WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY WAYNE COWGER,
Grievant,

v. **Docket No. 2013-0016-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/CENTRAL REGIONAL JAIL,
Respondent.

D E C I S I O N

Jeffrey Wayne Cowger, Grievant, is employed be the Regional Jail and Correctional Facility Authority/Central Regional Jail, Respondent. On July 8, 2012, Grievant filed this grievance against Respondent protesting a disciplinary suspension. The statement of grievance states, "5 day suspension without pay from Tuesday, July 17, 2012, at 0645 hours and end at 1515 hours on Saturday, July 21, 2012." The relief sought is, "over turn 5 day suspension without pay."

A conference/hearing was held telephonically at level one on July 24, 2012, and the grievance was denied at that level on July 26, 2012. Grievant appealed to level two on July 30, 2012. A mediation session was held on October 18, 2012. Grievant appealed to level three on October 24, 2012. A level three hearing was held before the undersigned Administrative Law Judge on February 7, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and by representative Jack Ferrell, CWA Local 2055. Respondent was represented by Travis E. Ellision, III, then General Counsel for Regional Jail Authority. Both parties submitted Proposed Findings of Fact and Conclusions of Law documents and this matter became mature for decision on March 4, 2013, upon receipt of the last of these proposals.

Synopsis

Grievant is employed as a Correctional Officer at the Central Regional Jail, Respondent. Grievant was suspended for five working days without pay for allegedly improperly supervising an inmate, and two instances of unauthorized leave. Grievant contests the disciplinary action. In disciplinary grievance matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Respondent did not establish fundamental elements of a cited action of misconduct. Respondent failed to meet its burden of proof with regard to a substantial allegation of misconduct. Mitigating factor(s) found in the circumstance of this case. Accordingly, this grievance is GRANTED-IN-PART.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is classified as a Correctional Officer II at the Central Regional Jail in Braxton County, West Virginia.

2. On April 24, 2012, in addition to other duties, Grievant was assigned to supervise an inmate who was cleaning in the administration areas, which includes the lobby area.

3. The inmate Grievant was supervising was a trusty[1] scheduled to be released the next day.

---

[1] Trusty is defined as an inmate that has been granted working privileges, referencing RJA inmate handbook. Generally a convict considered trustworthy and allowed special privileges. *See* BLACK'S LAW DICTIONARY 1515 (6th ed. 1990).

4. Corporal Jeffrey Maxwell drafted a confidential Incident Report and presented such to his supervisor Corporal Zandel Sponaugle regarding Grievant on April 24, 2012. Resp. Ex. 2.[2] Cpl. Maxwell's report provided information regarding a brief encounter between himself and Grievant and his observations of the situation.

5. Cpl. Maxwell offered his opinion in the last paragraph of his two-page report by stating that Grievant "appears to not be staying alert while on duty." Cpl. Maxwell did not testify at the level three hearing.

6. On April 24, 2012, Grievant visited Webster County Memorial Hospital for diagnosis and treatment. Grievant was provided a medical slip. G. Ex. 2.

7. Grievant's 'certificate to return to work' remarks, "Pt to avoid offending agent (Tilex)." G. Ex. 2. This document was signed by what appears to be the treating medical professional at Webster County Memorial Hospital.

8. On April 24, 2012, another Incident Report was prepared by Cpl. Jeffrey Maxwell to Cpl. Zandel Sponaugle titled "Supplemental." Resp. Ex. 2. This report describes Cpl. Jeffrey Maxwell and Cpl. Zandel Sponaugle questioning Grievant as to why Grievant appeared to be asleep in the conference room while he was supposed to be supervising an inmate cleaning in the unsecured lobby area.

9. Grievant denied being asleep.

10. Grievant was advised to write an incident report regarding this matter.

---

[2] Respondent's Exhibit 2 is five Incident Reports from April 24, 2012 (I.R. reference no. 12042401). The exhibit consists of incident reports from: (1) Cpl. Jeffrey Maxwell to Cpl. Zandel Sponaugle; (2) Supplemental Cpl. Maxwell to Cpl. Sponaugle; (3) Cpl. Zandel Sponaugle to Lt. James Shavers; (4) Grievant to Cpl. Sponaugle; and (5) Supplemental Grievant to Cpl. Sponaugle.

11. Grievant wrote two reports regarding events of this time period to Cpl. Sponaugle titled "Cleaning admin" and "Getting sick on Tilex." Resp. Ex. 2.

12. In Grievant's incident reports, he indicated he and the assigned inmate had been cleaning several designated areas. Grievant had been in close proximity to a particular cleaning product for an extended period and was suffering some ill effects. Grievant advised his eyes were burning, his nose and throat were getting sore and he was nauseous. Grievant indicated he was sitting in the conference room out of the way while the trusty was cleaning an identified area. Grievant acknowledges he felt somewhat disoriented but denies he was sleeping. Further, Grievant reported that on the way home from work he started coughing and threw up. Grievant sought medical treatment on April 24, 2012, at a local hospital.

13. On May 10, 2012, Cpl. Jeffrey Maxwell filed an Incident Report with Sgt. Matt King indicating Grievant had failed to report to duty. Resp. Ex. 3. Incident Report (I.R. Reference No. 12051002)

14. On June 2, 2012, Cpl. Edward Clark noted on an Incident Report (I.R. Reference No. 12060203) to Lt. James Shaver that Grievant failed to report to duty on that same date.

15. The West Virginia Regional Jail & Correctional Facility Authority ("WVRJA") has promulgated a Code of Conduct Policy 3010 ("Policy") effective May 15, 1997, and revised December 15, 2007. The Policy provides, among other things:

> Procedure 7 – The hours of work for officers and civilian employees shall be regulated by Authority policy. The Administrator or designee shall have the authority to cause any employee to be called to duty without regard to the normal duty hours of the employee. Refusal to work required overtime shall be cause for disciplinary action;

* * *

> Procedure 16 – All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees;
>
> * * *
>
> Procedure 19 - All employees shall conduct themselves, whether on or off duty, 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;
>
> * * *
>
> Procedure 32 – Employees are to be alert to detect and prevent escapes or other incidents and/or violations of institutional regulations;
>
> * * *
>
> Procedure 41 – No employee shall abuse state work time; examples include, unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, loafing, wasting time or inattention to duty.

16. Lt. James Shaver reviewed all the cited incident reports and after consulting with Wayne Armstrong, Human Resource Director, at WVRJA, made the decision to take disciplinary action against Grievant for misconduct.

17. Grievant was hand delivered a June 28, 2012, suspension letter signed by Lt. James Shaver which stated, in part, that:

> The purpose of this letter is to advise you of my decision to suspend you without pay for five (5) working days from your position as Correctional Officer II at the Central Regional Jail of the West Virginia Regional Jail & Correctional Facility Authority. The reason for this suspension is your unacceptable duty performance and dereliction of duty particularly pertaining to your failure to properly supervise a cleaning trusty in an unsecured area of the facility and two unauthorized absences in which you failed to report to duty for your regular scheduled shift and failed to notify the facility prior. This letter shall serve as notice that any further unacceptable duty performance or dereliction of duty shall result in further disciplinary action, up to and including dismissal.

Resp. Ex 1.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

As proof of Grievant's misconduct, Respondent has offered several incident reports and the testimony of Lieutenant James Shaver. An essential question is what weight, if any, is to be given to the various incident reports.[3] A key consideration is whether the statement contained in the reports are credible, and what, if any, does the information provided by the reports establish as fact. There was no direct witness testimony provided at level three by Respondent's witness which reported first hand knowledge of events on April 24, 2012. Grievant specifically denies he was sleeping. Respondent's one and only

[3] There are no less than eight incident reports relating to one or another issue of this grievance matter. Not all information of the various reports is established to facts certain or reliable information. The fact that some of the evidence is offered in written form does not relieve Respondent of the obligation to establish the relevant facts discussed in the documents.

witness recited what was reported to him. Witness Shaver did not directly observe the contested conduct which he relied upon to justify taking disciplinary action against Grievant.

Various aspects of the incident reports heavily relied upon by Respondent are hearsay, and as such, the undersigned must determine how much weight will be given to a report, individually and/or collectively, in this proceeding. 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.[4] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *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).

In particular, the incident report of Corporal Maxwell (I.R. Reference No. 12042401 of April 24, 2012) was relied upon by Respondent to establish the fact that Grievant was

---

[4] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 M.S.P.B. 150 (1981).

derelict in the performance of duty, particularly pertaining to a failure to properly supervise a cleaning trusty in an unsecured area of the facility. Corporal Maxwell did not testify at level three. The report, as presented at the level three hearing, was not an affidavit or sworn statement. It contained conjecture and opinion. Cpl. Maxwell strongly inferred that Grievant was sleeping on the job; he specifically stated that the situation appeared to him as if the trusty was not being properly supervised. This opinion is interesting and it is understandable that Respondent would seek further clarification regarding the situation. However, Cpl. Maxwell's report, in and of itself, does not establish his conjecture as fact. Cpl. Maxwell's reported factual observations are not necessarily inconsistent with the statements and explanation of Grievant given then and now. It is Cpl. Maxwell's interpretations of the situation which are unsubstantiated. It is not known if Cpl. Maxwell and Grievant have history (defined as negative interactions), but it is clear Cpl. Maxwell was not going to let this encounter pass without further administrative review. Respondent's investigation did not include signed statements from the trusty or kitchen personnel, who presumably were present at the time of the contested conduct. The rationale for this oversight is not known, nor was it explained why Cpl. Maxwell did not testify at level three where he would be subject to cross-examination by Grievant. Cpl. Maxwell's unsubstantiated speculation of what might have transpired is not reliable.

Grievant testified at the level three hearing. Grievant reiterated and confirmed the information presented in his April 24, 2012, incident reports. Grievant specifically denies he was sleeping. Grievant acknowledges he felt somewhat disoriented, and reports he was experiencing some ill effects to cleaning material. Grievant sought medical treatment on April 24, 2012, at Webster County Memorial Hospital. *See* FOF 6, 7 and G. Ex. 2.

Grievant's testimony in general was consistent and appeared plausible with regard to conduct of April 24, 2012. Grievant presented information that reasonably explained the conduct Cpl. Maxwell perceived to be inadequate supervision. Unverified speculation does not rise to the level of preponderance of the evidence, especially when contradicted by plausible explanation and direct testimony. Grievant indicates he was monitoring the trusty's actions. It is not established by a preponderance of reliable evidence that Grievant was sleeping and or improperly supervising the trusty in his charge.

Lastly, it is of issue that Grievant did not properly report to duty on May 9, 2012, and June 2, 2012. The rationale for Grievant's failure to report to work is somewhat convoluted. In the end, on or about May 9, 2012, Grievant was confused and mistakenly did not properly report for his scheduled shift. Likewise, on June 2, 2012, Grievant was allegedly confused about scheduling due to changing of days and the work week. The incident reports documenting this misconduct are accurate and reliable. *See* Resp. Ex. 3, and FOF 13 and 14. It is established Grievant failed to properly report as scheduled. Grievant acknowledges he failed to properly report but contends both occurrences were unintentional and a result of abnormal alteration in the scheduling process. In both examples, Grievant did communicate with administrative personnel subsequent to the time of his failure to report. Pursuant to information provided by the record, May 9, 2012 was the first time Grievant had ever failed to properly report for a scheduled shift.

Grievant argued that the penalty imposed is too severe. "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). Grievant's demeanor was appropriate. His testimony provided insight into his attitude and respect for his duties. Grievant acknowledged his conduct and attempted to shed light on some of the misconceptions that were prevalent in this matter. Grievant was forthcoming with information and his perceptions of the various situations. Grievant's incident reports drafted at the time of relevant events in discussion and Grievant's testimony at level three were consistent with one another. Further, Grievant displayed concern for his reputation and respect for the institution. Grievant avers that he is being penalized too severely for established conduct. Grievant did not discuss his full work history, but additional insight with regard to the three allegations of wrong doing pertinent to this case was provided. Grievant does not dispute he failed to call off. Grievant's testimony was persuasive.

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." *Dickens v. West Virginia Regional Jail & Correctional Auth'ty*, Docket No. 2009-0534-CONS, (Mar. 23, 2009). In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted).

Mitigation of a penalty is considered on a case-by-case basis. Respondent proved by a preponderance of the evidence that by failing to report for duty for a scheduled shift and/or failing to notify the facility of an intended absence Grievant's conduct violated applicable WVRJA's Code of Conduct Policy. Grievant failed to report for duties on May 9, 2012 and June 2, 2012. Respondent did not establish by a preponderance of the evidence that Grievant was derelict in the performance of duty on April 24, 2012 and/or failing to properly supervise a cleaning trusty in an unsecured area of the facility. Circumstances conducive for mitigation are found to exist in the facts of this matter. It was perceived that the alleged dereliction of duty attributed significantly to the severity of the disciplinary action. Respondent did not establish fundamental elements of that cited action of misconduct. Accordingly, the discipline levied will be reduced. A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996)

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. "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). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

3. 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. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *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).

4.

> Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See, Seddon v. W. Va. Dept. of Health,* Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2.

5. A significant stated charge against Grievant was supported solely by unreliable hearsay evidence. Respondent did not prove Grievant was derelict in the performance of duty on April 24, 2012.

6. Respondent failed to meet its burden of proof with regard to a substantial allegation of misconduct.

7. A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

8. Reduction in the level of discipline is warranted in the interest of fairness and Grievant's history of satisfactory work performance.

Accordingly, the grievance is **GRANTED-IN-PART.**

Grievant's suspension shall be reduced to a period of three days. Respondent is **ORDERED** to pay Grievant two days of back pay, with interest, and to restore all other benefits that Grievant lost as a result of the suspension, including leave, seniority and retirement benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 26, 2013

_____

Landon R. Brown
Administrative Law Judge