WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID FARR,
Grievant,

v. **Docket No. 2009–0532-MAPS**

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

DECISION

Grievant David Farr was employed as a Correctional Officer 2 by the Regional Jail and Correctional Facility Authority ("RJCFA") and assigned to the Southern Regional Jail ("Jail") in Beaver, West Virginia. Grievant's employment was terminated on October 17, 2008, due to an incident that occurred at the Jail on September 28, 2008. On that date, while Grievant was assigned to the "booking" section of the Jail, he mistakenly allowed an inmate to be released who was not authorized to be released.[1] On October 17, 2008, David Farr filed a grievance, directly to level three, contesting his dismissal and requesting "to return to duty full time at the Southern Regional Jail."[2] A hearing was held on November 10, 2008, in Beckley, West Virginia. Grievant Farr appeared *pro se* and RJCFA was represented by Chad M. Cardinal, Esquire. The parties were given twenty-five days following the hearing to prepare and mail Proposed Findings of Fact and Conclusions of

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

[2] Pursuant to W. VA. CODE § 6C-2-4(a)(4), an employee may file a grievance contesting his / her discharge at level three of the Public Employees Grievance Procedure.

Law, the last of which was received by the undersigned Administrative Law Judge on December 8, 2008. This grievance became mature for decision on that date.

Synopsis

Grievant does not deny that he mistakenly released an inmate from the Jail who was not properly authorized to be released. However, Grievant argues that, due to the chaotic work environment in the booking section of this very busy jail, it was not surprising that a mistake occurred. Grievant was working alone in a complicated job that he was ill-prepared to perform. He further avers that many other bad releases have occurred at the Jail and the Correctional Officers involved in those situations were not dismissed. He believes that termination of his employment is too harsh given those circumstances. 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. Due to staffing decisions at the jail, he was placed in a very difficult situation for which he was not well prepared and 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 offence and the 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. Grievant Farr has been employed as a Correctional Officer ("CO") by the RJCFA since 2004. The entire time he has served as a CO, Grievant has been assigned to the Southern Regional 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"). That was the classification he held until he was dismissed.

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

4. Grievant received six hours of training at the CO training academy during his first year of employment with the RJCFA. On April 5, 2005, Grievant spent eight hours in the booking section of the Jail receiving on-the-job training in the highlights of the inmate intake and release procedures for the Southern Regional Jail.[3] Grievant received no further training regarding inmate intake and release after that date.

5. The employees assigned to the booking section of the Jail are responsible for, among other things, the paperwork related to intake and release of inmates, searching and fingerprinting 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.[4] The booking section is extremely busy and the atmosphere was described by the witnesses as "very stressful," "hectic," "chaotic"and a "mad house."

6. Entry of data into the TAG database is not essential to the completion of an

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[3] Grievant's training officer testified that there was insufficient time to go into great detail regarding the paperwork involved in the intake and release procedure during this training session but they were able to cover the basic essentials or "highlights" of the process.

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

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.

7. Grievant was never trained to operate the TAG system.

8. The North Central Regional Jail is similar in size and activity to the Southern Regional Jail. At the North Central facility, two officers are scheduled to be in booking at all times, one booking officer and one supervisor. Because of the importance of proper booking and release, there is a statewide directive that all facilities have a Corporal in booking on all shifts.[5] Corporals are a step up in rank and experience from CO 2s.

9. Commitment and Release Orders either are 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 and release orders that are sent to the booking section of the Jail, from the various courts, contributing to the confusion in the booking process at the Jail.

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[5] First Sargent Richard Dorsey is an instructor of the course dealing with "inmate intake and release" at the RJCFA Academy. He testified that as a result of a statewide directive he always schedules a Corporal to work booking at that facility on every shift. Timothy Luikart teaches TAG at the Southern Regional Jail. Mr. Luikart testified that within the last two years the number of Corporals has increased, statewide, with the understanding that a Corporal was always to be assigned to booking. Lieutenant Larry Wayne Bunting is the Chief Correctional Officer at the Southern Regional Jail. Lieutenant Bunting testified that he attended a meeting of RJCFA supervisors and lieutenants in Charleston where they were instructed to schedule a Corporal in booking on all shifts.

10. There is a Corporal working each shift at the Jail who is the Shift Supervisor. The Shift Supervisor must approve every release before the inmate is released.

11. The Shift Supervisor has extensive duties throughout the Jail and is not always readily 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 was assigned to work the booking section alone.

13. This was only the fifth time that Grievant 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."[6]

15. At 2:30 p.m., a Jail Commitment Order/Jail Release Order[7] 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[8] was transmitted to the Jail ordering the *release* of Carol Beasley from the Jail

17. 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

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[6] *See* Respondent Exhibit 8.

[7] *See* Respondent Exhibit 3. This is a form Order that has a section for Commitment on the top half and a section for Release on the bottom half, with spaces to be filled in by the magistrate.

[8] *See* Respondent Exhibit 4.

magistrate.

18. The Order authorizing Carol Beasley's release enigmatically ended up in Patrick Beasley's file.

19. The Shift Supervisor released Carol Beasley. Grievant later released Patrick Beasley based upon the Release Order for Carol Beasley that was in Patrick Beasley's file. The Shift Supervisor reviewed and authorized the release of Patrick Beasley.

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

21. An investigation was made into the bad release of Patrick Beasley and on October 21, 2008, Grievant was given a letter from Cedric Greene, Deputy Director of RJCFA, informing Grievant that he was dismissed from employment as a CO 2 effective November 2, 2008.

22. 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 those releases received a two-day suspension without pay. One Corporal volunteered to be demoted to a CO 2 in addition to the two-day suspension.[9]

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

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[9] *See* testimony of Chief Correctional Officer, Lieutenant Larry Wayne Bunting.

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 releasing an inmate from the Jail without a Court Order authorizing the release of the inmate. There is no doubt that this was a serious mistake and that fact is not disputed by Grievant.[10] The Deputy Director of the 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 release Patrick Beasley from the Jail without proper authority 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 offence committed. In his grievance statement Grievant specifically notes: "There have been many bad releases in the past and no one was ever fired from their job." Given this statement and the testimony elicited 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:

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[10] Grievant recognized the nature of his mistake in his grievance statement when he noted: "this is the only *serious trouble* I have been in . . . " (Emphasis added).

> (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,
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> (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).

Grievant cannot be treated differently from his co-workers. For fourteen years there has been a standard punishment for a bad release, a two-day suspension. 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. 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 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 he 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. During the testimony of the Deputy Director of RJCFA, it was noted that Grievant has received three good annual evaluations of his work performance. The Deputy Director and Lieutenant Bunting both agreed that Grievant was a competent Officer with 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 three 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 that there should be a Corporal working in booking on all shifts. Two of these witnesses were high-ranking supervisors and were certainly in a position to know about the directive. *See* Footnote 5, *supra*. First Sargent Dorsey, a supervisor at the North Central Regional Jail, testified that there are always two officers assigned to booking in that facility for these very reasons. Mr. Luikart, a TAG instructor and counselor at the Southern Regional Jail, testified that the Jail is one of the busiest booking facilities in the state and working one officer in booking "is stressing any man's capacity." Finally, Lieutenant Bunting, the Chief Correctional Officer for the Jail, testified that a CO 2 is theoretically able to work in any duty station. However, as a practical matter, if the supervisors feel that a particular CO is not able to handle the stress or is not particularly good at paperwork that officer is not assigned to booking. Bunting noted that the paperwork can be confusing, especially in the chaotic atmosphere of the booking section and if an officer does not work booking regularly "you're going to lose a lot [the prior training]." He stated that the inmate intake and release training given to COs is probably not sufficient if they don't work at booking often. Lieutenant Bunting did stress the importance of a CO asking questions and seeking help if he / she was unsure about a particular release.

Grievant is not a Corporal and had very little experience in booking. He was the only officer working booking when the incident occurred and there was no booking clerk on duty. Grievant was assigned to booking for the sole reason that he was the most senior officer on duty that day. Additionally, Grievant had not been trained in the use and operation of the TAG database system. While use of the TAG system is not essential in committing or releasing an inmate, use of the system is an expectation for any CO working booking.

Grievant's attempt to properly record intakes and releases on this system clearly added to the stress of an already difficult situation. 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. Mr. Luikart accurately summed up the situation when he stated that because the Jail was understaffed in booking, mistakes happen; "it is always just a matter of time."

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. 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 § 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 offence 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 offence 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 2 at the Southern Regional Jail. Respondent is also Ordered to pay Grievant all pay and benefits he would have earned as a Correctional Officer 2 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: January 2, 2009

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William B. McGinley
Administrative Law Judge