WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW EDWIN STAFFORD,
Grievant,

v. **Docket No. 2009-0583-MAPS**

WEST VIRGINIA REGIONAL JAIL
and CORRECTIONAL FACILITY AUTHORITY/
SOUTHERN REGIONAL JAIL,
Respondent.

DECISION

Matthew Edwin Stafford ("Grievant") was employed as a Correctional Officer Two ("CO 2") by the West Virginia Regional Jail and Correctional Facility Authority ("RJCFA") and assigned to the Southern Regional Jail ("Jail") in Beaver, West Virginia. Grievant was dismissed from his employment on October 14, 2008, due to a "bad release"[1] that occurred several months before.

On October 23, 2008, Matthew Edwin Stafford filed a grievance directly to Level Three, contesting his dismissal. His statement of grievance provides that:

> On May 22, 2008[,] I was involved with the wrongful release of inmate Cecil Perry [sic] # 0001014750. In November of 2007[,] Chief Correctional Officer Lieutenant Bunting ordered that I was never to work in booking again. After this date[,] I was assigned to the booking department at least once a week due to the lack of staff and lack of staff being trained to work in the booking department. On May 22, 2008[,] I was assigned in the booking department. On this date[,] the wrongful release of Inmate Cecil, Terry[,] OID # 0001014750 was made. After the above date of November 2007[,] I was never trained or retrained to read legal orders by a judge or magistrate. Therefore, I feel that I was wrongfully terminated.

As relief, Grievant requests "immediate reinstatement of employment at the

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[1] When an inmate is released from a regional jail without proper authorization, the incident is routinely referred to as a "bad release."

Southern Regional Jail and compensation for all wages lost during termination."[2] A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on December 6, 2009, in Beckley, West Virginia.[3] Grievant appeared in person and through his counsel, Belinda S. Morton, Esquire, and RJCFA was represented by Chad M. Cardinal, Esquire. This matter became mature for decision on March 13, 2009, the date proposed findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant mistakenly signed off on the release of a misdemeanor, pretrial inmate from the Jail who was not properly authorized to be released. There was a paperwork mistake. Respondent maintains that the unauthorized release of an inmate is an unforgivable mistake.

Grievant argues that dismissal from his employment is too harsh of a penalty given the circumstances. The record indicates that the Grievant was involved in an erroneous release in the past and voluntarily took a demotion. After this incident, Grievant was ordered to not work in booking unless no other officer was available.

Respondent offered Grievant no further training, yet placed him in booking nearly

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[2] Pursuant to WEST VIRGINIA CODE § 6C-2-4(a)(4), an employee may file a grievance contesting his dismissal at Level Three of the Public Employees Grievance Procedure.

[3] On February 17, 2009, a post-hearing telephone conference was held. At the Level Three hearing, the RJCFA produced documents it failed to disclose to the Grievant during the discovery process and this ALJ afforded the Grievant the opportunity to review these non-disclosed documents and proceed with additional testimony at a later date, if Grievant desired. At the telephone conference, Grievant's counsel informed this Board that the Grievant did not desire to submit additional evidence.

once a week. It is the duty and obligation of the shift supervisor to review the documentation prior to the release of an inmate and, even in light of the circumstances, Grievant's supervisor failed to review the file and the release documents. Nearly one month after the bad release, Grievant received an above-average performance rating and months passed without incident. Then, on October 14, 2008, Grievant was dismissed.

The release of an inmate without proper authorization is a serious infraction that is not to be taken lightly. However, Grievant has proven by a preponderance of the evidence that the punishment of dismissal was disproportionate to the offense. This grievance is **GRANTED**.

The following findings of fact are based upon a thorough review of the record produced in this matter.

Findings of Fact

1. At the time of the incident in question, Grievant was employed as a CO 2 with the RJCFA. He had been employed by the RJCFA for over eight (8) years.

2. In 2000, Grievant received training on inmate intake and release procedures.

3. In approximately September of 2007, Grievant was involved in a "bad release." He was not directly disciplined by the RJCFA but chose to take a voluntary reduction in rank. He was reduced from a CO 3 to a CO 2. No additional booking training was provided to the Grievant.

4. After the 2007 bad release, Lieutenant Larry Bunting, Chief Correctional Officer at the Southern Regional Jail, ordered that the Grievant never be ordered to work in the booking department unless no other CO was available. After Lieutenant Bunting's order,

Grievant was placed in booking nearly one day per week.

5. On May 22, 2008, Grievant was instructed by the shift supervisor, Correctional Officer 3 James Donald Prince, to work in the booking department. On this day, Grievant worked in the booking department at the Jail.[4]

6. On May 22, 2008, Grievant signed off and released a pretrial, misdemeanor inmate who should not have been released. As a result, Cecil Terry was released from the Jail.[5] The following led up to the erroneous release:

- On May 21, 2008, inmate Cecil Terry was arrested on a bailpiece[6] and taken to the Jail;
- On this same day, inmate Cecil Terry was booked into the Jail on a Temporary Commitment issued by Gary Vaughan of Acme Bonding in Lieu of a bailpiece;
- On or about May 22, 2008, at 1:12 a.m., an *Order Issuing Bailpiece* was faxed from the Magistrate Court for Cecil Terry;
- On May 22, 2008, at 10:30 a.m., a release was faxed from the Magistrate Court for Cecil Smallwood;
- On May 22, 2008, Grievant executed an inmate release from custody form for Cecil Terry that noted the reason for the release was payment of bond;
- On May 22, 2008, Grievant signed a release form and shift supervisor Corporal James Prince approved the release form; and

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[4] No evidence was presented by either party as to whether another CO was available to work in the booking department.

[5] Inmate Terry was picked up a short while after the bad release.

[6] WEST VIRGINIA CODE § 62-1C-14(a) discusses bailpieces and provides that "[a] bailpiece is a certificate stating that the bail became such for the accused in a particular case and the amount thereof. Upon demand therefor, the court, magistrate or clerk shall issue to the bail bondsperson a bailpiece. Any officer having authority to execute a warrant of arrest shall assist the bail bondsperson holding such bailpiece to take the accused into custody and produce him before the court or magistrate. The bail bondsperson may take the accused into custody and surrender him or her to the court or magistrate without such bailpiece." "If bailpiece is inaccessible due to unavailability of the courts' circuit clerk or magistrate, the bail bondsperson, or his or her designee, can take an offender to a regional or county jail without bailpiece, and the jail must accept the offender" if certain statutory requirements are met. W.VA. CODE § 62-1C-14(b).

- Cecil Terry was released from custody.

See Level Three, Respondent's Exhibits 1, 2 and 3. Level Three, Testimony of Investigator Paul O'Dell, Jr.[7] The record indicates that there was some paperwork confusion with Inmate *Cecil* Terry and Inmate *Cecil* Smallwood. A release form was faxed in for Cecil Smallwood. Level Three, Testimony of Investigator Paul O'Dell, Jr. The similarity of the inmates' names contributed to the cause of the bad release.

7. Commitment and release orders are either hand delivered or faxed to the booking section of the Jail by the magistrate and circuit courts in the Southern Region (which consists of seven counties). *Id*. There is no uniformity of forms for commitment and release orders that are sent to the booking section of the Jail from the various courts. The lack of uniformity in the paperwork contributed to the cause of the bad release.

8. It is the obligation and duty of the shift supervisor to "verify the authority by which an inmate is to be released by":

> a. Verifying the correct date of release by checking the Adjusted Date of Release entry on the Booking Register against the Order of Release;
> b. Reviewing committal documents, bail petitions, and court orders;
> c. Checking to ensure that there is no current detainer or other official documents preventing the release on the inmate from other jurisdictions;
> d. Ensuring that an entry is made in the Actual Date and Time of Release and Type/Reason for Release sections of the Booking Register, and that the officer witness the releasing by signing the Booking Register; and
> e. In the event the Shift Supervisor has reason to believe that the documentation authorizing the release is inadequate, the Shift Supervisor may place the inmate in the holding cell for a reasonable time. The Shift Supervisor shall then cause said document to be

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[7] This is the exact same incident this Board considered in *Prince v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0593-MAPS (Feb. 13, 2009).

corrected.

Level Three, Respondent's Exhibit 4 (RJCFA Policy and Procedure Statement, Document 19001).

9. At the time of the bad release at issue, James Prince was the shift supervisor and signed off on the release of inmate Cecil Terry. Mr. Prince did not follow RJCFA policy. Because of the incident, Mr. Prince was dismissed.[8]

10. On July 2, 2008, Grievant received a job performance evaluation. Overall, the Grievant was evaluated as above average. Level Three, Grievant's Exhibit 1.

11. An investigation was made into the bad release of Cecil Terry by Paul O'Dell, Jr., Chief Investigator for the RJCFA, on August 29, 2008. The investigation concluded that an error occurred and Cecil Terry was improperly released from the Jail.

12. After the May 22, 2008, bad release, Grievant continued his normal duties and responsibilities at the Jail. He was given no additional training in booking.

13. Nearly five months after the bad release, on October 14, 2008, Grievant was given a letter from Cedric Greene,[9] Deputy Director of RJCFA, informing Grievant that he was dismissed from employment.

Discussion

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[8] Mr. Prince was subsequently reinstated and given a two-day suspension by the West Virginia Public Employees Grievance Board. *See Prince v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0593-MAPS (Feb. 13, 2009).

[9] Mr. Greene is apparently no longer employed by the Respondent and did not appear as a witness at the Level Three hearing.

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 § 3 (2008). *See 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.*

Permanent state employees who are in the classified service[10] 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. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam)[11](recognizing the viability of the "good cause" standard pronounced in *Oakes*).

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[10] Grievant is a covered employee under the civil service system. W.VA. CODE § 31-20-27(a). The purpose of the civil service system is to provide civil service employees the security of tenure. *Blake v. Civil Serv. Comm'n*, 172 W.Va. 711, 310 S.E.2d 472 (1983); *Vosberg v. Civil Serv. Comm'n*, 166 W. Va. 488, 275 S.E.2d 640 (1981)**; *Zigmond v. Civil Serv. Comm'n*, 155 W. Va. 641, 186 S.E.2d 696 (1972).**

[11] "Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases." Syl. Pt. 3, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

"*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

Grievant was dismissed for signing off on the initial paperwork that eventually led a pretrial misdemeanor inmate to be released from the Jail without a court order authorizing the release. There is no doubt a serious mistake occurred and that fact is not disputed by Grievant. The appropriate commitment and release of inmates is the most important function of the RJCFA. *See* Level Three, Testimony of James D. Wells. Indeed, the release of an inmate without authority is a serious error that impinges upon the public confidence in the RJCFA and is contrary to the core mission of the Jail. The undisputed facts show that Grievant signed off on the release of Cecil Terry from the Jail without proper authority to do so. It appears that prior to the release, Grievant failed to properly understand the effects of the various documents faxed to the booking department and confused the inmate names. The Respondent has met its burden of proving a violation of policy and operating procedure. *See generally* Level Three, Respondent's Exhibit 4 (RJCRA policy and procedure for releases).

The Grievant maintains that the penalty of dismissal is unwarranted in light of the totality of the circumstance. The argument that discipline is excessive given the facts of the

situation is an affirmative defense. Grievant bears the burden of demonstrating the penalty was clearly excessive and reflects an abuse of the RJCFA's discretion or an inherent disproportion between the offense and the dismissal. *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

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).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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 with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). When 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).

This ALJ now considers each inquiry under *McVay v. Wood County Board of Education*. The first area of inquiry is the Grievant's work record. Grievant has been a loyal employee of the Regional Jail Authority for over eight years. It would appear that he initially worked his way up through the ranks to attain the position of CO 3. *See* Level Three, Grievant's Exhibit One (letter from the RJCFA to Grievant recognizing the Grievant's "commitment to the job and commitment to this facility [Southern Regional Jail] is indicative of a true professional"); Level Three, Grievant's Exhibit 2 (January 9, 2007, letter from RJCFA to Grievant selecting the Grievant for promotion and stating that the Grievant's advancement "reflects not only your [Grievant's] personal motivation and desire for career development, but a professional commitment to the facility and to the Authority"). However, in 2007, while working in a supervisory capacity as a CO 3, Grievant was involved in a bad release. Instead of being directly punished,[12] Grievant took responsibility for his actions and offered to take a reduction in rank from a CO 3 to a CO 2. *See* Level Three, Grievant's Exhibit 4. His offer was accepted by the RJCFA. The record indicates that in July of 2008, Grievant's performance was evaluated. He received a rating of above average.[13]

The next area of inquiry for mitigation is the clarity of rules regarding the infraction. Again, there is no dispute. All agree that an inmate may not be released without an appropriate court order authorizing the release. Indeed, unauthorized release of a pretrial inmate is a serious offense that cannot be taken lightly.

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[12] Mr. John Louis King, II, RJCFA Chief of Operations, testified that "there was no disciplinary action taken. He [Grievant] voluntarily reduced himself in rank."

[13] The evaluations did indicate that the Grievant used sick leave often. Likewise, there was some vague testimony that suggested the Grievant had some very minor problems in the past with tardiness and use of sick leave.

While the clarity of the rule prohibiting unauthorized release is clear, the precise penalty that has been imposed for this error in the past is not so clear. According to the Division of Personnel's *Supervisor's Guide to Discipline*[14] utilized by the Respondent, uniformity of enforcement, adequate warnings of the consequences and consideration of past agency practices, are "general principles" that should be considered when determining whether "good cause" for discipline exist. Mr. John Louis King, II, RJCFA Chief of Operations,[15] testified that discipline for bad releases is conducted on a case by case basis and various types of penalties have been imposed in the past.[16] COs have received written reprimands, suspensions[17] and demotions. However, over the last six months, with the inception of a new administration at the RJCFA, dismissal is the standard disciplinary measure *regardless* of length of service, past performance or other equitable considerations. *Id. See also Prince v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0593-MAPS (Feb. 13, 2009).

The final area of inquiry under *McVay, supra,* is whether there were mitigating

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[14] This guide was produced by the Respondent sometime after the Level Three hearing. At the February 17, 2009, Telephone Conference, both parties agreed that this guide may be properly considered as evidence. *See* Footnote 3 *supra*.

[15] In addition to this position, at the time of the Level Three hearing, Mr. King was serving as the acting administrator of the Southern Regional Jail.

[16] A recent Grievance Board decision indicates that prior to May, 2008, nearly all bad releases at the Southern Regional Jail resulted in a two-day suspension. *See Farr v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0532-MAPS (Jan. 2, 2009).

[17] Mr. King testified that when the paperwork was confusing, CO's were disciplined with a written reprimand or suspension. Mr. King had *no* input on the decision to dismiss the Grievant. However, in the past when Mr. King made these decisions, he considered the totality of the circumstances.

circumstances that should be considered when judging the severity of the penalty. In this situation there were several.

First, this is not an instance where the Grievant was acting with blatant disregard for his duties. Where a CO is acting with blatant disregard, dismissal may be appropriate. In *Bone v. West Virginia Department of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979), the West Virginia Supreme Court of Appeals held that dismissal of a correctional officer was appropriate where he refused three times to carry out a lawful order. The *Bone* Court recognized that each case must be considered on a case by case basis and persistent refusal to obey a direct order warrants dismissal. 163 W.Va. at 258, 255 S.E.2d at 923. Unlike the CO in *Bone*, there is no intentional disregard of duties on the part of the Grievant. The evidence suggests the Grievant made a mistake. The names of the inmates on the documents at issue were very similar. The intake and release documents are not uniform.

Secondly, it cannot be ignored that there is a link in the causal chain not attributable to the Grievant. That is, while the Grievant signed off on the initial document to begin the release process, ultimately it was the shift supervisor's obligation to review the file and ensure that the release was appropriate. *See* Level Three, Respondent's Exhibit 4 (RJCFA Policy and Procedure Statement, Document 19001). The shift supervisor had final approval.[18] On May 22, 2008, shift supervisor James Prince failed to closely examine the file and the release documents. *See generally Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988)(recognizing a supervisor's "duty to exercise reasonable care to keep himself informed of the work performance of his subordinate

[18] The record indicates that through the Jail's TAG computer system, Grievant did not have authority to formalize release. This authority rested with the shift supervisor.

employees”).

Thirdly, the Grievant has received minimal training in booking and even after deficiencies were apparent, no formal booking training was offered. Grievant was trained at the academy in 2000. Likewise, there is some evidence suggesting that he received “computer” training for the TAG computer system, which involves inmate intake and release.[19] Level Three, Testimony of Matthew Edwin Stafford.

Each year the administrator of the Southern Regional Jail offers in-service training to COs. While some training is mandatory, the Jail administrator has discretion when utilizing approximately sixteen hours of annual in-service training. *See* Level Three, Testimony John Louis King, II. The Jail has offered no additional training in booking during the period in which both the Grievant’s bad releases occurred.[20] Instead of correcting the problem and recognizing Grievant’s training needs, the Jail instructed that the Grievant should not work booking unless no other officer was available. Formal in-service booking training may have prevented the bad release of Cecil Terry. Further, additional formal training would ensure public safety and support the “core mission” of the Jail. *Id*. at 5. While the Grievant’s failure to follow procedure cannot be ignored, it is clear that the Jail failed to provide booking training where a deficiency existed. *See also* pp. 14-16 *infra*

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[19] The record reflects that Grievant received a copy of the “Post Orders,” though the precise orders contained within the “Post Orders” are not included in the record. *See generally* Level Three, Testimony of Matthew Edwin Stafford.

[20] The RJCFA argues that after the first bad release, it permitted the Grievant to take a demotion because “the demotion would permit the Grievant the opportunity to improve his performance.” Respondent’s *Proposed Findings of Fact and Conclusion of Law*, 4. It is unclear how a demotion satisfied the training needs of the Grievant.

(discussing three other bad release grievances at the Southern Regional Jail in 2008).

Lastly, it must be recognized that after the May 22, 2008, bad release, the Grievant continued to work at the Jail for approximately six (6) months after the bad release. Indeed, even after the August, 2008, investigation, Grievant was not immediately dismissed. If, as indicated in the October 14, 2008, dismissal letter, the RJCFA truly believed that the Grievant was "unable or unwilling" to do his job, surely, in recognition of public safety, it would have dismissed the Grievant earlier (or at least suspended Grievant during the time of the investigation). The temporal distance between the bad release and the firing undermines the veracity of averments made in the October 14, 1008, dismissal letter, and the public safety rationale presented by the RJCFA.

In this grievance, in light of the particular facts and evidence presented, mitigation is appropriate. Given the extensive mitigating circumstances, the Respondent's dismissal of the Grievant was clearly excessive. Grievant has met his burden of proving an "inherent disproportion between the offense and the personnel action" by a preponderance of the evidence. *Martin, supra.*

This instant grievance does not exist in an analytical vacuum. This grievance is the fourth in a tetralogy of grievances concerning bad releases at Southern Regional Jail in 2008. The totality of the circumstances should be considered when determining the appropriate disciplinary action the Grievant should receive. *See* Level Three, Testimony of John Louis King, II. The first case considered by this Board was *Farr v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0532-MAPS (Jan. 2, 2009). *Farr* concerned a bad release in September, 2008, at Southern Regional Jail where a CO

was dismissed. The evidence in *Farr* established that, prior to October, 2008, no employee at Southern Regional Jail had been dismissed for a bad release and most bad releases resulted in the CO receiving a two-day suspension. CO Farr was found to have little experience in booking. Likewise, the *Farr* ALJ recognized that the booking and releasing department at the Southern Regional Jail was understaffed, resulting in a chaotic work environment. The ALJ in *Farr* found that mitigation was appropriate and reduced the CO's dismissal to a two-day suspension.

Next, this Board considered the case of *Prince v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0593-MAPS (Feb. 13, 2009). The *Prince* grievance involved the exact bad release at issue in this matter. As aforementioned, Mr. Prince was the shift supervisor on May 22, 2008. It was found that there was confusion based upon similarity in the inmates' names. Further, it was recognized that the documents utilized in booking are not uniform and this nonuniformity contributed to the bad release. Like the Grievant, CO Prince was allowed to work for nearly six months after the bad release. Then, without further incident, CO Prince was dismissed. In light of the mitigating circumstances, CO Prince's dismissal was mitigated to a two-day suspension.

Most recently, this Board considered the case of *Dickens v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0534-MAPS (Mar. 23, 2009). CO Dickens was a shift supervisor who signed off on a bad release. In *Dickens*, the ALJ found that in the past fourteen years there had been eight bad releases at Southern Regional Jail

and in each incident a two-day sentence was imposed.[21] Further, it was recognized that because of the complicated nature of the booking process, some very good officers have made mistakes that lead to a bad release. Indeed, while working at Kanawha County Jail, the Chief of Operations at the RJCFA made an error which resulted in a bad release and his suspension. CO Dickens dismissal was reduced to a two-day suspension.

Unlike the above trilogy of bad release grievances, this case is a bit different because CO Stafford has previously been involved in a bad release (though he was never directly disciplined for the first release). As previously mentioned, in the past, nearly all past bad releases at Southern Regional Jail have resulted in a two-day suspension. *Farr v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0532-MAPS (Jan. 2, 2009); *Dickens v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0534-MAPS (Mar. 23, 2009). In this grievance, there is no direct guide indicating the appropriate number of days Grievant should be suspended in light of the specific circumstances presented.

However, a grievance from 1996 does provide some insight as to the disciplinary punishment given to a CO for a second bad release. When considering the effect of a second bad release, at least one CO at the RJCFA has received a two-day suspension. *See Heilmann v. W.Va. Regional Jail and Corr. Auth.*, Docket No. 96-RJA-005 (April 15, 1996). There is no indication in the record that would suggest the public policy has changed since 1996 and, indubitably, the core function of the Jail remains the same.

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[21] The Dickens ALJ recognized that one CO 2 volunteered to be demoted in addition to the 2-day suspension. Presumably, this was a reference to Grievant Stafford.

In recognition of the particular facts presented, this ALJ finds that a two-day suspension is appropriate. When reaching this determination, the nature of the offense, the Grievant's work history and the totality of the circumstances are considered. This suspension should be coupled with additional formal training in the area of booking for the Grievant.

The following conclusions of law are appropriate:

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 Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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.*

2. Permanent 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. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. The Respondent proved, by a preponderance of the evidence, that Grievant failed to follow established policy regarding the release of inmates which led to the unauthorized release of a pretrial inmate. Thus, discipline of the Grievant is appropriate.

4. "Whether 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).

5. Given the totality of the evidence, Grievant proved, by a preponderance of the evidence, that the penalty imposed upon him was clearly disproportionate to the offense committed and mitigation of the punishment is appropriate.

6. In light of the totality of the evidence, Grievant's dismissal must be reduced to two days without pay.

Accordingly the grievance is **GRANTED**. Respondent is hereby **ORDERED** to reinstate Grievant to his position as a Correctional Officer 2 at the Southern Regional Jail.

Respondent is further **ORDERED** to pay Grievant all pay and benefits he would have earned as a Correctional Officer 2 had he not been dismissed, plus interest, minus two-days pay for the appropriate two-day suspension.

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: March 30, 2009

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Mark Barney
Administrative Law Judge