THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL AARON WAYNE,
Grievant,

v. **DOCKET NO. 2010-1301-MAPS**

REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY/TYGART VALLEY
REGIONAL JAIL,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Michael Aaron Wayne, on March 31, 2010, after he was suspended for 10 days without pay, contesting the charges and the discipline imposed. As relief Grievant seeks to have the suspension removed from his personnel file, and back pay for the 10 days he was suspended.

A level three hearing was held before the undersigned Administrative Law Judge on September 7, 2010, in Elkins, West Virginia. Grievant appeared *pro se*, and Respondent was represented by Chad M. Cardinal, General Counsel for the Regional Jail and Correctional Facility Authority. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on October 7, 2010.

Synopsis

Grievant was suspended for 10 days without pay for a "bad release," when he, along with two other officers, misread an order from a municipal judge as an order to release an inmate, rather than an order to commit her to jail for two days, and signed off on her release. When a fourth officer caught this mistake the next day, the municipal judge was notified and he advised that it was not a concern and he would enter a new order reflecting the release of the inmate, which he did. The second order made the release of the inmate legal and proper, and nullified any "bad release." Further, the original order to hold the inmate was confusing and improper in its form, and Grievant cannot be cited for failure to follow the order.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by the Regional Jail and Correctional Facility Authority ("RJA") at the Tygart Valley Regional Jail ("TVRJ") since October 1, 1992. He is a Sergeant, acting as a Shift Supervisor, and a training officer.

2. On August 21, 2009, Grievant was working at the TVRJ as the Shift Supervisor, and was responsible for reviewing and signing off on inmate releases, after review by the booking officer.

3. On August 21, 2009, the TVRJ received a form Jail Commitment Order by fax alerting the facility that an inmate Roth would be transferred to the facility. The Jail Commitment Order portion of the form was completed, and stated that inmate Roth was

ordered committed "to the custody of the city jail" until "$611.00 bail is posted." When she arrived at TVRJ shortly after 3:00 p.m., inmate Roth carried with her a new Jail Commitment Order form signed by Thomas Pritt, Municipal Judge for the City of Elkins. At the top of the form is the Jail Commitment Order, which is used to indicate the period of time the inmate is to remain at the TVRJ. There are three boxes which may be checked: until a set bond is posted, to await court action, with the hearing date provided, or "for a period of _____, as sentence upon conviction." This part of the form was blank. At the bottom of the form is the Jail Release Order. This part of the form had been completed by Judge Pritt. The box in front of "Time served as of the date of judgment has satisfied the sentence imposed," had been checked, and the time and date on this part of the form was August 23, 2009, 4:00 p.m. Judge Pritt had written out to the side of the release order, "please note date and time."

4. Prior to release of inmate Roth, the commitment order and the release were reviewed by Correctional Officer II Ray Unrue, Grievant, and Lieutenant Richard Cox. All three officers read Judge Pritt's order as an order to hold inmate Roth until 4:00 p.m. on the date the order was received, which was August 21, 2009, for time served. None of the three officers noted that the date on the order was August 23, and that the actual date was August 21, 2009. All three officers signed off on the release of inmate Roth.

5. Inmate Roth was released from custody on August 21, 2009, at 4:00 p.m.

6. On August 22, 2009, the release documentation was reviewed by a fourth officer, Corporal Rick Miller. He saw the discrepancy in the dates. He advised Lt. Cox, and Lt. Cox called Judge Pritt to advise him that inmate Roth had been released by mistake. Judge Pritt advised that because the charges against inmate Roth were minor

misdemeanor offenses, a warrant for her arrest would not be issued, it was nothing to be worried about, and that he would send over an amended order allowing her release on August 21, 2009. The form order completed by Judge Pritt was blank at the top of the form where the Jail Commitment Order section is. At the bottom of the form in the Jail Release section, Judge Pritt checked the box for "Time served as of the date of judgment has satisfied the sentence imposed." The date and time on the form were August 21, 2009, at 4:00 p.m.

7. Michael Martin, Administrator of TVRJ was advised of the incident on August 22, 2009. Mr. Martin reviewed the situation, and took no further action because Judge Pritt had advised that it was okay to have released inmate Roth, and he would send over a new order reflecting that her release date was August 21, 2009. Mr. Martin did not advise the Central Office of the RJA of the incident.

8. Judge Pritt does not normally use the Jail Release section of the form to indicate that an inmate is to be held for a particular period of time. Lt. Cox had never seen a commitment order like this one, and read it as a release order.

9. Judge Pritt accepted partial responsibility for the incident, and acknowledged that his order may have created confusion. He believed inmate Roth's release was a "minor correctable error and no real harm has been done."

10. Lt. Cox received a written reprimand for signing off on inmate Roth's release. Officer Unrue resigned before any discipline was imposed. On March 10, 2010, Grievant received a ten day suspension without pay for this incident.

11. Shortly after this incident, Judge Pritt sent another post-dated Order to the TVRJ which was nearly identical to the Order of August 21, 2009, and an inmate was again

released on the date the Order was received, rather than being held to serve an additional two days. The three officers who signed off on this release each received a one-day suspension without pay. None of these officers had a prior bad release on their records, and all three had only about two years of service with the RJA.

12. Judge Pritt now calls the booking officer at TVRJ when he uses the release section of the form when an inmate is being committed to custody, to make sure his intent is understood.

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. *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 and 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*.

Respondent demonstrated that Grievant was involved in releasing an inmate who should not have been released. However, the Judge who had ordered inmate Roth held for two days entered a new order authorizing her release on August 21, 2009, at 4:00 p.m., which was when she was actually released. The first issue then is whether this was a “bad release,” after the Judge entered the second order essentially approving the release. Or viewed another way, did the second order nullify the bad release?

The investigator assigned to this matter Paul O'Dell,[1] now Deputy Director of the RJA, testified that this was a serious offense, and he did not find Judge Pritt's order confusing. He described Grievant's action as inattention to detail. He testified that regardless of the order entered by Judge Pritt correcting the mistake, this was still a bad release. The undersigned cannot reach this same conclusion. While it is understandable that the RJA would be concerned that this incident occurred at all, and it was certainly appropriate to bring this matter to the attention of all of those involved, once the Judge entered the order authorizing the release of inmate Roth on August 21, 2009, her release on that date was legal and proper. It could no longer be characterized as a bad release.

The second issue then is whether Grievant can be faulted for failure to follow Judge Pritt's order in the first instance. It is certainly easy to look at the original order signed by Judge Pritt after the fact, and say that it is clear inmate Roth should have been held for two days. However, the facts are that the form used by Judge Pritt has a Jail Commitment section which by all appearances is intended to be used to commit an inmate to custody for a period of time, and the Judge did not complete this section. Instead, Judge Pritt completed the part of the form which is intended to be used when an inmate is to be released. Although the date on the form is certainly August 23, rather than August 21, three officers missed the difference in the date in this case, and shortly thereafter, three other officers missed this distinction in a separate incident. Judge Pritt not only acknowledged that he contributed to the problem, but now he actually calls the booking officer to explain what his intent is. The only logical conclusion that can be reached is that

[1] Mr. O'Dell began the investigation after receiving an anonymous telephone call from a woman advising him that the TVRJ had had a bad release.

the order was not only clearly confusing, it was improper in its form. While it is commendable that the RJA has a zero standard for bad releases, imposing progressive discipline on the officers involved in this incident is not going to change their behavior, where the order as written was almost designed to create failure. If employees of the RJA are to strive to have no bad releases, it is imperative that all parties involved in the process be clear as to what is required. Grievant did what he believed Judge Pritt intended, and cannot be cited for failure to follow Judge Pritt's order.

Grievant also argued that the discipline imposed was clearly excessive. While the undersigned has found that Grievant did not commit the offense with which he was charged, the issue of whether the discipline was clearly excessive deserves attention as well. "The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Grievant demonstrated that the discipline imposed was clearly excessive. First, of the six people involved in this and a similar incident, one received only a written reprimand, three received a one day suspension, one resigned before discipline was imposed, and one received a ten day suspension. Respondent's excuse for hammering Grievant was that this was his second offense, and he received a seven day suspension for his first offense.[2] At the time of Grievant's first offense, several officers involved in bad releases were fired. Thus, at that time, the discipline imposed on Grievant was less than what other officers received. However, the discipline being imposed now by Respondent for first offenses is significantly less than that imposed on Grievant for his first offense. To look at the discipline imposed on Grievant for his first offense in a vacuum in setting the penalty

[2] Grievant actually received a 10 day suspension for his first bad release, but because he was working 12 hour shifts, he served the suspension over 7 days, and actually the suspension ended up being for 84 hours, which was more than 10 eight hour days. This discrepancy reflects an inattention to detail by those judging Grievant's inability to perform his job with perfection.

for the second offense, without regard to the discipline now being imposed on employees for a bad release resulted in Grievant receiving much more severe discipline than other employees. Further, were the undersigned to concede that this was a bad release, the circumstances do not justify a ten day suspension regardless of any other factors. Administrator Martin did not even report this incident to the RJA Central Office personnel because Judge Pritt approved the release after the fact, and told Lt. Cox not to worry about it. Additionally, the Judge's original order did not clearly advise Grievant and the other employees involved of what they were being directed to do. The discipline imposed on Grievant was clearly excessive.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent did not demonstrate that the release of inmate Roth constituted a bad release, or that Grievant failed to follow a proper order of the municipal judge.

Accordingly, this grievance is **GRANTED.** The ten day suspension is **ORDERED REMOVED** from Grievant's record. Respondent is also **ORDERED** to pay Grievant ten days of backpay, with interest, and to restore all other benefits which Grievant lost as a result of the ten day suspension, including leave and retirement benefits.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: November 17, 2010