therefore, this grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed as a Correctional Officer II at the Mount Olive Correctional Complex. At the time of the events leading to the filing of this grievance, Grievant was assigned to work in Central Control.

2. Major Robert Rhodes is the Chief Correctional Officer at the Mount Olive Correctional Complex.

3. Major Rhodes works in a supervisory capacity to Grievant, and has the authority to modify her work assignments.

4. Major Rhodes and Grievant worked together, but they did not have a good working relationship. At the time of the events described herein, Grievant had a pending EEO complaint against Major Rhodes.[1]

5. Grievant was working at the facility on December 17, 2012. She left work for a medical appointment, and returned to the facility thereafter.

6. Upon her return to the facility, Grievant went to the count room where Officer Holly Cobb and Officer Tammy Johnson were working.

7. 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."[2]

8. It is unknown if Officer Tammy Johnson heard Grievant's comment.

9. Officer Rhodes was working at the facility on December 17, 2012, but he was not present when Grievant made her comment to Officer Cobb.

10. Officer Cobb did not perceive Grievant's comment as a threat against Major Rhodes. She thought Grievant was only "venting." As such, Officer Cobb did not report Grievant's comment to administration.[3]

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[1] The substance of the EEO matter is not relevant to this proceeding, and such was not addressed during the level three hearing.

[2] Grievant's exact words are unknown. Grievant does not recall the exact words she used, and neither does the one known witness to the comment. However, no one disputes that this was the gist of her comments.

[3] *See*, testimony of Holly Cobb.

11. On the morning of December 18, 2012, Officer Cobb told Patricia Rhodes about Grievant's comment. Upon information and belief, Ms. Rhodes informed Major Rhodes of Grievant's comment that same date.

12. On December 26, 2012, Officer Cobb made a written report to Captain Steve Caudill, Dayshift Shift Commander, about Grievant's comment on December 17, 2012.[4] The record is unclear as to what prompted Officer Cobb to draft this report so long after the event. However, Officer Cobb indicated that she filed the report because Trish Rhodes had reported Grievant's comments to Major Rhodes.[5]

13. Officer Cobb's report was circulated among members of management and administration, including Major Rhodes.

14. On December 26, 2012, the same day Officer Cobb filed her report, Major Rhodes delivered Officer Cobb's report to Investigator Curtis Dixon.[6]

15. Investigator Dixon was directed by Acting Warden Jason Collins to look into this matter. This was not considered to be an official investigation.[7]

16. Investigator Dixon interviewed Officer Cobb on December 26, 2012, the same day she filed her report. Investigator Dixon recorded the interview and such was later transcribed.[8]

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[4] *See*, Respondent's Exhibit 10.

[5] *See*, testimony of Holly Cobb.

[6] *See,* testimony of Curtis Dixon.

[7] *See*, testimony of Curtis Dixon.

[8] *See*, Respondent's Exhibit 11.

17. Investigator Dixon interviewed the following other staff members: Rebecca Ridenour, Laura Volini, and Patricia Rhodes. Ms. Ridenour and Ms. Volini were working in the count room area when Grievant made the comment, but neither had heard it. Ms. Rhodes had not been present when the comment was made.[9]

18. Investigator Dixon interviewed Grievant on December 31, 2012, when she returned to work. This interview was recorded and later transcribed.[10] During this interview, Grievant admitted to making a comment about shooting Major Rhodes, but asserted that she did not mean it as a threat.

19. Based upon Investigator Dixon's January 2, 2013, memorandum, it does not appear that the transcription of Grievant's interview is complete. In his memorandum, Investigator Dixon notes that Grievant, "stated she was tired of everything the Major had done to her and he would not leave her or *Jeremy* alone." (Emphasis added) *See*, Respondent's Exhibit 13. There is no mention of a "Jeremy" in the transcript. *See*, Respondent's Exhibit 12.

20. Investigator Dixon did not interview Officer Tammy Johnson. He deemed it unnecessary after Grievant's interview on December 31, 2012.

21. On January 2, 2013, Investigator Dixon sent a memorandum to Warden David Ballard detailing the findings of his interviews with Grievant and the others. In

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[9] *See,* testimony of Curtis Dixon; Respondent's Exhibit 13.

[10] Grievant disputes the accuracy of the transcript of her interview. When this was raised during at the level three hearing, the undersigned ordered that Respondent provide Grievant and the undersigned with a copy of the audio recording of her interview. If Grievant found any discrepancies between the recording and the transcript, the undersigned directed Grievant to address such in her proposed Findings of Fact and Conclusions of Law. The undersigned did not receive a copy of the recording.

this memorandum, Investigator Dixon concluded that by her comment to Officer Cobb, Grievant violated Policy Directive 129.00.

22. Deputy Warden Ralph Terry conducted a predetermination meeting with Grievant on January 15, 2013. During this meeting, Grievant admitted to making a comment about shooting Major Rhodes, but asserted that she did not mean it as a threat.

23. By letter dated January 15, 2013, from Warden David Ballard, Grievant was suspended without pay for eighty hours, the equivalent of ten traditional working days. The reason for the suspension was stated as "continued unsatisfactory job performance and violation of workplace security."

24. Major Rhodes reassigned Grievant to work in a housing unit away from him several weeks after she returned from serving her suspension. From December 2012 until he reassigned Grievant, the two worked together. Major Rhodes could have reassigned Grievant well before he did, but he chose not to do so.

25. Even after Major Rhodes reassigned Grievant, she worked in Central Control at times; therefore, Major Rhodes and Grievant still had contact. Such was Major Rhodes' decision.

26. There are no firearms located in the count room where Grievant made the comment to Officer Cobb. Further, Grievant does not carry a gun in her position. Although guns are housed at the facility, Grievant did not have access to them.

Discussion

At the commencement of the level three hearing, Respondent, by counsel, moved the undersigned to dismiss this grievance as untimely filed. Therefore, the first

issue to discuss in this grievance is that of timeliness. The burden shifts to Respondent to prove the grievance was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See also, Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee. See, W. VA. CODE § 6C-2-4(a)(1); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 6-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

The Supreme Court has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. *See*

Duruttya v. Board of Educ., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743. Justice Starcher sums up the Court's philosophy in *Hale*:

> In *Spahr, supra*, we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr,* 182 W.Va. 726, 391 S.E.2d 739 (1990). *Spahr* and *Duryutta, supra* teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

Hale, n.10, 199 W. Va. at 393, 484 S.E.2d at 646.

Grievant was notified of her suspension on January 15, 2013. Grievant's statement of grievance is dated January 29, 2013. However, it was not clocked in as received by the Grievance Board until February 8, 2013. The postmark from the envelope indicates that Grievant mailed her statement of grievance on February 7, 2013. Grievant does not assert that she mailed her statement of grievance earlier than February 7, 2013, but argues that she was confused by the paperwork. Respondent

argues that Grievant missed the filing deadline by one day, because January 21, 2013, was a holiday. Applying the Court's philosophy in *Hale* to this case, it appears clear this claim should not be barred as untimely filed. Viewing this case through the lens of substantial compliance, flexible interpretation, simplicity, and fairness mandates allowing the Grievant to proceed on the merits. Given the totality of the circumstances, the undersigned finds that Grievant substantially complied with the timeframes for filing her grievance. Therefore, the grievance was timely filed. The Respondent's Motion to Dismiss is denied.

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. Procedural Rules of the W. Va. Public Employee Grievance Bd. 156 C.S.R. 1 § 3; *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 asserts it properly suspended Grievant from her position as a Correctional Officer for ten days without pay for "continued unsatisfactory job performance" and for violating the workplace security policy.[11] In its suspension letter, Respondent also charges Grievant with the following violations of DOC Policy Directive 129: failure to comply with Policy Directive, Operation Procedures, or Post Orders;

[11] *See*, Respondent's Exhibit 1.

Instances of disrespectful conduct or the use of insulting, abusive, or obscene language to or about others; disruptive behavior; and threatening or coercing other persons. Grievant denies Respondent's allegations and asserts that the comment she made was not a threat.

All of the charges alleged against Grievant stem from the one conversation Grievant had with Officer Holly Cobb on December 17, 2012.[12] The parties do not dispute that Grievant told Officer Cobb that her doctor had put her off work due to stress after she had told the doctor, something to the effect of, "if I had a gun I would shoot Major Rhodes in the face." The exact wording of Grievant's comment is unknown.

Because there is no dispute as to the comment made, the issue now becomes whether the comment Grievant made to Officer Cobb concerning what she told her doctor constitutes a threat as contemplated by the Workplace Security Policy. The Division of Personnel Workplace Security Policy, Section III(C) states as follows:

> Threatening of Assaultive Behavior: Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. Any person (e.g., client, customer, vendor, visitor, etc.) who exhibits threatening, hostile, or abusive behavior, either physically or verbally, or who otherwise willfully interrupts or molests the orderly and peaceful process of any department,

[12] As stated in the suspension letter, Respondent's claim of "continued unsatisfactory job performance" is linked to Grievant's alleged violation of the Workplace Security Policy on December 17, 2012. Respondent presented evidence of Grievant's prior disciplinary history with respect to progressive discipline and two performance appraisals at the level three hearing, but does not appear to pursue the claim of unsatisfactory job performance in its proposed Findings of Fact and Conclusions of Law. The focus of this grievance has clearly been the allegation that Grievant violated the Workplace Security Policy. As such, the undersigned considers the independent claim of continued unsatisfactory job performance abandoned, and it will not be addressed further herein.

> division, or agency of State government, may be denied services and may be subject to arrest and criminal prosecution. In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following: the perception that a threat is real; the nature and severity of potential harm; the likelihood that harm will occur; the imminence of the potential harm; the duration of risk, and/or the past behavior of an individual.

Id. "In evaluating whether employee statements constitute a threat, this Grievance Board has previously referred to the West Virginia Division of Personnel's Workplace Security Policy which requires examination of whether the threat seems real, and the nature, likelihood and imminence of potential harm." *Williams v. Division of Natural Resources*, Docket No. 2013-1980-DOC (Aug. 19, 2013) (citing *Jefferson v. Shepherd Univ.*, Docket No. 07-HE-116 (Mar. 12, 2008)).

The undersigned must examine the comment and the context in which it was made. In the conversation with Officer Cobb, Grievant was repeating what she had told her doctor. Major Rhodes was not present during this conversation. Grievant was not exclaiming or declaring to Officer Cobb that she was going to shoot Major Rhodes. No other person in the count room area is known to have heard the comment Grievant made to Officer Cobb. There was no evidence presented to suggest that Grievant appeared angry, hostile, disruptive, or unstable when she made the statement.[13] Officer Cobb testified that Grievant was upset, but nonetheless, she did not think that Grievant was making a serious threat against Major Rhodes. She thought that Grievant was only

[13] Grievant has not described the nature of her medical appointment. However, Grievant has repeatedly raised the issue that because she had recently discovered she was pregnant, she had stopped taking her Prozac, and that her doctor told her at this visit that she should not have done so. However, there has been no evidence presented to suggest that this medical appointment was anything but routine.

venting. Such is why she did not initially report the incident. Also, no one else in the area is known to have heard Grievant make the comment.

Additionally, the evidence does not suggest that Major Rhodes perceived Grievant's comment as a threat. Major Rhodes learned of Grievant's comment on December 18, 2012, but took no action upon learning of it.[14] No action was taken by anyone at the facility until Officer Cobb made her report on December 26, 2012. Further, even though Major Rhodes had the authority to reassign Grievant to work in another area of the facility away from him, he did not do so until weeks after Grievant returned from her suspension. After Major Rhodes reassigned Grievant, she still worked in central control at times and had contact with Major Rhodes. Therefore, Major Rhodes' actions do not support the notion that he believed Grievant's comment to be a threat against him, or that there was an imminent threat to his safety.

Further, the evidence presented does not indicate that there was a likelihood or imminence of potential harm. Grievant did not carry a gun for her position and guns were not readily accessible to her at the facility. As her supervisor, Major Rhodes had to have known this. Grievant did not try to gain access to a gun or any other weapon. There has been no evidence presented to suggest that Grievant sought out Major Rhodes, or that she had any contact with him that day following her conversation with Officer Cobb.

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[14] *See,* Respondent's Exhibits 11 and 13; testimony of Holly Cobb. Further, according to Deputy Warden Ralph Terry, Major Rhodes declined to appear or testify at the level three hearing because he wanted no contact with Grievant. Respondent made no request to allow Major Rhodes to appear telephonically. Therefore, the undersigned does not have the benefit of his testimony. The undersigned can only rely on the evidence presented at the level three hearing.

Grievant's comment was inappropriate and unprofessional, but it does not appear to have been a threat, or even perceived as one. Therefore, the undersigned cannot conclude that Grievant violated the Workplace Security Policy or any of the stated provisions of DOC Policy Directive 129. Accordingly, this grievance is granted.

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. Procedural Rules of the W. Va. Public Employee Grievance Bd. 156 C.S.R. 1 § 3; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. "In evaluating whether employee statements constitute a threat, this Grievance Board has previously referred to the West Virginia Division of Personnel's Workplace Security Policy which requires examination of whether the threat seems real, and the nature, likelihood and imminence of potential harm." *Williams v. Division of Natural Resources*, Docket No. 2013-1980-DOC (Aug. 19, 2013) (citing *Jefferson v. Shepherd Univ.*, Docket No. 07-HE-116 (Mar. 12, 2008)).

3. Respondent failed to meet its burden of proving by a preponderance of the evidence that Grievant violated the Workplace Security Policy or the stated provisions of DOC Policy Directive 129.

Accordingly, this Grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back pay, with statutory interest, for the eighty hours she was suspended, to reinstate Grievant's seniority and tenure, and any benefits lost due to this suspension,

and to expunge any reference to this suspension from any and all personnel records maintained on Grievant. Grievant's requests for overtime pay, compensation for emotional distress, and additional compensation for four hours for filing her grievance are **DENIED**. It is noted that the Grievance Board has no authority to award relief for tort-like claims or punitive damages. *See Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

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 (eff. July 7, 2008).

DATE: October 2, 2013.

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Carrie H. LeFevre
Administrative Law Judge