THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER HIGGINS,

Grievant,

v. **Docket No. 2012-0352-MAPS**

DIVISION OF CORRECTIONS/
ST. MARY'S CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant, Christopher Higgins, filed this grievance at level one on September 29, 2011, against his employer, Respondent Division of Corrections/St. Mary's Correctional Center, challenging the disciplinary demotion he received, stating "[t]he decision to demote for the listed reasons as shown on attached demotion letter was arbitrary and capricious. The discipline imposed was to [sic] harsh and severe and does not follow West Virginia Division of Personnel Administrative Rule Section 12.5." As relief sought, the Grievant seeks, "[t]o be reinstated to the rank of Correctional Officer V, including back pay. To be made whole in every way. To have a reasonable discipline imposed."

A level one hearing was conducted on November 14, 2011. The grievance was denied at level one by letter dated December 5, 2011. Grievant appealed to level two of the grievance process on December 19, 2011. Level two mediations were conducted on April 18, 2012, and December 3, 2012. Grievant perfected his appeal to level three on April 28, 2012. The level three hearing was conducted on March 29, 2013, and on May 30, 2013, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, with his Representative, Debra Bolen. Respondent appeared by counsel, John H. Boothroyd,

Assistant Attorney General. This matter became mature for decision on July 9, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was demoted from his position as a Correctional Officer V to that of a Correctional Officer II for various policy violations all resulting from an incident that occurred on June 17, 2011. Grievant denies many of Respondent's claims, and argues that his demotion was improper, excessive, arbitrary and capricious. Respondent demonstrated that Grievant's conduct violated its policies and procedures, and that the demotion was appropriate. Grievant failed to prove that his demotion was arbitrary and capricious, clearly excessive, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his demotion. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed as a Correctional Officer at the St. Mary's Correctional Complex, a prison housing adult male felons. At the time of the events discussed in this grievance, Grievant was a Correctional Officer V, which is a supervisory position, holding the rank of Lieutenant. Grievant had been a Lieutenant for approximately one month at the time of the events detailed in this grievance.

2. On June 17, 2011, Grievant, along with four other officers, was involved in an incident with an inmate, B.B.[1]

3. At the time of the June 17, 2011, incident, Grievant was serving as the Shift Commander, which is the highest ranking official at the facility, during that shift. As Shift Commander, Grievant was in charge of the entire facility.

4. Near the beginning of the shift, Corporal Donald Smith called Grievant regarding a situation he was having with inmate B.B. in building 75. B.B. was being somewhat disobedient, but not violent, aggressive, or disruptive. B.B. is approximately 5'8" tall and weighs 140 pounds.

5. Cpl. Smith had already enlisted the help of two other correctional officers, Sergeant Sandra Shultz and Sergeant Deborah Bolen, to deal with the situation with B.B. Sgt. Bolen is the person who suggested Cpl. Smith call Grievant.

6. Grievant informed Cpl. Smith that he would be coming down to assist and would bring along Correctional Officer II Mark Webster. CO II Webster had just returned from doing a transport and was on overtime.

7. When Grievant and CO II Webster arrived at Building 75, Cpl. Smith, Sgt. Bolen, and Sgt. Shultz were waiting for them. B.B. was not with them; he was still in his housing unit.

8. The five officers then proceeded to inmate B.B.'s housing unit. Cpl. Smith and Sgt. Bolen went into the housing unit, while Sgt. Shultz, CO II Webster, and Grievant remained in the hallway.

[1] To protect his identity, the inmate involved in this incident will be referred to only by his initials.

9. Cpl. Smith and Sgt. Bolen retrieved inmate B.B. from his unit without incident and without securing him.

10. The five officers then escorted B.B. into the hallway area, away from the view of those in the housing unit and the security cameras.

11. Cpl. Smith placed B.B. on the wall. B.B. was leaned against the wall, with his cheek to the wall, his arms on the wall with his palms facing away from the wall, and his feet more than shoulder width apart. At this point, B.B was surrounded by the five officers. CO II Webster was aiming pepper spray at B.B.'s face at all times. During this time, B.B. refused to answer the officers' questions, but was not aggressive.

12. Cpl. Smith began to place handcuffs on B.B. At that point, Sgt. Bolen and other officers began to insult and taunt B.B. Sgt. Bolen made comments about B.B. being frightened and stated that her niece's balls were bigger than his. These comments escalated the situation causing B.B. to begin shaking.

13. Cpl. Smith then performed a take-down of B.B. Cpl. Smith's take-down was smooth and did not result in any injury to B.B. While B.B. was on the floor, Cpl. Smith, assisted by Sgt. Bolen, handcuffed him. During this time, Sgt. Shultz was sent to get leg irons.

14. For unknown reasons, Cpl. Smith stood B.B. back up on the wall after he was handcuffed, but before Sgt. Shultz returned with the leg irons.

15. After B.B. was stood back on the wall, Cpl. Smith began to pat him down. B.B. was still handcuffed at this time. During the pat down, CO II Webster sprayed B.B. in the face with the pepper spray. Officer Webster went to the other side of B.B.'s face

and sprayed him again. Cpl. Smith disengaged with B.B. At that point, Grievant grabbed B.B. and threw him to the floor. B.B. hit the floor hard.

16. By the time Sgt. Shultz returned with the leg irons, the second take-down had already occurred and the officers were getting B.B. up off the floor. Sgt. Shultz had only been gone for a few minutes.

17. As a result of hitting the floor with such impact, B.B. was dazed and bleeding. Grievant and CO II Webster picked B.B. up off the floor and began to escort him to the medical unit. Cpl. Smith took over for Grievant, and proceeded to the medical unit with CO II Smith and B.B. B.B. was stumbling, shuffling his feet, and required assistance walking. B.B. also appeared disoriented during this time.

18. As a result of being thrown to the floor by Grievant, B.B. sustained a one and one half inch cut under his chin which required fourteen stitches. The cut bled enough to leave a pool of blood about the size of a dinner plate on the floor where B.B. landed. The cut dripped blood while B.B. was being taken to the medical unit.

19. B.B. arrived at the medical unit at approximately 8:20 p.m. being escorted by Cpl. Smith and CO II Webster. Nurse Sharon Glasscock was at the medical unit when B.B. arrived, and she examined him. Cpl. Smith and CO II Webster did not fully inform Nurse Glasscock of how B.B. was injured. They did not inform her that B.B. hit his head or that he may have lost consciousness. Further, the officers did not offer any explanation for the cut on B.B.'s chin other than that Smith and B.B. had become tangled after the pepper spray was administered, and when B.B. fell to the floor, Smith fell on him. They also did not inform Nurse Glasscock that B.B. was taken down twice.

20. Nurse Glasscock recalled seeing Sgt. Bolen standing in the medical unit during this time. Sgt. Bolen was not assisting with B.B. and did not say anything. She was just standing there. The report of another nurse, P. Greathouse, indicates that both Sgt. Bolen and Grievant were present.

21. When he arrived at the medical unit, B.B. was covered in blood and he had pepper spray stains on his skin. He was walking with the assistance of the two officers. B.B. was bleeding from his chin. B.B. had abrasions on both of his cheeks, and his lip was swollen. B.B. did not speak much. He did not maintain eye contact with Nurse Glasscock; he kept looking at the floor. Nurse Glasscock asked Cpl. Smith and CO II Webster to remove B.B.'s handcuffs so that she could better examine him, and they did so. B.B. was not angry or agitated. He was compliant during his examination.

22. B.B. complained of jaw and shoulder pain. Nurse Glasscock asked B.B. to remove his shirt so that she could examine him for other injuries, but B.B. stated he could not raise his arm. Accordingly, Nurse Glasscock cut B.B.'s shirt off of him. Nurse Glasscock cleaned the blood and pepper spray off of B.B., and administered first aid to him. Nurse Glasscock put a sling on B.B.'s arm to protect the shoulder in case there was an injury.

23. In addition to Nurse Glasscock, at least two other nurses were on duty in the medical unit while B.B. was there that evening. All three of the nurses participated in evaluating and treating B.B. while he was in the medical unit. They applied ice packs to his injuries, dressed his wound, and kept him comfortable until he left the medical unit. The nurses called their supervisor about B.B.'s injuries and she notified the doctor.

The nurses then received orders to send B.B. out to a hospital for treatment for his injuries.

24. B.B. was in the medical unit from approximately 8:20 p.m. until 1:50 a.m. before he was finally transported to the hospital. During that time, B.B. was lying in a hospital bed unrestrained. His handcuffs were never reapplied. The officers did not give the nurses instructions to use special precautions with B.B. because of his behavior. Further, no officer was left in the medical unit with B.B. to supervise him.

25. Because B.B. had been in the medical unit for so long without being transported to the hospital, Nurse Glasscock called the Shift Commander's office to check the status of his transport. She was told that the officers were doing reports and that he would be transported when they were done. When the transport had not occurred within another hour, Nurse Glasscock called again. That time, Nurse Glasscock was told that they were getting the papers ready to transfer B.B. to Mt. Olive Correctional Complex. That was the first she had heard of B.B. being transferred out of the facility.

26. Cpl. Smith did not complain of exposure to pepper spray and did not seek treatment in the medical unit for such.

27. As Shift Commander that evening, Grievant should not have been involved in the incident at all. All officers involved in the incident were aware of this. Such is why Cpl. Smith replaced Grievant in taking B.B. to the medical unit.

28. DOC policies require that following an incident, such as the one that occurred on June 17, 2011, during which an inmate is injured or when there has been a

use of force, all those who were involved, or who witnessed the event, draft separate, independent incident reports.

29. Following the incident, while B.B. was in the medical unit, Sgt. Bolen, Cpl. Smith, and Grievant got together in Grievant's office, and conspired to falsify their incident reports. It was decided that Grievant and Sgt. Shultz would not be mentioned in the reports, that there would only be one take-down mentioned, and that Cpl. Smith would be listed as performing the take-down. Grievant's presence and his involvement in the incident were entirely omitted.

30. Cpl. Smith decided to write up B.B. for assault. Grievant instructed Cpl. Smith to also write B.B. up for creating a disturbance so that B.B. could be transferred out to another correctional facility.

31. B.B. was transferred to Mt. Olive Correctional Facility immediately upon being released from the hospital.

32. Cpl. Smith, Sgt. Bolen, and CO II Webster drafted and submitted incident reports regarding the incident with B.B. that were factually inaccurate and omitted significant details.

33. Sgt. Shultz and Grievant did not draft reports as required. Grievant claims to have simply forgotten to prepare his incident report. Grievant did not seek a report from Sgt. Shultz even though he knew she was present during the incident.

34. The reports of Cpl. Smith, Sgt. Bolen, and CO II Webster list only one take-down, state that Cpl. Smith performed that take-down, fail to mention that Grievant and Sgt. Shultz were present, and neglect to mention that B.B. was injured.

35. As the Shift Commander, Grievant was required to review all incident reports filed during his shift. While Grievant has changed his story on whether he reviewed the incident reports, it is clear that Grievant took no action to have the three officers correct their reports.

36. As a result of the falsified reports and B.B. being transferred to another correctional facility, there was no immediate investigation into the June 17, 2011, incident.

37. On or about June 21, 2011, the mother of an inmate at St. Mary's called the office of the DOC Commissioner and complained that inmate B.B. had recently been removed from his unit and beaten by a group of officers. Associate Warden of Programs Patrick Mirandy was directed to contact the woman about her claims. After talking to the woman, Associate Warden Mirandy recommended to Deputy Warden Tony LeMasters that her allegations be investigated.

38. A Use of Force Committee was convened to review the June 17, 2011, incident, as well as a disciplinary investigation.

39. The Use of Force Committee concluded the following: "(1) The use of less than lethal (Intermediate Control Tactics—Soft) force that was used on the first initial handcuffing and take down and placing the inmate back on the wall was necessary and appropriate to bring Inmate [B.B.] under control; (2) The use of less than lethal (Intermediate Control Tactics—Soft) force which was (2) one second bursts of Mark 9 OC spray and the second take-down of the inmate was unnecessary since inmate [B.B.] was placed in handcuffs and was compliant; and, (3) Finally, the Board concluded that our findings be two recommendations. The first being that the force used to place

inmate [B.B.] in cuffs was justified and in accordance to Policy. After we heard the testimony and read the reports the board finds that the force used after the cuffs were placed on the inmate was not justified and excessive in nature. This was not in compliance with Policy Directive 312.02. The board being aware that the incident in question is currently under institutional investigation remains silent to the potential disciplinary action that may be given."

40. By letter dated July 21, 2011, Grievant was suspended pending the outcome of the investigation into the June 17, 2011, incident.

41. On September 7, 2011, Deputy Warden Tony LeMasters conducted a predetermination hearing with Grievant, during which Grievant was advised that disciplinary action was being considered against him for his actions relating to the June 17, 2011, incident.

42. By letter dated September 13, 2011, Grievant was demoted from the rank of Correctional Officer V (Lieutenant) to the rank of Correctional Officer II, a non-supervisory position, effective October 1, 2011. This demotion resulted in a 15% pay reduction. As stated in this letter, Respondent determined that Grievant's conduct violated Policy Directive 129.00 Section J, paragraphs 1, 9, 27, 28, 37, and 42, and Policy Directive 312.02.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *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.*

Respondent asserts it properly demoted Grievant from his position as a Correctional Officer V, to the position of Correctional Officer II. As stated in its demotion letter to Grievant dated September 13, 2011, Respondent charged Grievant with violating Policy Directive 129.00, Section V. (J) (1) failure to comply with Policy Directives, Operational Procedures, or Post Orders; (9) refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation; (27) denial of official information to an authorized official; (28) unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy; (32) falsifying any records whether through misstatement, exaggeration, or concealment of facts; (37) physical abuse of an inmate; and, (42) gross negligence on the job which results in the escape, death or injury of an inmate of the death or injury of any other person.[2] At level three, Respondent further alleged that Grievant violated Policy Directive 129.00, Section V. (J) (5) instances of inadequate or unsatisfactory job performance and (47) breach of facility security or failure to report any breach or possible breach of facility security. Respondent also asserts that Grievant violated provisions of Policy Directive 312.00 regarding the reporting of the incident.

[2] *See,* Letter dated September 13, 2011, Respondent's Exhibit 30.

Grievant admits to failing to draft a report about the June 17, 2011, incident, but denies the other charges alleged against him. Grievant further asserts that Respondent's decision to demote him was improper, arbitrary and capricious, violated West Virginia Division of Personnel Administrative Rule Section 12.5, and was excessive.

Grievant's actions during the June 17, 2011, incident and its subsequent reporting and investigation are the bases for the charges lodged against him; therefore, what occurred during the incident must be addressed. The facts regarding the incident itself, as well as those concerning the preparation and submission of reports, and the reasons for B.B.'s transfer from the facility are in dispute. As such, the undersigned must make credibility determinations. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *Id., Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Credibility determinations are exceptionally challenging in this case because the officers involved changed their stories, some multiple times, and because there was an initial cover-up of the entire incident. Further, B.B.'s statement provided during the

investigation at the facility is his only account of the incident, and he was unable to recall much of the event because of the injuries he suffered during it.

First, the initial cover-up must be addressed. Cpl. Smith and Sgt. Bolen admit that the incident reports they submitted regarding the June 17, 2011, incident were factually inaccurate. They further admit that they drafted their reports together, deciding to leave out the fact that Grievant was present, that he performed a second take-down on B.B., and that B.B. was injured in the process. Cpl. Smith asserts that Grievant was present when he and Sgt. Bolen prepared their reports and that Grievant was aware of what they were doing, and participated in concocting the account of events as stated on those incident reports. Sgt. Bolen admits to lying on her incident report and to drafting her report with Cpl. Smith. However, Sgt. Bolen asserts that Grievant was not involved and did not participate with her and Cpl. Smith in the falsification of the reports. Sgt. Bolen asserts that she lied to protect her Lieutenant, meaning Grievant.

Grievant denies knowing about, or participating in the cover-up with Cpl. Smith and Sgt. Bolen. Grievant admits that Cpl. Smith and Sgt. Bolen prepared their reports together in his office, but asserts that he was in and out of the office during that time, making telephone calls, and he did not know that they were falsifying their reports. Grievant admits that he did not prepare a report. He claims to have forgotten to do one. Grievant initially admitted to the investigator that he accepted and reviewed the reports of Cpl. Smith, Sgt. Bolen, and CO II Webster and forwarded them on to administration. Grievant also told the investigator that he did not instruct any of the three to correct their reports, asserting that he thought they were good enough. However, Grievant testified at the level three hearing that he was not sure if he reviewed those reports, because his

signature does not appear on them. Grievant also testified that he did not recall if he had even received the reports, suggesting that they may have been turned in after his shift.

CO II Webster is not alleged to have been present when Cpl. Smith and Sgt. Bolen prepared their false reports. However, it is undisputed that he drafted his report in the Grievant's office, that evening. In his report, like those of Cpl. Smith and Sgt. Bolen, CO II Webster leaves out that Grievant was present during the incident with B.B., performed a second take-down on B.B., and that B.B. was injured.

While some of the facts regarding the incident itself are not disputed, most are. From the evidence presented, it is clear that B.B. was the only inmate involved in the incident. The incident occurred in a hallway at the Respondent facility out of the view of cameras and outside witnesses, such as other inmates. Cpl. Smith and Sgt. Bolen went into B.B.'s housing unit, and escorted him out to the hallway where the others were waiting. Present in the hallway were Sgt. Shultz, CO II Webster, and Grievant. Inmate B.B. was placed on the wall by Cpl. Smith, meaning B.B.'s cheek, shoulders, arms, and the backs of his hands were pressed against the wall and his feet were placed more than shoulder's width apart. While it appears that B.B. may have said some words near the beginning of the incident, he quickly ceased answering the questions of Cpl. Smith, and remained silent during the rest of the incident. It is at this point where the stories of the various officers involved begin to diverge.

The first issue in dispute is how B.B. behaved and what was said while he was on the wall prior to the first take-down. B.B. asserts that when he was on the wall, Sgt. Bolen began insulting him with vulgar language, calling him a "pussy," and making fun

of him. Cpl. Smith, Sgt. Shultz, and CO II Webster recalled Sgt. Bolen saying to B.B. that either her daughter or niece had “bigger balls” than B.B. However, Sgt. Bolen denied this, and Grievant stated that he did not recall her saying such things. All of the officers except Sgt. Bolen agreed that B.B. did not talk back to the officers during the incident, and stayed silent mostly. Sgt. Bolen, however, asserted that B.B. was “snarky.” Next, B.B. asserts that he never moved or tried to come off the wall. He also denies being aggressive. Regarding this, all of the officers’ statements and accounts are inconsistent. However, all of the officers agreed that Cpl. Smith properly took B.B. down to the floor, handcuffed him, and stood him back up against the wall.

The officers’ stories regarding what occurred after B.B. was stood back up against the wall are also inconsistent. Cpl. Smith has stated that B.B. jerked or came off the wall. Grievant claimed that B.B. turned his whole body off the wall. CO II Webster claimed that B.B. moved aggressively and that B.B. moved his arm while Cpl. Smith was uncuffing him. CO II Webster changed his story and said that B.B. came off the wall. B.B., however, stated that he did not move at all. B.B. asserts that while he was standing there silent, Cpl. Smith stepped back and CO II Webster sprayed him with the pepper spray. All agree that CO II Webster sprayed B.B. with the pepper spray once on each side of his face. B.B. stated that after he was sprayed, he felt someone grab him by the shoulders and throw him down to the floor, and that he has no memory of anything further until he was in the medical unit. Grievant alleged that B.B. was falling and that he grabbed B.B. under his arms to control the fall and guide him to the floor. Sgt. Bolen claimed that Grievant did a proper take-down of B.B. and “placed” him on the floor. However, CO II Webster continued to assert that Cpl. Smith was the one

who took hold of B.B., even after Grievant admitted he did it. Cpl. Smith initially said he could not see anything that happened because he had pepper spray in his eyes. In a later interview, Cpl. Smith supposedly stated that Grievant had confessed to him that he tripped B.B. and threw him to the floor.

However, it must be stated that B.B.'s documented injuries are not supported by any version of the incident posed by the officers. The nurse's report shows that B.B. presented with a large cut under his chin, a swollen lip, pain in both of his shoulders, jaw pain, and abrasions on his cheeks on both sides of his face. While the throw to the floor explains the cut and possibly the shoulder and jaw pain, none of the evidence presented explains B.B.'s swollen lip or the abrasions. Such suggests there is still more to the story than what anyone has admitted or alleged.

Based upon the foregoing, it is clear that credibility issues abound. While it appears that none of the officers were entirely truthful throughout, some are certainly more credible than others. Sgt. Bolen is not credible. She has admitted untruthfulness, but only after being caught in a lie during an initial interview with an investigator. The investigator offered her "a mulligan" when he caught her in a lie, and she took it. She has consistently minimized the injuries B.B. suffered, the amount of bleeding he endured during the incident, and insisted that Grievant performed a proper take-down on him and "placed" him on the floor. Such is not consistent with B.B.'s injuries or the other evidence. Sgt. Bolen has admitted that she lied to protect her Lieutenant, Grievant. Obviously, she has shown bias, interest, and motive.

While Cpl. Smith is mostly credible, he admittedly filed the falsified report and participated in the initial cover-up. However, Cpl. Smith admitted this to the first

investigator, and has remained mostly consistent in his statements about the incident. His account of the events is supported, in part, by those of Sgt. Shultz and B.B. However, it is noted that there are some inconsistencies with Cpl. Smith's account, and he appears to have changed his story as to whether Grievant confessed to tripping B.B. before the second take-down.

CO II Webster is not credible. He has refused to admit that his report was false, even though Grievant and the other officers have admitted the incident did not occur as stated therein. His account of B.B.'s behavior before the second take-down has also varied. CO II Webster has admitted to lying when he stated that B.B. was not handcuffed when he sprayed him with pepper spray. Despite all other accounts, including Grievant's, CO II Webster has refused to state that Grievant performed the second take-down. CO II Webster has shown a willingness to be untruthful, even when other participants have confessed, and has demonstrated bias and motive.

Sgt. Shultz is credible. Although she was not present when the second take-down occurred, her account of the events occurring before the second take-down is supported by those of Cpl. Smith and B.B. Further, Sgt. Shultz's account of the aftermath of the second take-down, when she returned to the hallway, is supported by the medical evidence and Cpl. Smith's account. Sgt. Shultz failed to draft an incident report regarding the incident and her participation therein. She maintains that she was too upset, or disturbed, by the incident to do so. While the undersigned does not entirely accept that explanation, it was apparent that Sgt. Shultz was remorseful, and recognized the seriousness of the incident and the injuries B.B. received. Sgt. Shultz's demeanor was appropriate, and her accounts of the incident have been consistent.

Grievant is not credible. Grievant has admitted to lying about the incident and his role therein. Grievant lied to cover-up the incident to protect himself. Grievant eventually admitted performing the second take-down, but his account of the second take-down is implausible, and it is not supported by the medical evidence. Grievant changed his story during the investigations, and continued to change his story during the level three hearing. Conveniently, he and Sgt. Bolen were the only two officers present who did not recall Bolen using vulgar language to try to provoke B.B. at the commencement of the incident. Further, Grievant's claim that he simply forgot to prepare a report from the incident is preposterous. Preparing incident reports is a routine function of all correctional officers' jobs, and if that were not enough, who could have forgotten this incident? Grievant has demonstrated bias, motive, and a willingness to lie to protect his own interests.

The statement B.B. made to the investigator should also be considered. While this statement is hearsay, relevant hearsay is admissible in grievance hearings. *See, Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of

contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Id.; Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011)*; Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-8-115 (June 8, 1990).

B.B.'s statement was taken in the course of the investigation initiated at the facility, and is credible. This statement is sworn to have been transcribed from a recording of B.B. taken by the investigator. In his statement, B.B. did not appear to exaggerate, and admitted his own bad conduct. Further, he admitted that he could not remember anything that happened after he was thrown to the floor. His statement was direct and was not embellished. Further, B.B.'s version of the events is consistent with known facts.

The evidence presented establishes that on June 17, 2011, Grievant was on duty as the Shift Commander, the highest ranking official at St. Mary's, during the night shift. During the course of that shift, Grievant improperly participated in an incident with four other officers during which he performed an unnecessary and improper take-down on inmate B.B., which resulted in B.B. being severely injured. Further, Grievant willfully and knowingly participated in the cover-up of the incident by conspiring to falsify incident reports, neglecting to prepare his own incident report, knowingly accepting false reports from other participants and forwarding the same to facility administration, and by falsely charging the injured inmate so that he would be transferred out of the facility. Had another inmate's mother not called administration, it is likely that no one would

have ever found out about the incident. No one would have known Grievant had been involved because he was intentionally omitted from the incident reports that were prepared. Grievant did not prepare a report because he should not have been present during the event to witness it. Grievant lied to the investigators and to the Use of Force Committee at the facility to conceal his involvement in the incident. Accordingly, based upon the foregoing, the undersigned finds that Respondent has met its burden of proving that Grievant violated Policy Directive 129.00 Section V. (J) (1), (9), (27), (28), (32), (37), and (42). Further, Respondent has proved that Grievant violated provisions of Policy Directives 312.00 regarding the reporting of the incident.

As discipline for his offenses, Grievant was demoted from the rank of Lieutenant to that of CO II. Grievant asserts that his demotion was improper, arbitrary and capricious, violated West Virginia Division of Personnel Administrative Rule Section 12.5, and was excessive. The administrative rules require the imposition of "like penalties for like offenses." W. Va. Code St. R. § 143-1-12.5 (2012). A demotion with prejudice is "[a] reduction in a pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct . . . ." W. VA. CODE ST. R. § 143-1-11.4 (2012).

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 Resources/Welch Emergency*

Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). "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).

Respondent was within its rights to demote Grievant for his conduct on June 17, 2011. The demotion was not in violation of any rule or policy. Pursuant to both the administrative rules and DOC policy, demotion may be used for the inability to perform duties and for improper conduct. *See, Smith v. Div. of Corrections/Mt. Olive Correctional Complex,* Docket No. 2012-0412-MAPS (Jul. 17, 2012); *Bolen v. Div. of Corrections/St. Mary's Correctional Center*, Docket No. 2012-0343-MAPS (Sept. 30, 2013). Grievant's conduct during and after the June 17, 2011, incident was reprehensible. He willingly participated in the intimidation and mistreatment of an inmate who was in his charge, then forcibly threw the inmate to the floor causing him severe injuries. The inmate was not acting out, behaving aggressively, or in need of restraint. Grievant, essentially, attacked the inmate because he could. Grievant then engaged in a cover-up with his subordinates to conceal the incident, his own actions, and the inmate's injuries. Grievant participated in the falsification of incident reports, lied to facility administration, lied to investigators, and orchestrated falsely charging the inmate with two offenses to secure the inmate's transfer out of the facility so that no one would find out about what he had done. Grievant's argument that somehow his actions were the result of Respondent's failure to properly train him for the position of

Lieutenant is ridiculous. The other four officers involved in the incident were Grievant's subordinates, and they all had received sufficient training to know that what occurred was wrong. Further, they even knew that Grievant, as Shift Commander, should not have responded to the incident. Therefore, it is unreasonable to suggest that Grievant would not have received at least the same amount of training. Also, Grievant's argument that his lack of training resulted in his approving the inaccurate incident reports of Cpl. Smith, Sgt. Bolen, and CO II Webster falls flat because he ultimately testified at the level three hearing that he did not recall reviewing them and that they may have been submitted after his shift.

Respondent's decision to demote Grievant was not arbitrary and capricious, excessive, or an abuse of discretion. Grievant presented no evidence to suggest that other employees had received lesser discipline for like conduct. Grievant was demoted to the rank of CO II specifically to prevent him from having supervisory responsibilities. All of the other ranked officers involved received demotions to remove them from supervisory positions. Given Grievant's actions, demoting him to a rank where he would not have any supervisory responsibilities is entirely reasonable. Grievant has certainly proved that he cannot be trusted to be a supervisor. Grievant presented no evidence to demonstrate his demotion was at all improper. Given the deference afforded the employer in disciplinary actions and the lack of evidence that the discipline imposed upon Grievant was somehow disproportionate to the offense, mitigation is not warranted.

For the foregoing reasons, this grievance is DENIED.

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. Procedural Rules of the W. Va. Public Employee Grievance Bd. 156 C.S.R. 1 § 3; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. The administrative rules require the imposition of "like penalties for like offenses." W. Va. Code St. R. § 143-1-12.5 (2012). A demotion with prejudice is "[a] reduction in a pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct . . . ." 143 C.S.R. 1 § 11.4.

3. Respondent proved by a preponderance of the evidence that Grievant knowingly and willfully participated in an incident during which an inmate was intimidated and mistreated by multiple correctional officers, which culminated with Grievant forcibly throwing the inmate to the floor causing him severe injuries, including a one and one half inch gash to his chin which required fourteen stitches. Respondent further proved by a preponderance of the evidence that Grievant knowingly and willfully participated in a cover-up designed to keep facility administration from knowing of his conduct during the incident and the inmate's injuries, then lied to investigators and facility administration during the investigation into the incident.

4. "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).

5. "[M]itigation 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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Grievant failed to prove that his demotion was improper. Demotion does not violate of any rule or policy. Further, the demotion was not excessive given Grievant's reprehensible conduct. Grievant's demotion to the rank of CO II, a non-supervisory position, was not arbitrary and capricious, or disproportionate to his offenses. As such, mitigation of the demotion is not warranted.

Accordingly, this Grievance is **DENIED**.

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 (eff. July 7, 2008).

DATE: November 21, 2013.

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Carrie H. LeFevre
Administrative Law Judge