WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY R. DICKENS,

Grievant,

V. **Docket No. 2009-0534-CONS**

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ SOUTHERN REGIONAL JAIL,

Respondent.

DECISION

Grievant Timothy R. Dickens was employed as a Corporal at the Southern Regional Jail in Beckley, West Virginia. This jail is one of several correctional facilities operated by the West Virginia Regional Jail and Correctional Facility Authority ("RJCFA"). On October 2, 2008, Grievant was suspended without pay pending an investigation into the erroneous release of an inmate that occurred on September 28, 2008.[1] Grievant filed a level one grievance form contesting the suspension on the same day.[2] On October 17, 2008, Grievant was dismissed from employment at the Jail as a result of the investigation into the same bad release that occurred in September. Again, Grievant filed a level one grievance form contesting his dismissal.[3]

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

[2] The grievance was recorded at the Grievance Board and given the following docket number: 2009-0462-MAPS.

[3] This grievance was also recorded at the Grievance Board. The docket number given to this grievance was 2009-0528-MAPS.

Grievant requested that both of his grievances proceed directly to level three pursuant to W. VA. CODE § 6C-2-4.[4]

The two grievances were consolidated at level three and a hearing was held in Beckley, West Virginia, on February 4, 2009. Grievant was present at the hearing and was represented by John D. Wooten, Esquire. RJCFA was represented by Chad M. Cardinal, Esquire, their General Counsel. The parties submitted Proposed Findings of Fact and Conclusions of Law which were received by the Grievance Board on March 2, 2009. The grievance became mature for decision on that date.

Synopsis

Grievant does not deny that he participated in the release of an inmate from the Jail who was not properly authorized to be released. Grievant argues that termination of his employment is too harsh given the total circumstances of the incident. Respondent argues that the unauthorized release of a prisoner is a serious and unforgivable mistake and the dismissal of Grievant is justified.

Grievant had a good work record up to the time the bad release occurred. The booking system at the Jail is often chaotic when insufficient staff is available. Other employees who made similar mistakes received significantly less severe punishment. Given the totality of the circumstances, the punishment of dismissal was disproportionate to the offense and the grievance is granted.

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[4] W. VA. CODE § 6C-2-4(a)(4) allows grievants to proceed directly to level three under specific circumstances. Suspension without pay and dismissal are two of those circumstances.

The following findings of fact are based upon a thorough review of the record produced in this grievance and stipulations of the parties.[5]

Findings of Fact

Facts Stipulated by the Parties

1. Grievant Dickens has been employed as a Correctional Officer ("CO") by the RJCFA since 2001, and was most recently a Corporal ("CO 3"). During his entire employment Grievant was assigned to the Southern Regional Jail ("Jail").

2. After Grievant completed the CO training academy, specific continuing education requirements and one year of successful employment as a CO, he was reallocated as a Correctional Officer 2 ("CO 2"). Thereafter, Grievant was promoted to a CO 3 and that was the classification he held when he was dismissed.

3. Grievant has received positive annual evaluations of his job performance and, by all accounts, was a good CO and also a good Supervisor, until the bad release incident that led to his dismissal.

4. The employees assigned to the booking section of the Jail are responsible for the paperwork related to intake and release of inmates, searching and fingerprinting

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[5] The parties stipulated to certain facts in this grievance that will be included in the findings of fact herein. Additionally, the parties agreed that the entire record produced in a companion case, *Farr v. W.Va. Regional Jail and Corr. Auth./Southern Regional Jail*, 2009-0532-MAPS (Jan. 2, 2009), should be considered as part of the record in this grievance. David Farr was working "booking" at the Jail on September 29, 2008, and was involved in the same bad release that led to Grievant Dickens' dismissal. Farr was also dismissed from employment as a result of this incident. He was subsequently ordered to be reinstated after serving a two-day suspension without pay. *Id.* Some of the stipulations of the parties were excluded as repetitive and the order of the stipulations is altered in some instances.

new inmates, checking in property of inmates, monitoring inmates on the suicide watch and entering intake and release data on a computer database referred to as TAG.[6] The booking section is extremely busy and the atmosphere was described by the witnesses as "very stressful," "hectic," and "chaotic,"

5. Entry of data into the TAG database is not essential to the completion of an intake or release of an inmate. However, the normal expectation of the CO working in the booking section is that he or she will enter all appropriate information into the TAG program.

6. Grievant is a Corporal and only works in the capacity of a Shift Supervisor when a higher ranking officer is not available.

7. On September 28, 2008, the scheduled Booking Officer called in sick, and Grievant, as the Shift Supervisor, made several calls attempting to locate a replacement Booking Officer, but no one was available.

8. Grievant then assigned CO 2, David Farr, to the booking section of the Jail for that shift.

9. 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. There is no uniformity of forms for Commitment or Release Orders that are sent to the booking section of the Jail, from the various courts.

10. Grievant was working as the Shift Supervisor and was required to approve every release before the inmate was allowed to leave.

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[6] TAG is a computer database that allows the RJCFA to keep track of the status of all inmates in the various regional jails across the state.

11. As the Shift Supervisor, Grievant had extensive duties throughout the Jail and was not always available to give guidance to the CO working in booking.

12. On September 28, 2008, there were no COs available who had experience working booking, so Grievant assigned CO David Farr to work the booking section alone.

13. This was only the fifth time that CO 2 David Farr had been assigned to booking in the nearly four years he had been employed as a CO and only the second time he had worked in booking without another CO or booking clerk.

14. In the early morning hours of September 28, 2008, Patrick Beasley was temporarily committed to the custody of the Southern Regional Jail pending appearance before a Magistrate on the charges of "Assault/Battery, Obstruction, and Stalking/Harassment."

15. At 2:30 p.m., a Jail Commitment Order/Jail Release Order was transmitted to the Jail, again ordering the commitment of Patrick Beasley to the custody of the Jail.

16. At 2:00 p.m., on September 28, 2008, a Jail Commitment Order/Jail Release Order was transmitted to the Jail ordering the release of Carol Beasley from the Jail. The release was issued by the magistrate with authority to release this inmate.

17. An inmate may only be properly released from the Jail pursuant to a valid Court Order at the expiration of his or her sentence.

18. On the two Orders, the address for both of the Beasleys was the same, the County listed on both Orders was Monroe, and both Orders were signed by the same magistrate.

19. The Order authorizing Carol Beasley's release was mistakenly filed in Patrick Beasley's file by CO 2 Farr. Grievant had no responsibility in placing the Order in the wrong file.

20. CO 2 David Farr told Grievant that there was a release for Patrick Beasley in his file.

21. Grievant reviewed the file of Patrick Beasley, and saw there was a release placed in the file of Patrick Beasley, containing the last name of Beasley. Grievant mistakenly authorized the release of Patrick Beasley.

22. Before releasing Patrick Beasley, Grievant inspected other documents in the file, in addition to the misfiled Release Order. He compared the picture in the file to be certain it matched the inmate, made inmate Beasley recite his social security number to see if it matched the number in the file, checked the date of the release and the Commitment Order, and checked to make certain that there were no retainers for the inmate. Except for the failure to notice the difference in the first name on the release from the inmate whose file the release was in, Grievant carefully followed the proper release procedures.

23. The following day, September 29, 2008, an incident report was filed regarding the bad release of Patrick Beasley.

24. On October 2, 2008, Grievant was suspended without pay pending an investigation into the bad release of Patrick Beasley.[7]

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[7] Findings of fact numbered 21 and 23 were not stipulated to by the parties.

25. An investigation was made into the bad release of Patrick Beasley and on October 22, 2008, Grievant was given a letter from Cedric Greene, Deputy Director of RJCFA, informing Grievant that he was dismissed from employment as a CO 3 effective November 2, 2008.

26. At the same time of this incident, there were two other officers who had been alleged to have effectuated a bad release in May 2008. While their incident was being investigated, they were allowed to remain at work. Ultimately these officers were fired after a period of six months, but they were allowed to continue working during this time. These officers are pursuing their grievance rights.[8]

Additional Findings of Fact

27. Because of the importance of proper booking and release, there is a statewide directive that allowed all facilities to have a CO 3 in booking on all shifts. While the directive did not require this staffing pattern, there was funding to allow more COs to be promoted to the rank of CO 3 to make it possible to implement the practice. CO 3s are a step up in rank and experience from CO 2s.

28. There have been a significant number of bad releases throughout the regional jail system. The vast majority have resulted in suspensions and in one case, a CO was dismissed. However, prior to the unauthorized release of an inmate by Grievant, there had been eight "bad releases" at the Southern Regional Jail in the last fourteen years. Each CO involved in the bad releases in that facility, received a two-day suspension

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[8] One of these officers has been Ordered to be reinstated to his position as a CO 3 at the Jail after serving a two-day suspension without pay. *See Prince v. W. VA. Regional Jail and Corr. Auth./Southern Regional Jail,* Docket No. 2009-0593-MAPS (Feb. 13, 2009).

without pay. One Corporal volunteered to be demoted to a CO 2 in addition to the two-day suspension.

29. Because of the complicated nature of the booking process some very good officers make mistakes that lead to bad releases.[9]

30. Following his bad release, inmate Patrick Beasley was quickly apprehended and released on his own recognizance.[10]

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. 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). 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.*

Grievant was dismissed for allowing the release of an inmate from the Jail without a Court Order authorizing the release of that inmate. There is no doubt that this was a serious mistake and that fact is not disputed by Grievant. The Chief of Operations of the

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[9] The Chief of Operations for the RJCFA, John King, made an error which resulted in a bad release from the Kanawha County Jail. Mr. King was a supervisor at that jail and was suspended for the bad release.

[10] Inmate Beasley was released without bail upon his personal assurance that he would appear at his trial.

RJCFA testified that the appropriate commitment and release of inmates is the most important function of the Authority. The undisputed facts show that Grievant did authorize the release of Patrick Beasley from the Jail without a proper Release Order to do so. The Respondent has met the burden of proving that some disciplinary action was justified.

Grievant does not contend that he should receive no discipline for his actions. Rather he argues that, given the totality of the circumstances, the penalty of dismissal is disproportionate to the offense committed. In his grievance statement Grievant specifically states:

> During my service [as a CO at the Jail] I am aware of several incidents where officers and supervisors released inmates in error and received suspension or demotion and were not terminated. . .I do not think I should be treated differently than the employees who have made the same error I have made.

Given this statement and the record developed at the hearing it is apparent that Grievant is alleging discrimination in the penalty imposed. Discrimination is defined in the grievance procedure as "any differences in the treatment of similarly situated employees, unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm*., 221 W. Va. 306, 655 S.E.2d 52 (2007);[11] *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant cannot be treated differently from his co-workers. For fourteen years there has been a standard punishment for a bad release at the Southern Regional Jail, a two-day suspension. Even at all other facilities, a suspension was the standard punishment. Respondent could only cite a single incident where a CO was dismissed for a bad release. Respondent explains the departure from this more lenient practice by noting that there is a new Director for the Authority and he has decided to send a message that bad releases will no longer be tolerated.[12] This new approach is borne out by the fact that four COs at the Jail were dismissed for bad releases in a very short time frame under the new leadership. While it is certainly within the Director's discretion to set the level of discipline for specific offenses, it is arbitrary to give all offenders the same light penalty for fourteen years and then go to the most extreme punishment without any notice to the employees or demonstrating that there was something particularly egregious about this event to justify

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[11] *Frymier, supra,* was decided utilizing the definition of discrimination found in the old grievance statutes, W. VA. CODE §§ 18-29-2(m) and 29-6A-2(d). However, the definition of "discrimination" in the new grievance statute is virtually identical to the definitions found in the old grievance statutes. W. VA. CODE § 6C-2-2(d). Therefore, *Frymier* remains controlling on this issue.

[12] Respondent expressed concern that when an officer makes a bad release he can no longer be trusted with the public's safety and must be released. This argument is not consistent with Respondent's action of allowing two CO's to remain on duty for six months after a bad release while the incident was investigated. *See* Stipulated Finding of Fact 26, *supra.* Additionally, on occasion very good correctional officers have made this error and gone on to have notable careers. *See* Footnote 9 *supra.*

such a disparate treatment. No such evidence was offered. The appropriate course for the Respondent is to advise all employees it will not tolerate bad releases, that it will dismiss all employees for that infraction, and then enforce the new rule.

The Grievant also complains that the penalty of dismissal is unwarranted given his positive work record and the difficult circumstances faced in the booking section of the Jail on the date of the incident. In 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). 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).

The first area of inquiry is the Grievant's work record. Grievant has received only positive annual evaluations of his job performance and there is no record of any prior disciplinary action against him. He has regularly moved up through the CO ranks and has earned more responsibilities through his competent job performance. Until the bad release incident, Grievant has had a good work record. There is no dispute on this point.

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 that release. What was not clear was that a violation of this rule would lead to an officer's dismissal. In fact, until Grievant's termination, an infraction of the rule resulted in a two-day suspension.

The final area of inquiry under *McVay supra,* is whether there were mitigating circumstances that should be considered in judging the severity of the penalty. In this situation there were many. It was noted by the witnesses that, because of the hectic nature of the booking duties and the importance of the intake and release process, there was a statewide directive by the Respondent to increase the number of CO 3s available in the Regional Jails so that there could be a Corporal working in booking on every shift. It was clear from the record that the Southern Regional Jail is one of the busiest booking facilities in the state and working one individual in booking would be stressing any officer's capacity.

In this case, CO 2 Farr was working in booking alone. He had scant experience in the booking process and had not been trained in the use of the TAG database. While TAG is not essential to committing or releasing an inmate, use of the system is an expectation for any CO working booking and CO 2 Farr was trying to meet that expectation.
CO 2 Farr's attempt to properly record intakes and releases on this system clearly added to the stress of an already difficult situation. Unfortunately, Grievant was unable to assist CO 2 Farr in the booking area because he was the Shift Supervisor and had duties throughout the Jail that kept him occupied. He made several attempts to find an experienced officer to work in the booking section on this shift but none were available.

Finally, the fact that Carol Beasley's Release Order was placed in Patrick Beasley's file created an atmosphere for error that was not of Grievant's making. CO 2 Farr mistakenly placed the Carol Beasley Release Order in Patrick Beasley's file and informed Grievant that there was a Release Order in Patrick Beasley's file. Grievant confirmed the Order was in the file, but failed to notice the different first name. Grievant then proceeded to go through the entire security routine[13] to ensure that proper inmate was being released. Unfortunately, after missing the different first name on the misfiled release, the remaining checks served to confirm that Patrick Beasley was the proper inmate for release. Grievant's efforts to properly perform his duties were thwarted by a series of circumstances over which he had little control.

Given Grievant's work record, the extensive mitigating circumstances and disparity of punishment given to others for the same offense, mitigation of the penalty is warranted in this case. In considering mitigation, it is noted that Grievant is a supervisor and Respondent has the right to expect a higher level of performance from their supervisors. *See Cobb v. Dep't of Admin./General Services Div.*, Docket No. 97-Admin-404/455 (May 26, 1999). However, the history of punishment for bad releases at the Jail is that all COs receive a two-day suspension regardless of their rank. One CO 3 volunteered to take a demotion to a CO 2, but that action cannot be attributed to the RJCFA. Because of the stated factors for mitigation, a two-day suspension is appropriate.

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[13] The two Beasley's share the same address, their charges were very similar, they were arrested in the same county and their commitments were signed by the same magistrate. It is not hard to understand how an officer with little booking experience could make this mistake.

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 § 156-1-3 (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. The Respondent proved, by a preponderance of the evidence, that Grievant had failed to follow established policy regarding the release of inmates which led to an unauthorized release of an inmate. Thus, discipline of the Grievant is appropriate.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

4. Grievant proved that he was subjected to discrimination when the Respondent terminated his employment for the same offense for which several others received a two-day suspension.

5. "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).

6. 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.

Accordingly the grievance is **Granted**. Respondent is Ordered to reinstate Grievant to his position as a Correctional Officer 3 at the Southern Regional Jail. Respondent is also Ordered to pay Grievant all pay and benefits he would have earned as a Correctional

Officer 3 had he not been dismissed, plus statutory 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 23, 2009

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William B. McGinley
Administrative Law Judge