THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

THEODORE VESTAL,

Grievant,

v.

Docket No. 2008-1246-CONS

DIVISION OF CORRECTIONS/ANTHONY

CORRECTIONAL CENTER,

Respondent.

DECISION

Theodore Vestal ("Grievant") challenges the termination of his employment as a probationary Correctional Officer I by the West Virginia Division of Corrections ("DOC"). This grievance was filed directly to level three on January 8, 2008. Although probationary employees are not entitled to the expedited grievance process, this grievance was consolidated with a previous grievance challenging a suspension without pay. While somewhat usual, this particular case did bypass the lower levels. DOC did not object to this matter being considered at level three. Grievant's Statement of Grievance reads as follows:

> After suspension, warden indicated that he would meet with his corporal and unit manager every two weeks through December 2007. Did not have meetings, thus had no reason to believe performance not up to standards, which led to termination.

Grievant seeks reinstatement, back pay, benefits, and attorney's fees.

A level three hearing was held in the Grievance Board's office in Beckley, West Virginia, on April 2, 2008. Grievant was represented by E. Lavoyd Morgan, Jr., Esq. DOC was represented by Charles

Houdyschell, Jr., Senior Assistant Attorney General. This matter became mature for decision upon the receipt of the parties' proposed findings of fact and conclusions of law on June 23, 2008.

Summary

DOC discharged Grievant during his initial one-year probationary period of employment. Grievant argued his dismissal was disciplinary, but did not prove this. The charges of unsatisfactory performance which were proven were an inability to control the activities of the inmates and the failure to follow established procedure. DOC elected to terminate Grievant during the probationary period, citing unsatisfactory job performance. Grievant did not meet his burden of proof and demonstrate his performance was satisfactory. As to Grievant's challenge of the five-day suspension without pay, this matter is disciplinary in nature. DOC established by a preponderance of the evidence the charges against Grievant resulting in the suspension. In short, Grievant made inappropriate promises to the inmates concerning the award of privileges. Grievant also admitted to using one dominant inmate to gain control over other inmates under Grievant's charge. 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 began probationary employment with DOC as a Correctional Officer I at the Anthony Correctional Center on January 2, 2007.

2. During Grievant's probationary period, DOC found it necessary to address with Grievant a number of performance issues which involved inappropriate interaction with inmates, and an inability to control the inmate population. 3. In August of 2007, Grievant became involved in an incident with an inmate, David McDonald, in which he forcibly removed the inmate from the library. This incident led to an investigation into Grievant's conduct.

4. It was discovered that Grievant had approached another inmate, B.J. Keen, who he believed to be a potential witness to the events between Grievant and McDonald. Inmate Keen reported to an investigator that Grievant approached him with an offer of work hours if he would state that he did not witness anything taking place in the library. (See footnote 1)

5. Grievant admitted to speaking with Keen, but attempted to downplay the conduct in that he was joking about “hooking up some hours.” Respondent's Exhibit 2.

6. During the course of the Keen investigation, Grievant also admitted using a dominant inmate to calm down other inmates in Grievant's assigned dorm. Respondent's Exhibit 4.

7. The Warden determined that Grievant's conduct of allowing an inmate to have authority over other inmates was an unacceptable practice of giving the inmate a position of power. In addition, offering an inmate a benefit to cover up an officer's misconduct is a compromise of the officer.

8. A predetermination conference was held on October 12, 2007, prior to the imposition of any disciplinary action. Grievant was suspended for five days without pay because he admitted speaking with an inmate who was involved in an investigationconcerning Grievant's job performance. Grievant admitted informing an inmate he would be “hooking up” some work hours for him concerning an incident for which Grievant's job performance was under investigation. Further, Grievant stated that he had used inmates to maintain and regain control over the general inmate population.

9. Prior to the imposition of the suspension, Grievant's work performance once again led to an investigation. On September 22, 2007, Grievant was strip searching inmates returning to the dorm following a family picnic outing. Grievant was conducting a strip search of an inmate, when the inmate refused to remove his socks. Grievant and the inmate engaged in a shouting match. As a result, the inmate was removed from the area without the search being completed.

10. On November 22, 2007, Grievant was involved in another altercation with an inmate; this particular incident escalated to the point that Grievant was assaulted.

11. Finally, on December 6, 2007, Grievant was instructed, at the end of his work day, to report to work the following morning. Grievant indicated he would not report, and, in fact, failed to report as ordered.

12. A predetermination meeting was conducted on December 17, 2007. By letter dated December 19, 2007, Warden McCourt advised Grievant that he was being dismissed from his position for unsatisfactory work performance during his probationary period. The dismissal became effective on January 4, 2008. DOC required Grievant's immediate separation from the workplace. (See footnote 2)

Discussion

___This matter arises out of consolidated grievances involving the suspension of Grievant, and termination of Grievant as a probationary employee. While interrelated, they involved different burdens of proof and will be discussed separately. When a probationary employee is terminated on

grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992). "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). Grievant has done little to challenge the allegations against him, and, thus, he has failed to meet his burden of proof. If Grievant had established that his services were satisfactory, then the agency's decision would be deemed arbitrary and capricious. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

Grievant's only defense to the charges against him is that he did not have formal meetings every two weeks as set out in his suspension letter dated October 12, 2007. However, Warden McCourt testified that Grievant was advised on several occasions that his job performance needed improvement, an allegation which Grievant has introduced noevidence to refute. Furthermore, Wesley Bashlor, Unit Manager at Anthony Correctional Center, testified that he made numerous informal contacts in an effort to counsel Grievant on his job performance. Mr. Bashlor indicated these

sessions took place many times a week. Once again, the purpose of the informal contacts was to discuss Grievant's responsibilities, and performance.

Grievant was advised during his orientation process that it would be necessary for him to successfully complete a probationary period. Grievant was provided an Employee Performance Appraisal early in his probationary period that set out his responsibilities, as well as his performance standards and expectations. Additionally, it is clear that supervisory personnel communicated directly with Grievant regarding operational procedure, and job performance expectations.

Despite DOC's efforts to train a probationary employee, Grievant exhibited conduct that gave his superiors concern over his ability to work as a correctional officer. Grievant had received instruction on how to handle the inmate population, and the difference between appropriate and inappropriate interaction. Notwithstanding, Grievant became engaged in escalating problems with inmates which impacted his ability to maintain professional integrity, and inmate control. Grievant offered privileges to an inmate in an attempt to solicit favor in connection with his official duties. Before this matter could be fully resolved, another incident arose when Grievant could not maintain order during a strip search on an inmate. This disrupted other staff, further demonstrating a lack of ability to adequately control the inmate population. Finally, Grievant's refusal to report to work as directed is not a matter that one can expect any meeting to remedy. Grievant has failedto prove by a preponderance of the evidence that his services were satisfactory, nor has he demonstrated that his dismissal was arbitrary and capricious.

Turning to the five-day suspension, this matter is disciplinary in nature. 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 Employees Grievance Board, 156 C.S.R. 1 § 156-1- 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

A grievance was filed on October 18, 2007, which challenged Grievant's five-day suspension without pay for, “things that I was accused of doing. I did not do these things, the administrators took the investigators [sic] opinions and findings to be fact instead of what they were.” Grievant seeks to have the suspension reduced or rescinded, and to be made whole for his losses. At the risk of being somewhat redundant, the following discussion summarizes the charges leading up to the five-day suspension.

After an incident in which Grievant knew he would be the subject of an investigation (inappropriate contact with an inmate), Grievant began discussing the matter with another inmate. In particular, Grievant wanted to know what would be said by the inmate relating to Grievant's inappropriate conduct toward another inmate. Grievant admitted telling the inmate, a potential witness against him, that he would “hookup” some work hours for him in an attempt to solicit favor. Grievant also acknowledged that he used an inmate to maintain and regain control of the inmate population. In the instant matter, this conduct could have led to an earlier discharge from his probationary employment. DOC has metits burden in proving the charges supporting the five-day suspension by a preponderance of the evidence.

Grievant's submitted proposals following the level three hearing did not seek mitigation of the penalty. However, Grievant did seek a reduction of the period of suspension in his initial grievance. The argument that discipline is 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). "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 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which 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 witha history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This 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).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the discipline imposed was disproportionate to the offense committed. Grievant was a probationary employee. Grievant was well into the twelve-month probationary period prior to the imposition of this discipline. Despite counseling and instruction, Grievant repeatedly demonstrated an inability to control the inmate population. Just as troubling to the undersigned, Grievant attempted to solicit favor from an inmate by offering that inmate privileges which he had not earned. Accordingly, Grievant's request for a reduction of the penalty imposed is denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that his services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). "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).

2. Grievant has failed to prove, by a preponderance of the evidence, that his performance was satisfactory, and that he should not have been dismissed. *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 96-PSC-422 (Mar. 11, 1992).

3. Grievant failed to prove DOC violated any statute, policy, rule, or regulation in dismissing him from employment, or that DOC acted arbitrarily and capriciously in terminating Grievant's probationary employment. *Goard v. W. Va. Div. of Corr.* , Docket No. 95-CORR-068 (Mar. 20, 1995).

4. 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 Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). 5. "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 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

6. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to his suspension.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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: July 9, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Work hours are important to inmates because they have to earn those hours to advance through the program. Unlike other DOC facilities, offenders between the age of eighteen and twenty-two are placed into the Anthony Center Correctional program by sentencing judges for a period of six months to two years. If the offender successfully completes the program, the sentencing judge is under a statutory obligation to grant the offender a period of probation. W. Va. Code § 25-4-6.

Footnote: 2

If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2 of this rule. If the appointing authority gives the fifteen calendar days notice on or before the last day of the probationary period,but less than fifteen calendar days in advance of that date, the probationary period shall be extended fifteen days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve month probationary period. Division of Personnel's Administrative Rule, Section 10.5.

Further, Section 12.2 of the Rule addresses all dismissals, stating as follows:

Fifteen (15) calendar days after notice in writing to an employee stating the specific reasons, the appointing authority may dismiss any employee for cause. The appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. . .