WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTINE E. EVANS,

Grievant,

v.

Docket No. 2012-1500-CONS

REGIONAL JAIL & CORRECTIONAL
FACILITY AUTHORITY/SOUTHWESTERN,

Respondent.

DECISION

Grievant Christine Evans was employed by the Regional Jail and Correctional Facility Authority/Southwestern ("RJ&CFA") as a Correctional Officer 2 ("CO") and was assigned to the Southwestern Regional Jail. ("Jail") Grievant was terminated by letter dated June 26, 2012. The termination was based upon a "use of force incident" and other violations, on May 5, 2012, involving an inmate at the Jail. On June 18, 2012, Ms. Evans filed a grievance contesting her termination at Docket. No. 2012-1421-MAPS. Grievant alleged that "Under Policy 9027 Riots and Disturbances inmate step[ped] out [of] H-4 after C/O II [.] Runyon open[ed] the cell[.] I push[ed] her back she grab[s] my hair I held her down protect my power port until C/O II … McNeely came." As relief, Grievant sought "back pay, for time loss [sic] or that would of accumulated. Ins.[urance] paid, I feel that I am distraught and in a hostile environment." On July 17, 2012, Grievant filed another grievance at Docket No. 2013-0143-MAPS concerning the incident of May 5, 2012, which alleged that, "I was suspended for 30

days without pay, after which I was wrongfully terminated from my employment as a Corrections Office [sic] II. Termination of my employment for trying to protect myself with an aggressive inmate pulling my hair. I was disciplined multiple times for the same infraction, and then terminated without proper application of progressive discipline. Termination is in retaliation for my past use of the grievance process which resulted in a reversal of my improper termination." The relief sought is "Back pay, expenses and attorney fees." At the request of Grievant's counsel, an Order of Consolidation was entered on August 20, 2012, combining Docket No. 2012-1421-MAPS with Docket No. 2013-0143-MAPS on the basis that the two grievances were the same and should be consolidated for purposes of hearing and decision. The grievances were combined at Docket No. 2012-1500-CONS.

Because this grievance involves a dismissal from employment, it was filed directly to level three. See W. VA. CODE § 6C-2-4 (a) (4). A level three hearing was held in the Charleston office of the Public Employees Grievance Board on November 29, 2012. Grievant was represented by Catherine Dooley, Esq. and Respondent was represented by Travis Ellison, Esq. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. These were submitted by Grievant on January 22, 2013. Respondent was given additional time to submit Proposed Findings of Fact and Conclusions of Law, but notified the Grievance Board on January 29, 2013, that it would not submit the same. Therefore, this matter became mature for decision on January 29, 2013.

Synopsis

Grievant was terminated for inappropriate and excessive use of force against an inmate, insubordination, unprofessional conduct and the threat to discipline an inmate. Respondent proved that Grievant used excessive force and was in violation of various policies and procedures of the Regional Jail and Correctional Facility Authority. Grievant failed to demonstrate that Respondent's disciplinary action taken against her was retaliatory or improper in any way. Grievant also failed to show that termination was too severe a punishment or that mitigation was warranted under these circumstances. Grievant's termination was justified and appropriate. Accordingly, the grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant was a CO 2 employed by Respondent and assigned to the Southwestern Regional Jail. Grievant had been employed there for approximately 5 years.

2. On May 5, 2012, Grievant assisted in the booking of an intoxicated, or otherwise impaired, female inmate ("the inmate") at the Jail. Grievant conducted the "pat" search of the inmate.[1]

[1] The inmate did not appear at the hearing and her name is not relevant to the determination of this grievance. Therefore, she is referred to as "the inmate."

3. While being processed at the counter in the booking department by Grievant, the inmate was not physically or verbally threatening or violent toward Grievant or the other officers on duty.[2]

4. As the inmate was being processed, she addressed Grievant as if they knew one another and claimed that Grievant took illegal drugs with her and was her "dealer." The inmate did not raise her voice at any time. She was compliant, except that she continued to talk when told to be quiet.

5. Grievant was admittedly upset by the allegations being made by the inmate. During the booking process of the inmate, Grievant is heard angrily yelling, "Shut the f#*k up … Copy? Copy?" Her demeanor toward the inmate was hostile.

6. Another inmate was brought in for processing. While the incoming inmate was being processed, the inmate involved in this grievance was kept in holding cell H-4.[3]

7. Grievant began to process the new, incoming inmate. During this time, the subject inmate, now in the holding cell, continued to assert that she knew Grievant and took drugs with her.

8. Grievant left her task at the booking counter to go to the door of cell H-4 to address the inmate. Grievant was admittedly distracted by and frustrated with the

[2] Respondent's Exhibit No. 2 – The audio and video record of the entire intake process and the "incident" was admitted into the record. The quality of that audio record was very poor. The audio for the period of time when Grievant approached and entered the cell was not made available. The audio portion of the booking process at the counter was provided.

[3] The video does not show holding cell H-4, into which the inmate was placed, as no camera is installed to monitor that space.

inmate because she continued to make allegations which were upsetting to Grievant and she would not be quiet.

9. While the inmate was in the holding cell, Grievant said to an officer at the booking counter, "She just won't shut up … I'm getting ready to make some sunshine in her panties if she don't shut up." [4] Grievant was referring to the inmate involved in this grievance.

10. Ms. Pamela McNeely, ("CO McNeely") who has been a Correctional Officer 2 at the Jail for six years, came into the booking department while on her break to offer assistance, because she heard Grievant raising her voice to the inmate. CO McNeely came into the booking room after the inmate had been removed to cell H-4. She admittedly did not hear or observe any of the interaction between the inmate and Grievant prior to that time.

11. After CO McNeely came to offer assistance, one of the officers requested a shirt to cover the inmate, who was somewhat exposed on top. CO McNeely briefly left the booking room to retrieve the shirt for the inmate.

12. Upon CO McNeely's return, Grievant was, again, back at the door of cell H-4, angrily talking to the inmate. [5] CO McNeely heard the inmate asking Grievant why she (Grievant) was "doing this to her" because they did crack together. CO McNeely testified that there was no "heated discussion" on the part of the inmate at this time, but that Grievant was angry and hostile toward the inmate.

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[4] Respondent concluded that this meant that Grievant was going to try to make the inmate urinate in her underwear.

[5] Unfortunately, shortly before Grievant approaches the cell door for the second time, the audio tape cuts out, or could not be coordinated at hearing, and the audio does not come on again until just before Grievant exits the cell door, after the altercation.

13. CO McNeely motioned for Officer Don Runyan in "Central Control" to open the door to H-4 so that she could give the shirt to the inmate. When the door was opened, Grievant was in front of the door, CO McNeely was immediately to her left, and the inmate was standing near the door at the front of the cell. According to CO McNeely, the inmate, who was fully visible to her, was not in a threatening posture or stance at this time.

14. The video record of the door to cell H-4 does not fully reveal the inmate's posture. The record does show, however, that the inmate did not come out of the cell and that Grievant moved over the threshold into the cell immediately after the door was opened.

15. CO McNeely testified that when the door was opened, Grievant stepped into the cell, pushed the inmate back, punched her in the face with a closed fist and "slammed" her head against the wall.[6] CO McNeely further testified that the inmate grabbed Grievant's hair with one hand to defend herself and shielded her face from further blows with the other. Grievant then was "on top" of the inmate. CO McNeely held onto the inmate's pants and tried to pull the inmate out from beneath Grievant.

16. During the incident, Officers Hassell Ferrell and Carrie Lescher came in to see what was happening and Officer Lescher helped CO McNeely to separate the inmate and Grievant. Corporal ("Cpl.") Shane Miller also appeared near the doorway of holding cell H-4 during this time.

17. CO McNeely further testified that, "When the inmate was on the floor, Ms. Christine followed her and proceeded to beat on her there."

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[6] After Grievant's entry, nothing can be seen of the altercation inside the cell due to the placement of the video cameras.

18. Cpl. Miller instructed Grievant "That's enough," during the altercation and Grievant responded, "She's got a hold of my hair." [7]

19. CO McNeely testified that after the inmate and Grievant were extricated from one another, Grievant intentionally kicked the inmate in the head. This kick came after Cpl. Miller's direction to Grievant to stop.

20. Immediately following the altercation, Grievant is heard again cursing at the inmate.

21. After the incident, Cpl. Miller instructed CO McNeely to put the inmate into a "restraining chair."

22. Medical staff then assessed the inmate and determined that she did not need to be taken to the infirmary or hospital for treatment. She had no open wounds or cuts.

23. The inmate never made a verbal threat of violence against Grievant or any of the other officers. [8]

24. Based on her experience and training on how to handle intoxicated and disorderly inmates, CO McNeely believed that Grievant used excessive force against the inmate. CO McNeely did not see the inmate act aggressively toward Grievant at any time. CO McNeely testified that when the inmate was at the cell door, the proper procedure would have been to firmly direct her to backup. There was no justification or reason for Grievant to have entered cell H-4, according to CO McNeely.

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[7] Level Three Testimony of Grievant.

[8] Level Three Testimony of Grievant.

25. CO McNeely completed an Incident Report, dated May 12, 2012, addressed to Sgt. E. Croasmun, which stated in pertinent part :

> " … I went to the booking dept. to see if I could offer some help because I heard Officer Evans raising her voice to inmate … Inmate … kept asking Officer Evans why she was acting this way and that they knew each other from the street and they smoked 'crack' with each other and ran Crack Alley together. Officer Evans kept stating she didn't know her and became aggressive with said inmate … When the door rolled [open] the inmate stepped out of the cell and asked Officer Evans why she was acting like that toward her. Officer Evans then punches inmate … in the face and shoves her back into H-4 all the way to the bunk then starts hitting her head off the wall, this Officer was trying to pull Officer Evans off said inmate along with Officers Kerry Lescher and Hassell Ferrell when Officer Evans was getting up to walk out the cell Officer Evans kicks inmate … in the head/facial area."

26. This report was not timely completed. It should have been completed on the day the incident occurred. However, CO McNeely prepared her report three days later after being asked to do so by a superior. CO McNeely stated that, even though she did not prepare an incident report on the day it occurred, she believed that the altercation should have been reported.

27. Grievant testified that the inmate was irate, "hollering, screaming… and intoxicated," during the booking process.[9]

28. Grievant was startled when cell door H-4 was opened, as she did not realize that CO McNeely was near her or had made a request to have it opened. Grievant believed that the inmate was stepping towards her in a threatening manner when the door was opened. Grievant testified that she responded by trying to push the inmate back onto her bunk in the cell. When she did so, the inmate grabbed her hair

[9] Grievant's account of the inmate's demeanor and the altercation conflicted very significantly with CO McNeely's account and issues of credibility are addressed below.

and held onto it.[10] They fell back onto the floor. Officers Lescher[11] and McNeely assisted in halting the altercation. Grievant categorically denied punching or hitting inmate and/or pushing her head into the wall. Grievant also denied kicking inmate in the face. Rather, Grievant said that her right leg brushed against the inmate when Grievant was getting to her feet after the altercation.

29. Grievant testified that it was not her desire to hurt the inmate, though she was admittedly "frustrated" and upset during the booking process over the inmate's repeated allegations that they took drugs together and/or that Grievant provided drugs to the inmate. Grievant denied knowing the inmate and was upset because she believed that the inmate's unjust allegations could result in an investigation against her and/or the loss of her job.

30. Grievant stated that she was defending herself when she pushed the inmate back, because the inmate had "already been combative" and was belligerent, cursing and screaming.[12] Grievant felt threatened by the inmate when the door was opened, because the inmate was within three feet of her and could reach out and touch her. Grievant explained that Correctional Officers gauge whether they need to defend against a potential physical threat by a combative inmate by how close the inmate is to

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[10] Respondent's Exhibit No. 3, Grievant's letter of termination, provides that Grievant stated, "I was trying to protect my life and she still had hold of my hair while we were on the floor."

[11] Officer Lescher's first name was unclear.

[12] Grievant's Exhibit No. 1-West Regional Jail & Correctional Facility Authority Incident Report completed by Grievant.

the officer, i.e., within “three seconds” or three feet is too close and threatening. Grievant testified that inmate's prior behavior and "verbals" made her a potential threat under the circumstances. Grievant noted that the inmate was bigger than she, weighing approximately 200 pounds. Grievant was slight in build. When the inmate moved toward her, Grievant felt threatened and took action to stop her by pushing her.

31. Grievant took issue with the fact that CO McNeely opened the door without notice to Grievant. Given the inmate’s allegedly irate behavior, Grievant thought that the shirt for the inmate should have given to the inmate through a slot in the door and that the door should have remained closed.

32. Co McNeely responded that she motioned for Officer Runyon to open the door because the inmate’s conversation was "not heated" at the time. CO McNeely also thought that the inmate needed assistance putting on the shirt because she was intoxicated.

33. Officer Hassell Farrell was subsequently suspended due to his actions/inactions during said altercation.[13] Corporal Miller was also disciplined.

34. Grievant was suspended for 30 days pending the outcome of an investigation into the incident with the inmate.

35. On June 26, 2012, a predetermination conference was held with Grievant, Mr. Joseph DeLong, the Acting Executive Director of RJCFA, and Mr. Farmer, the Administrator of the Southwest Regional Jail ("Administrator Farmer") at the time of the incident. At the predetermination conference, Grievant stated that she

[13] In addition, an investigation was conducted concerning potential tampering with the videotape of the incident, but it was preserved. Officer Runyon was investigated for potential tampering. He resigned, though it was unclear whether his resignation was related to this incident.

had acted in self-defense; that she was " … trying to protect [her] life and she [inmate] still had hold of [her] hair while we were on the floor."[14] At that conference, Grievant admitted to using inappropriate language with the inmate.

36. Following the investigation and the predetermination hearing, Grievant was terminated. The letter of dismissal to Grievant from Mr. DeLong, dated June 26, 2012, fully and clearly sets forth the reasons for Grievant's termination, in pertinent part, as follows:

> "There was a Use of Force incident on May 5, 2012, involving an inmate that you may have known in the past. You were observed on video being aggressive and rough with the inmate in question. You used an extensive amount of foul language in your interactions with the inmate and it appears that the inmate was not resisting your commands. You commented to law enforcement officers who were on the scene that 'she just won't shut up' and 'I'm getting ready to make some sunshine in her panties.' Our conclusion to this is that you were going to try and make the inmate urinate in her underwear. The inmate was moved to H-4 for closer observation. Video evidence indicates the inmate was totally compliant and non-combative. You approached the H-4 door and made the statement 'one more word and I'm coming in there.' You state to a law enforcement officer who is present 'I'm getting ready to give her some orange and black at about 5.96. I've got my inhaler.' You also stated to this officer 'pump it up right?' and then you laughed. When another Correctional Officer asked that H-4 be opened to give her a shirt to cover her exposed upper body, you entered cell H-4. The sound of punching and slapping can be heard on video while you're in the room along with some foul language being used. You were observed by a fellow correctional officer after the correctional officer heard a loud thud from H-5. You were on top of the inmate with one hand on her collar and the other hand in a fist punching inmate in the face. He estimated that he witnessed you punching her numerous times before he could get in between the two of you in order to stop the assault. Testimony also reveals that you also kicked the inmate in the head after being told by your Supervisor to leave and get the chair. Is our determination that you used excessive force by

[14] Respondent's Exhibit No. 2 - The letter of dismissal to Grievant from Acting Executive Director, Mr. Joseph DeLong, dated June 26, 2012.

> entering a cell, punching an inmate and then, when told to leave the area by a supervisor, proceeded to kick the inmate in the head while the inmate was restrained."[15]

37. The termination letter found specific violations of the following policies and procedures:

> Policy and Procedure 3010 No. 3, which states: "The use of excessive force will not be tolerated. The use of force, except in compliance with Regional Jail Authority policy, shall result in disciplinary action.";
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> Policy and Procedure 3010 No. 9 which states "All employees shall promptly and faithfully execute all lawful orders/instructions of the Supervisor. Insubordination or refusal to follow a lawful order of a Supervisor shall constitute grounds for disciplinary action.";
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> Policy and Procedure 3010 No. 19, which states "All employees shall conduct themselves, whether on duty or not, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service.";[16]
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> Policy and Procedure 3010 No. 29 which states "Employees are not to discipline or threaten to discipline inmates."; and
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> Policy and Procedure 3010 No. 33 which states "At all times, employees shall maintain a professional demeanor and are to be respectful, polite, and courteous and refrain from using abusive or obscene language in their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility."

38. Administrator Farmer testified at the hearing. He became the Administrator of the Southwest Regional Jail in December of 2011, and has been employed there for approximately 10 years.

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[15] Respondent's Exhibit No. 2.

[16] Policy and Procedure 3010 Nos. 19 and 33 both dictate that Respondent's employees should conduct themselves professionally. In the Discussion section, for ease of discussion, these policies will sometimes be referred to jointly and generically as the policies requiring professional conduct by employees.

39. Mr. Farmer participated in Grievant's pre-determination conference. He viewed the audio/video record of the incident in full. He reviewed some of the statements generated in connection with the investigation. Mr. Farmer believed that Grievant was hostile towards the inmate during the intake process at the booking counter. In Mr. Farmer's opinion, before CO McNeely opened the cell door, she properly assessed whether there was any threat posed by the inmate. Based upon the foregoing, Mr. Farmer was of the opinion that Grievant used excessive force against the inmate.

40. Mr. Farmer stated the Grievant's termination was proper because her use of excessive force constituted gross misconduct.

41. Mr. Farmer was aware of a prior disciplinary action against Grievant, which he reversed. Mr. Farmer could not recall any specific information about that disciplinary action, beyond the fact that he had "reversed" it. That disciplinary action was taken prior to December of 2011. Grievant testified that this incident involved cigarettes, but she had no further recollection about it.

42. Grievant was suspended once, for 10 days, after she was "accused" of saying that she wanted an inmate to be "beaten up."[17] Grievant was uncertain of when the suspension was, but thought it may have been in 2011.

[17] Level Three Testimony of Grievant.

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); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Since Grievant was a tenured employee in the state's classified service, the employer must demonstrate that the misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting the rights and interests of the public." *House v. Civil Serv. Comm'n,* 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' " *Syl. Pt. 2, Buskirk v. Civil Service Comm'n,* [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.,* [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n,* [149 W. Va. 461,] 141 S.E.2d 364

(W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

CO McNeely's testimony, if credible, clearly establishes the use of excessive force, insubordination and unprofessional conduct by Grievant. However, Grievant refutes CO McNeely's account of the incident, asserting that she did not use excessive force but was simply defending herself against the threat of violence by the inmate and that her actions were therefore justified. In support of this assertion, Grievant said that the intoxicated inmate was "irate," "combative," "belligerent" and "hollering and screaming" during the intake process. Grievant complained that the inmate "would not cooperate." She admitted that the inmate never threatened her or any of the other officers. Grievant stated that she was distracted in attempting to process the new, incoming inmate, because the subject inmate would not be quiet. When cell door H-4 was opened, Grievant was startled and testified that the inmate stepped toward her in a threatening manner. Grievant stated that she pushed the inmate back in order to stop her. According to the termination letter, Grievant "was trying to protect her life," in the altercation. However, significantly, Grievant did not assert that the inmate punched, slapped or hit her, only that she grabbed and held onto Grievant's hair. Grievant testified that the inmate never verbally threatened her. Grievant categorically denied punching, hitting or kicking the inmate. She admitted only to unintentionally brushing the inmate with her leg after the altercation ended.

CO McNeely's testimony concerning the inmate's demeanor and the physical altercation between the inmate and Grievant contradicts Grievant's testimony in significant part. CO McNeely testified that the inmate was not in an aggressive stance

when the door was opened and characterized the inmate's response to Grievant as solely defensive. CO McNeely stated that she observed Grievant punching the inmate in the face and slamming the inmate's head against the wall. According to CO McNeely, the inmate was holding Grievant's hair with one hand and trying to protect her face with the other. During the altercation, Cpl. Miller told Grievant "That's enough." It took two officers to extricate Grievant and the inmate from one another. Despite Cpl. Miller's clear directive to Grievant to stop, CO McNeely testified that when the altercation was over, Grievant kicked the inmate in the face.

The conflicting accounts of these events necessarily calls the credibility of the witnesses into question. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. *Lanehart v. Logan County Bd. of Educ.,* Docket No. 95- 23-235 (Dec. 29, 1995); *Perdue v. Dept. of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1993). 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. In addition the ALJ should consider: 1) the 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 statement. *See Holmes v. Bd. of Directors / W. Va. State College,* Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't. of Health & Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

An important factor for consideration in determining the credibility of the witnesses is "the existence or nonexistence of any fact testified to by the witness."

Grievant testified that the inmate was highly irate and "screaming" during the booking process. However, the record does not support Grievant's characterization of the inmate's volume and tone of voice. The audio record of the inmate at the booking counter was provided at hearing and the inmate was not heard screaming while being "booked" and she was not irate. Unfortunately, the audio record of the interaction between the inmate and Grievant right before the cell door was opened was not available at hearing, but CO McNeely testified that the inmate's conversation with Grievant was "not heated" at that time. Rather, she testified that Grievant was yelling at the inmate.

Additionally, Grievant asserted that the inmate would not cooperate and was belligerent and combative. The audio/video record showed that the inmate was intoxicated or otherwise impaired. Probably because of her intoxication, the inmate persisted in talking to Grievant, maintaining that they knew one another and took drugs together, despite Grievant's repeated directions to the inmate to "shut up." Typical of an intoxicated or impaired person, the inmate seemed to be slow or clumsy in responding to some of the questions asked and directives given. However, she was non-combative and generally compliant. The inconsistency between Grievant's testimony concerning the inmate's willingness to cooperate while at the booking counter and the audio/video record of the same calls Grievant's credibility into issue.

In determining credibility issues, the undersigned considered the plausibility of the witnesses' statements. In her predetermination hearing, Grievant maintained that

she was defending "her life" against the inmate's aggression.[18] That statement is implausible to the undersigned. Officer McNeely was right next to Grievant when the cell door opened and there were numerous other officers nearby to assist Grievant in the event that the intoxicated, unarmed, female inmate became violent. Grievant admitted that the inmate never made a verbal threat of violence against her. It is simply not credible or reasonable that, under the circumstances, an experienced correctional officer such as Grievant would have felt seriously physically threatened by the inmate. Finally, assuming that Grievant was somehow physically threatened by the inmate, other less violent alternatives of maintaining control were available, such as a strong verbal directive to the inmate to back away and/or sit down.

Additionally, in evaluating CO McNeely's credibility, the undersigned considered any potential bias which she may have had against Grievant. Grievant could offer no explanation of why CO McNeely would be untruthful in her testimony about the incident. CO McNeely had no apparent bias against Grievant or interest or motive to be untruthful, which lends additional credibility to her testimony in this matter.

Finally, to determine CO McNeely's credibility, the undersigned noted her demeanor at the hearing. She clearly and calmly explained her observations of the incident and was adamant that Grievant was aggressive toward the inmate, ignored the command of her supervisor and used excessive force with the inmate. CO McNeely appeared serious and forthright in her testimony, had an opportunity to perceive the events in question and could clearly communicate them. Her testimony is therefore

[18] Respondent's Exhibit No. 2 - The letter of dismissal to Grievant from Acting Executive Director, Mr. Joseph DeLong, dated June 26, 2012.

found to be credible in establishing Grievant's violation of the policies and procedures of Respondent, particularly the prohibition of the use of excessive force.

Additionally, the audio/video record of the intake process of the inmate, though inaudible at times, clearly recorded Grievant saying, "She just won't shut up … I'm getting ready to make some sunshine in her panties if she don't shut up." This statement is a threat to discipline the inmate under Policy and Procedure 3010, No. 29 as well as a violation of Policy and Procedure 3010, Nos. 33 and 19. Correctional officers routinely deal with individuals who are intoxicated/impaired and are trained as to how to respond to them. The evidence showed that Grievant did not deal professionally with the inmate. Rather, Grievant was hostile and verbally abusive towards the inmate during the intake process, in further violation of Policy and Procedure 3010, Nos. 33 and 19. Finally, Grievant admitted that Cpl. Miller instructed her to stop during the altercation, but she could not because the inmate was holding her hair. However, the credible testimony of CO McNeely establishes, that even after the inmate and Grievant were pulled apart, Grievant intentionally kicked the inmate, which constituted insubordination under Policy and Procedure 3010, No. 9.

Administrator Farmer reviewed some of reports or statements taken during the course of the investigation. He participated in Grievant's predetermination hearing with Mr. Joseph DeLong. He also reviewed the audio/video evidence of the incident in full. In his opinion, based upon the foregoing, Grievant’s demeanor toward the inmate was hostile and she used excessive force against the inmate. Mr. Farmer ably articulated Respondent's reasons for Grievant’s termination.

Therefore, the undersigned finds that the testimony of CO McNeely and Administrator Farmer, combined with the audio/video evidence, is persuasive to establish that Grievant used excessive force against the inmate and violated the policies and procedures of Respondent which are set forth above. Striking blow(s) to the inmate's face, slamming her head against the wall and kicking her very clearly constituted excessive force for various reasons; chief among them, the inmate was not physically threatening to Grievant. Grievant's actions clearly constitute "misconduct of a substantial nature directly affecting rights and interests of the public," and her termination was justified.

Grievant further avers that she was disciplined multiple times for the same infraction, and then terminated without proper application of progressive discipline. DOC ("Department of Corrections") Policy Directive 129.00 "Progressive Discipline" establishes levels of discipline which may be imposed when an employee exhibits initial or continuing unacceptable work behavior or performance. These levels range from a verbal warning, when the deficiency is not of a serious or repetitious nature, to dismissal when the deficiencies continue after the employee has had adequate opportunity for correction or commits a singular offense of such severity that dismissal is warranted. Progressive discipline is applied as appropriate and required. "If … the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the

circumstances of the case." *Thurmond v. Steele,* 159 W. Va. 630, 635, 225 S.E.2d 210 (1976). *See Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970); *Kidd v. W. Va. Dept. of Tax and Revenue*, Docket No. 91-T-127 (Dec. 17, 1991). The assertion that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

Grievant admitted to using foul language with the inmate, but contended in her defense that such language is commonly used at the Jail. If Grievant's only violation of policy had been the use of foul language, then progressive discipline limited to a suspension may have been appropriate. However, there were other violations of policy by Grievant which constituted "misconduct of a substantial nature" directly affecting the rights and interests of the public, which justify her termination. The record establishes that Grievant used excessive force against the inmate, was insubordinate to her supervisor, threatened to discipline the inmate and engaged in unprofessional conduct. Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

Finally, as to Grievant's assertion that she was disciplined multiple times for the infraction described in this grievance, the undersigned presumes that Grievant is

protesting the fact that she was both suspended and terminated because of her infraction.[19] However, a suspension was warranted while the incident was being investigated due to the nature of the allegations against Grievant. 95 C.S.R. 1 § 4.10 requires that, "A staff person charged with alleged maltreatment of an inmate shall not work directly with any inmate until an investigation is completed." The investigation supported Respondent's decision to terminate Grievant's employment. Therefore, both Grievant's suspension and termination, under the circumstances, was not unwarranted and was not a violation of the progressive discipline policy of Respondent.

Grievant further avers that the penalty of termination was too severe and that her punishment should be mitigated. "Whether to mitigate punishment imposed by the employer depends upon 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 first area of inquiry under *McVay, supra.,* is Grievant's work record. Grievant's work history relating to past disciplinary measures was addressed at hearing, though her personnel record was not offered into evidence. During her five-year tenure of employment with Respondent, Grievant was suspended once for 10 days, after she was "accused" of saying that she wanted an inmate to be "beaten up."[20] Grievant was uncertain of exactly when this suspension occurred. However, she guessed that it occurred in 2011. It is significant

[19] There was no direct testimony elicited on the subject of Grievant being disciplined multiple times for the same infraction or explanation of this assertion in Grievant's Proposed Findings of the Fact and Conclusions of Law.
[20] Level three testimony of Grievant.

and concerning that Grievant had a prior suspension, which was within a year or so of this incident, that was based upon a finding that Grievant said that she wanted an inmate to be harmed.

The next area of inquiry under *McVay, supra*., is to determine whether the policies and procedures which Grievant violated could be clearly understood. In this instance, there is no question that the policies and procedures of Respondent, as set forth above, strictly and plainly prohibited Grievant's excessive use of force with the inmate, insubordination, unprofessional conduct and threatening the inmate with punishment. 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. There were no mitigating circumstances in this situation to justify a reduction in the penalty imposed.

"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 prospect of rehabilitation." Overbee v. W. Va. Dept. of Health and Human Resources/ Welch Emergency Hospital, Docket No. 96-HHR-183 (Oct. 3, 1996). The use of excessive force and the threat to discipline the inmate in the present grievance, in combination with the aforementioned suspension of Grievant, does not support mitigation of the penalty imposed. The penalty of termination was not excessive in light of the employee's past work record and there was no abuse of discretion by Respondent in discharging Grievant.

Grievant asserts that her termination was retaliatory because of a grievance that she had filed in the past. Reprisal is "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. VA. CODE §18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in a protected activity, e.g., filing a grievance;
> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 365 S.E.2d 251 (W. Va. 1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT-088 (Sept. 19, 1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Two other disciplinary actions had been taken against Grievant during her five year tenure with Respondent and one was reversed. The undersigned assumes that

Grievant filed a grievance in connection with one or both of those disciplinary actions, though no testimony or evidence was offered concerning her past grievances. If she did file a grievance, her employer would necessarily have been aware of this. Mr. Farmer testified that, though he could recall reversing a disciplinary action against Grievant in the past, he could not recall why Grievant had been disciplined in the first place. [21] Therefore, he must have viewed the event as somewhat innocuous. Nothing in Mr. Farmer's testimony or demeanor indicated any animus toward Grievant or a retaliatory motive in terminating her employment. Therefore, Grievant did not offer any evidence showing a causal connection between an earlier grievance and her subsequent suspension and termination in this grievance.

Even assuming that Grievant made a prima facie case of reprisal, Respondent offered legitimate, non-retaliatory reasons for termination of Grievant's employment. Respondent promptly investigated the incident. Respondent considered the reports or statements taken in connection with the investigation. Video and audio evidence documented that Grievant was aggressive and rough with the inmate, threatened to discipline her and used an extensive amount of foul language in her interactions with the inmate, who was not resisting commands. Grievant was observed punching the inmate, with no physical provocation from the inmate. CO McNeely testified that Grievant failed to follow the order of her supervisor to stop, proving insubordination. After examining all of the evidence, Respondent rationally concluded that Grievant used excessive force against the inmate and was in violation of the aforementioned policies and procedures of Respondent. Mr. Farmer's testimony

[21] This disciplinary action may have involved the cigarette incident, though that is not clear.

concerning the reasons for the disciplinary action taken against Grievant was professional and not personal in nature, evidencing a legitimate, non-retaliatory reason for Grievant's termination. Grievant did not offer any evidence that Respondent's explanation or reason for the termination was merely pretextual; therefore, she has failed to establish that the termination of her employment was the result of reprisal.

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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved, by a preponderance of the evidence, that Grievant violated its rules and policies by using excessive force against an inmate; being insubordinate; conducting herself in a manner which brought discredit on her professional responsibilities; failing to maintain a professional demeanor and; by threatening to discipline an inmate. Based upon the totality of the circumstances, Respondent proved, by a preponderance of the evidence, that the discipline of Grievant for violation of its rules and policies was justified and appropriate.

3. Since Grievant was a tenured employee in the state's classified service, employer must demonstrate that the misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting the rights and interests of the

public." *House v. Civil Serv. Comm'n,* 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that ‘dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' " *Syl. Pt. 2, Buskirk v. Civil Service Comm'n,* [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.,* [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. Respondent demonstrated that Grievant's misconduct which formed the basis for the dismissal was of a "substantial nature directly affecting the rights and interests of the public," and that her termination was therefore justified.

5. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in a protected activity, e.g., filing a grievance;
> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 365 S.E.2d 251 (W. Va. 1986*); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.,* Docket No.

94-BOT-088 (Sept. 19, 1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Burchell v. Bd. of Trustees/Marshall Univ.,* Docket No. 97-BOT-011 (Aug. 29, 1997).

6. Grievant failed to make a prima facie case of reprisal by Respondent.

7. Even assuming that Grievant made a prima facie case of reprisal by Respondent, Respondent rebutted that presumption by providing legitimate, nonretaliatory reasons for the termination of Grievant's employment.

8. Grievant bears the burden of showing that the penalty of dismissal was too severe or was an abuse of discretion. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

9. Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

10. "Whether to mitigate punishment imposed by the employer depends upon 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). In assessing the penalty to be imposed, "whether to mitigate punishment imposed by the employer depends upon 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).

11. Grievant failed to prove that Respondent had any legal obligation to impose a lesser form of punishment for the charged offenses.

Accordingly, the 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: FEBRUARY8, 2013 _____

SUSAN L. BASILE

ADMINISTRATIVE LAW JUDGE