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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

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Suite 508  
Charleston, WV 25301  
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DENNIS EISENHAUER

v.

DOCKET NO. CORR-88-008

DEPARTMENT OF CORRECTIONS

DECISION

Grievant, Dennis Eisenhauer, is employed by the Department of Corrections as Deputy Warden of Operations at the West Virginia Penitentiary at Moundsville. Mr. Eisenhauer filed a level one grievance on July 26, 1988 in which he alleged that a written reprimand had been issued without just cause. At level one Warden Jerry Hedrick stated that he was unable to respond as he was "...not privileged to your testimony in this matter...". The grievant then appealed to A. V. Dodrill, Jr., Commissioner of the Department of Corrections, who took no action.<sup>1</sup> A level four appeal was filed on August 30; an evidentiary hearing was conducted on September 28, 1988.

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<sup>1</sup>W.Va. Code §29-6A-4 provides a four-step grievance procedure: the immediate supervisor; the administrator of the grievant's work location, facility, area office or other appro-  
(footnote continued)

During the period of December 1987 through January 1988 Correctional Officer Lois Sanders filed five incident reports:<sup>2</sup>

December 30, 1987 - while an officer was instructing her on how to conduct an inmate count he remarked that it was sometimes difficult when "...the darkies will be sitting on the toilet with the lights out and you can't see them." Officer Sanders asked what constituted a darkie and the officer responded "the coloreds". When she asked "What is a colored?" he responded: "a black". The officer then commented that he thought he had made her mad and she informed him that he had done so.

December 30, 1987 - offensive writing on the wall of the men's restroom was discovered. "Black is beautiful (sic) tan is grand and white is the color of the big guard man. Black is also stupid because you spelled beautiful wrong." Officer Sanders noted that on December 29 she had reported racial writing on the new wall break on the fourth tier of "K" side, but she did not state the contents thereof.

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(footnote continued)  
priate subdivision; the chief administrator of the employing department, board, commission or agency and finally, to the Education and State Employees Grievance Board. In this instance the grievant's immediate supervisor and the administrator of his work location were the same individual thereby combining levels one and two. The appeal to Commissioner Dodrill at level three received no response.

<sup>2</sup>Lois Sanders is a black female employed as a Correctional Officer I.

January 6, 1988 - while assigned to the wheel area Officer Sanders overheard a conversation in which Correctional Officer Martin remarked to Correctional Officer Olnick that he (Martin) had gotten his name in the paper "...for hitting that nigger." Officer Sanders stated that she was subjected to racial slurs on a daily basis with the only change being the officers' names.

January 9, 1988 - Officer Sanders reported that she was made to feel incompetent by Lt. Ericson when he disputed her assertion that two other employees had arrived for work. Officer Sanders stated that she had to provide verification by another employee that the two employees in question had indeed arrived.<sup>3</sup>

January 27, 1988 - Officer Sanders charged that Lt. Ericson approached a door which she was unlocking but had not yet removed the key. According to Officer Sanders he opened the door pulling her into the corridor while she retained a grip on the keys. He told her that he believed that she had the key out of the door.<sup>4</sup>

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<sup>3</sup>Lt. Ericson responded on the report that he had simply been doing his job in checking on the two officers who were not at roll call and that while he had repeated the question to the grievant he had not used language to make her feel incompetent.

<sup>4</sup>Three other reports filed by other correctional officers are included in Grievant's Exhibit 5 and serve as their responses or additional information relating to Officer Sanders' reports.

Commissioner Dodrill notified the grievant by letter dated February 12, 1988 of his receipt of a letter from Officer Sanders in which she expressed concern regarding incidents of racial harassment. Commissioner Dodrill advised the grievant that he had discussed the matter with Warden Hedrick, who had previously acknowledged "...the possibility of these remarks being made." The Commissioner described the actions of Officer Sanders' co-workers as intolerable and assured her that he would take whatever steps necessary to remedy the problem.

On April 26 Executive Assistant William R. Whyte filed a memorandum to Commissioner Dodrill reporting on an investigation conducted by himself and a representative of the Human Rights Commission on the alleged racial harassment.

Based upon interviews of seventeen employees, including numerous correctional officers, the chaplain, the grievant and Warden Hedrick, Mr. Whyte concluded that he was unable to discern the occurrence of racial harassment. He did identify evidence that several of the persons interviewed may have engaged in disrespectful conduct and/or the use of insulting, abusive or

obscene language to or about others, in violation of the Department of Corrections Policy Directive 400, Section A-4.<sup>5</sup>

Mr. Whyte also determined that the grievant had been approached by Officer Sanders with complaints of the officers' actions and that his lack of an adequate response or investigation could be viewed as a violation of Policy Directive 400, Section 7.00 A5. The grievant had allegedly stated that no disciplinary action had been taken due to insufficient evidence but that action would be taken whenever the complaints reached the point of affecting the functioning of the institution. The report notes that the grievant did not initiate an investigation to develop evidence and implies, but does not state, that it was the grievant's responsibility to do so. Mr. Whyte recommended that all of the named employees receive a first offense penalty and instruction on sexual and racial harassment. He also advised that a copy of the Policy Directive 400 be made available to all employees and that a human rights class be included in the basic corrections class at the Department of Corrections Training Academy and be offered as in-service training.

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<sup>5</sup>Officers had admitted to using the term "nigger" in a conversation overheard by the grievant; had used the terms "darkie" and "colored" in her presence and had referred to her husband as a "jungle bunny".

By letter dated July 21, 1988 Commissioner Dodrill advised the grievant that as a result of an investigation he was to consider the document as an official reprimand. Commissioner Dodrill determined that sufficient reason existed for him to believe that the grievant failed to act in response to a complaint of racial harassment filed by a correctional officer. His failure to take corrective action or to initiate an investigation was cited to be in violation of Policy Directive No. 400, Section A5 "Inadequate or unsatisfactory job performance". Commissioner Dodrill imposed what he viewed as the minimum penalty of the written reprimand and the grievant's enrollment in an appropriate in-service training class on the issues of harassment and discrimination, when offered.

At the level four hearing the grievant, who as the Deputy Warden of Operations heads the Security, Support Services and Security Support divisions, testified that he had reported to Warden Hedrick regarding a complaint of racial harassment as early as September 1987. When the incident reports were filed in January the grievant stated that he advised Warden Hedrick to issue a memorandum regarding the issue. According to the

grievant the warden indicated that he would first call the commissioner and that later the warden advised him that a memo would not be issued as it might further inflame the situation and to "let a dead dog lie".

The grievant states that he followed the directive of his supervisor and did not pursue the matter further. He argues that his punishment was improper as he did not have the authority to discipline employees or order an investigation. Therefore, he could not have implemented the actions he is being punished for having not done.

In support of his argument the grievant presented the testimony of Richard Lohr, Chief Correctional Officer, who corroborated the grievant's testimony by stating that he also had recommended that the matter be investigated but the warden had directed the grievant and him not to initiate an investigation. The grievant also presented a flow chart of the institutional chain of authority, which indicates the division of Internal/External Investigations reports only and directly to the warden. John Hepburn, Division of Chief of Security Support and the institution

investigator, confirmed that he does not initiate investigations without the warden's direction and that the warden had advised both the grievant and him that all investigations were to go through his office.

The Department of Corrections chose not to present any evidence; however, Mr. Whyte, representing the department, stated that despite any in-house procedures at the institution the commissioner determined that "something more" had been expected of the grievant in pursuing the complaints and that to say he had no authority or responsibility was not sufficient.

When questioned by this examiner both parties stated that there existed no policies, regulations or other written documentation relevant to this matter. Therefore, based upon the evidence presented at level four, it appears that the grievant has been subjected to punishment for failure to take actions specifically prohibited by the chief administrator of the institution. As the warden has assumed sole authority for the action which the commissioner believes should have been taken, punishment of the grievant was improper.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

### Findings of Fact

1. Grievant is employed by the Department of Corrections and presently holds the position of Deputy Warden of Operations at the West Virginia Penitentiary at Moundsville.

2. Following a series of complaints filed in December 1987 and January 1988 and a letter to Commissioner A. V. Dodrill relating to racial harassment at the penitentiary an investigation was conducted by Executive Assistant William R. Whyte and a representative of the Human Rights Commission.

3. Mr. Whyte determined that the incidents reported by Correctional Officer Lois Sanders did not constitute racial harassment but may have been disrespectful conduct and/or the use of insulting, abusive or obscene language in violation of Policy Directive No. 400, Section 7.00 A4.

4. Mr. Whyte determined that the grievant's failure to adequately respond or investigate could be viewed as a violation of Policy Directive 400, Section 7.00 A5 "Inadequate or unsatisfactory job performance".

5. Based upon the investigative report Commissioner Dodrill issued the grievant an official reprimand and directive that he complete in-service training on the issues of harassment and discrimination, when offered.

6. The grievant has no authority to discipline employees or to initiate investigations as per the policy of Warden Hedrick.

7. The grievant had previously brought the matters regarding Officer Sanders to the attention of the warden and had recommended that a memo be issued.

#### Conclusions of Law

1. An administrator's authority must be exercised reasonably, not arbitrarily or capriciously.

2. The grievant was improperly disciplined for failure to take actions which had been specifically prohibited by the administrator of the institution who had assumed all responsibility for the matters in question.

Accordingly, the grievance is GRANTED and the Department is Ordered to remove the letter of reprimand from the personnel file of the grievant.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of your intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: November 15, 1988

Sue Keller

SUE KELLER  
HEARING EXAMINER