WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES DONALD PRINCE,
Grievant,

v. **Docket No. 2009-0593-MAPS**

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

DECISION

James Donald Prince ("Grievant") was employed as a Correctional Officer Three ("CO 3") by the 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 24, 2008, James Donald Prince filed a grievance, directly to Level Three, contesting his dismissal. His statement of grievance provides that:

> On May 22, 2008, there was an erroneous release of inmate Cecil Terry. I was the supervisor that day, and I signed off on the release. Subsequently, I was terminated on October 15, 2008, due to my mistake. From May to October 1[,] I conducted my normal duties as a supervisor without error. During the meeting to discuss my termination, Sedrick [sic] Greene stated that I was being released [sic] of my duties due to his lack of confidence in my ability to complete my tasks as a supervisor. In the past, erroneous releases have occurred with other supervisors at Southern Regional Jail. These supervisors were disciplined with a two day suspension. I feel that the disciplinary actions [sic] taken against me were harsh due to the fact that I have never even had so much as a warning on this type of situation before.

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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."

As relief, Grievant requests "[r]einstatement as Correctional Officer III a[t] Southern Regional Jail and any loss [sic] wages due to separation."[2] A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on December 19, 2008, in Beckley, West Virginia. Grievant Prince appeared pro se and RJCFA was represented by Chad M. Cardinal, Esquire. This matter became mature for decision on or about February 2, 2009, the date proposed findings of fact and conclusions of law were due. The Respondent has submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant openly and honestly admits he mistakenly signed off on the release of a misdemeanor, pretrial inmate from the Jail who was not properly authorized to be released. Respondent maintains that the unauthorized release of an inmate is an unforgivable mistake that indicates the Grievant is "unable or unwilling to meet the standards required for your [Grievant's] position";[3] yet, it allowed the Grievant to supervise booking for six months after the accidental release. Then, after exemplary performance during the six-month interim, Respondent dismissed the Grievant for the lone incident.

Grievant argues that dismissal from his employment is too harsh of a penalty given the circumstances. Grievant is a supervisory correctional officer with many responsibilities and duties throughout the Jail. Overseeing the release of inmates is only one of his duties.

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

[3] Respondent's Exhibit 8 (October 14, 2008, dismissal letter).

But for the incident in question, in over twelve years in the corrections field, Grievant has never improperly released an inmate. The evidence suggests an honest, but serious mistake occurred. Given the totality of the circumstances, 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 Prince was employed as a CO 3 with the RJCFA. He has been employed by the RJCFA for more than twelve (12) years.

2. In 1996 and on March 4, 1997, Grievant received training on inmate intake and release procedures. *See* Level Three, Respondent's Exhibits 11 and 12.

3. On May 22, 2008, Grievant was working as Shift Supervisor at the Southern Regional Jail. The Shift Supervisor must approve every release before an inmate is released. *See* Grievant's Level Three Testimony and Respondent's Exhibit 10 (release procedures).

4. The Shift Supervisor has extensive duties throughout the Jail. During some shifts, Grievant may oversee more than twenty (20) inmate releases.[4] Likewise, Grievant oversees 13-14 employees and must ensure general security of the Jail.

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[4] The Grievant supervises the work of lower ranked COs who handle bookings and releases. Presumably, the Grievant's error is proximately related to the error of a less-senior CO who initially handled the release documents.

5. On May 22, 2008, Grievant signed off and released an 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, Booking Clerk Canterbury, along with CO Matthew Stafford, executed inmate release from custody forms for Cecil Terry and Cecil Smallwood that noted the reason for the releases was payment of bond;

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[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). These requirements are "(1) The bail bondsperson, or his or her designee, delivering an offender to a jail without a bailpiece issued by the courts' circuit clerk or magistrate appears on the registered list maintained at the jails and approved by the court of original jurisdiction; (2) The bail bondsperson signs an agreement provided by the jail indicating that the offender has been booked in lieu of bailpiece. Such agreement shall contain a clause indicating the incarceration of such offender is lawful and that the jail accepting the offender shall be held harmless from any claims of illegal incarceration or other relative charges; thereby, such bail bondsperson assumes the risk and liability of such incarceration; and (3) Bailpiece must be applied for by the bail bondsperson or his or her designee from the courts' circuit clerk or magistrate and hand-delivered by the bail bondsperson or his or her designee to the jail housing such offender on the next judicial day following the initial intake."

- On May 22, 2008, CO Stafford signed both release forms and Grievant approved the release forms;
- Both Cecil Smallwood and Cecil Terry were released from custody.

See Level Three, Respondent's Exhibits 1, 3 and 7. The similarity of the inmate names contributed to the cause of the bad release.

6. 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). 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.

7. After the bad release, Grievant continued his normal duties and responsibilities at the Jail. Grievant continued to oversee the release of inmates.

8. An investigation was made into the bad release of Cecil Terry by Paul O'Dell, Chief Investigator for the RJCFA, on August 29, 2008. The Investigation Report concluded that an error had occurred and Cecil Terry was improperly released from the Jail. *See* Level Three, Respondent's Exhibit 7.

9. Nearly five months after the bad release, on October 14, 2008, Grievant was given a letter from Cedric Greene,[7] Deputy Director of RJCFA, informing Grievant that he was dismissed from employment. *See* Level Three, Respondent's Exhibit 8.

10. Aside from the incident in question, the Grievant, in his over twelve years of employment, has never been involved in the bad release of an inmate. No questionable or

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

negative event occurred between the bad release and Grievant's receipt of the dismissal letter.

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 § 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[8] 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*)(recognizing the viability of the "good cause" standard pronounced in *Oakes*).

Grievant was dismissed for releasing an inmate from the Jail without a court order authorizing the release of the inmate. There is no doubt a serious mistake occurred and

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[8] Grievant is a covered employee under the civil service system. W.VA. CODE § 31-20-27(a).

that fact is not disputed by Grievant. Grievant openly and honestly admits his transgression. Mr. John L. King, II, RJCFA Chief of Operations, testified that the appropriate commitment and release of inmates is the most important function of the RJCFA. Indeed, the release of an inmate without authority is a serious error that impinges upon the public confidence in the RJCFA. 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, the Grievant failed to examine the booking pictures of the inmates or closely examine the case numbers. The Respondent has met its burden of proving a violation of policy and operating procedure. *See* Level Three, Respondent's Exhibit 10 (RJCFA Policy and Procedure Statement, Doc. 19001).

The Grievant maintains that the penalty of dismissal is unwarranted in light of the totality of the circumstance; however, the Grievant recognizes that he should receive some punishment for his mistake. This ALJ concurs with the Grievant's assessment.

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).

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 twelve years. It would appear that he has worked his way up through the ranks to attain the position of CO 3. Prior to the incident in question, he has never been involved in the improper release of an inmate.[9]

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[9] At some point in his career, Grievant has been disciplined for something. However, Mr. John King testified that this was irrelevant and not considered by the RJCFA when it dismissed the Grievant.

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.

While the clarity of the rule prohibiting unauthorized release is clear, the precise penalty that has been imposed in the past for this error is not so clear. The Grievant testified that in over twelve years of employment he had never heard of an employee being dismissed for a bad release. Grievant testified that in the past, employees have received either a two-day suspension or a drop in rank. Mr. John L. King, II, RJCFA Chief of Operations, testified that discipline for bad releases is conducted on a case by case basis and he had heard of employees being dismissed in the past.[10] However, over the last six months, with the inception of a new administration at the RJCFA, dismissals are the standard disciplinary measure *regardless* of length of service, past performance or other equitable considerations.

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. First, this is not an instance where the Grievant was acting with blatant disregard for his duties.[11] Yes, he should have not made the error and the error was

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[10] 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).

[11] Eighteenth century English poet Alexander Pope surmised that "to err is human ... ." Previous correctional-type grievances indicate that a disciplinary measure is typically not disproportionate to the offense where there is an outright disregard for policies and

serious. However, it must be recognized that, in addition to his other duties, Grievant oversees many releases each shift. A single mistake occurred and there is no evidence to suggest this mistake was something more than unintentional. The names of the inmates on the documents at issue in this grievance were very similar. The intake and release documents are not uniform.

Lastly, it must be recognized that after the May 22, 2008, bad release, the Grievant continued to work in the exact same position for approximately six (6) months prior to his dismissal. During this six-month period, Grievant released prisoners without incident. In fact, Grievant testified that he released over 200 inmates after the August, 2008, Investigation Report. Yet, in its dismissal letter, the Respondent cites lack of confidence in the Grievant's abilities. There is not one scintilla of evidence to establish or support this

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procedure. *See Abbot v. W.Va. Div. of Corr.*, Docket No. 95-CORR-184 (Sept. 21, 1995)(finding no mitigating circumstance where the CO disrespected an inmate and was attacked, where CO's conduct caused inmate tension and where a professional lock pick set was found in the CO's locker); *Cohenour v. Div. of Corr./St. Mary's Corr. Center*, Docket No. 03-CORR-055 (Oct. 23, 2003)(finding a thirty-day suspension appropriate where a CO gave "pay back" to an inmate by lacing a sandwich with laxatives); *Scott v. Div. of Corr./Huttonsville Corr. Center*, Docket No. 02-CORR-186 (Jan. 29, 2003)(three-day suspension for failure to report a co-worker's outside contact with a parolee was appropriate); *Ferrel v. W.Va. Div. Of Corr.*, Docket No. 96-CORR-194 (Jan. 31, 1997)(dismissal appropriate where the Grievant blatantly failed to follow safety procedures when handling maximum security inmates); *Cox v. Div. of Corr./Anthony Corr. Center*, Docket No. 05-CORR-165 (Mar. 17, 2006)(mitigation inappropriate where CO had a long history of improper conduct with female inmates and violated a direct order). However, *contra Edmond v. Div. of Corr./Huttonsville Corr. Center*, Docket No. 04-CORR-313 (May 18, 2005)(dismissal mitigated where all offenses were not proven, employer did not follow progressive discipline and grievant violated a "no-contact" directive related to a lover's quarrel). None of these grievances have dealt with the scenario of an honest mistake. It must be recognized that an honest mistake does not equate to an excusable mistake. Nevertheless, culpability is an element that should be considered in the analysis of mitigation.

amaurotic assertion by the Respondent. The evidence establishes that an isolated mistake occurred.

This grievance has striking similarity to the case of *Farr, supra*. Like this grievance, *Farr* concerned a bad release in October, 2008, at Southern Regional Jail where a CO was dismissed. The evidence in *Farr* established that, prior to October, 2008, no employee had been dismissed for a bad release and most bad releases resulted in the CO receiving a two-day suspension. Likewise, the *Farr* ALJ recognized that booking and releasing departments at the Southern Regional Jail were understaffed, resulting in a chaotic work environment. The ALJ in *Farr* found that mitigation was appropriate in light of the circumstances.

Like *Farr*, this ALJ finds that, in light of the facts in this particular grievance, 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." *Martin, supra.* Because of the stated factors for mitigation, a two-day suspension is 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 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.

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 3 at the Southern Regional Jail. Respondent is further **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: February 13, 2009

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Mark Barney
Administrative Law Judge