

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TROY CARTER,**

**Grievant,**

**Docket No. 2022-0831-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
SOUTHERN REGIONAL JAIL AND  
CORRECTIONAL FACILITY,**

**Respondent.**

**DECISION**

Grievant, Troy Carter, was employed by Respondent, Department of Homeland Security (“DHS”), as a Correctional Officer V, shift supervisor, at Southern Regional Jail (“SRJ”). On May 31, 2022, Grievant filed a lengthy statement of grievance, which is incorporated in full by reference. Grievant contends his September 13, 2022, suspension for failure to write up a use of force incident report was unjustified. Grievant further alleges Respondent’s disciplinary action was retaliatory and his due process rights were violated. For relief, Grievant sought forty (40) hours of regular pay restored, eighty (80) hours of overtime, removal of the suspension at issue from his record, and a written referral from Respondent.

A level one hearing was held on June 16, 2022, and a decision was rendered at that level on July 8, 2022, denying the grievance. Grievant appealed to level two on July 19, 2022. A level two mediation was held on September 29, 2022. Grievant appealed to level three on October 13, 2022. A level three hearing was held on March 21, 2023, before the West Virginia Public Employee Grievance Board’s Administrative Law Judge Carrie LeFevre at the Grievance Board’s Charleston, West Virginia office. Grievant appeared in person and was represented by Amanda J. Taylor Esquire. Respondent

appeared through its counsel, Jonathan M. Calhoun Esquire, Assistant Attorney General. This matter became mature for decision on April 12, 2023, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.<sup>1</sup>

### **Synopsis**

Grievant was employed by Respondent as a Correctional Officer V, a supervising employee. Grievant protests his forty (40) hour suspension from employment for his failure to file a use of force incident report. Respondent established Grievant failed to comply with his mandatory duty of filing a written use of force report pursuant to applicable policies. Respondent established by a preponderance of the evidence that its disciplinary action was lawful and within its authority. Respondent's actions were not established to be retaliatory and did not violate Grievant's due process rights. Accordingly, the 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 at the time relevant to this grievance was employed<sup>2</sup> by Southern Regional Jail ("SRJ"), as a Correctional Officer V, Shift Supervisor, with the rank of Lieutenant and subsequently a Correctional Counselor II.
2. While working in the A-pod Tower of SRJ, on January 26, 2022, Grievant and another SRJ employee, Corporal Michael Pack, had a conversation over the intercom box of A-Pod Tower.

---

<sup>1</sup> The grievance was reassigned to the undersigned following Judge LeFevre's resignation.

<sup>2</sup> Grievant resigned from SRJ in October 2022.

3. This January 26, 2022, conversation was recorded and saved as an audio file.

4. During the conversation, Corporal Pack communicated events that transpired in the Medical-Pod earlier that shift. Corporal Pack, Grievant's subordinate, informed Grievant that in dealing with an offender<sup>3</sup> that he (Corporal Pack) had smacked the offender in the ribs.

5. The inmate who was struck by Corporal Pack was transported to Beckley Appalachian Regional Hospital to receive medical treatment due to having abnormal vitals.

6. In the audio recording, Grievant can be heard immediately after hearing about the incident asking Corporal Pack to come to him and the conversation abruptly ended.

7. Grievant did not file a use of force incident report after hearing Corporal Pack admit to striking an inmate.

8. WVDCR Policy Directive 303 states:

Any staff person using and/or witnessing the use of force beyond the control level of verbal direction must be able to clearly articulate in a written report the level of resistance faced, the level of control used, and that control was affected in the lawful performance of duty. Such written reports shall be in the established Division format and shall be submitted as soon as the individual situation allows; Reports regarding use of force incidents in correctional facilities will be submitted to the Shift Commander; reports regarding use of force incidents by Parole Officers will be submitted to their immediate supervisor. If the employee is not seriously injured, the report shall be submitted no later than at the end of their tour of duty; in cases involving serious injury to the employee, additional time is permitted. The Chief of Security/designee shall ensure that any video and/or recordings of any use of force incident that exist are preserved.

---

<sup>3</sup> For purposes here, an offender is an inmate at SRJ and the term offender/inmate is used interchangeably.

*WVDCR Policy Directive 303.*

9. Grievant is aware of his duty to submit a written report for use of force incidents and has demonstrated the understanding and ability to do such, prior to the January 26, 2022 event.

10. Grievant, as Corporal Pack's supervisor, was required to report any use of force incident and failed to do so.

11. Grievant's explanation for not filing a use of force report regarding the January 26, 2022, communication changed repeatedly.

12. As part of her job duties, Investigator Jaymi Martin, investigates the recorded audio tapes of A-Pod intercom system.

13. On April 25, 2022, Investigator Martin, listened to the January 26, 2022, audio recording between Grievant and Corporal Pack and noted a reference that an assault on an inmate occurred.

14. On May 16, 2022, Investigator Trina McKinney was assigned to investigate possible employee misconduct and possible assault on an inmate.

15. Investigator McKinney testified to her findings and conclusions at the level three grievance hearing and her report was submitted into evidence. *See Grievant's Exhibit 4.*

16. During the investigation, Investigator McKinney reviewed the transcription of the audio recording between Grievant and Corporal Pack.

17. As part of the investigation, Investigator McKinney learned the inmate who was struck by Corporal Pack had been transported to Beckley Appalachian Regional Hospital to receive further medical treatment.

18. As part of the Investigation, Grievant was interviewed by Investigator McKinney on May 24, 2022, where Grievant was played the January 26, 2022, A-Pod Tower intercom recording. Grievant was further interviewed on May 26, 2022.

19. Grievant was aware and acknowledged that on January 26, 2022, he was within a supervisory role to that of Corporal Pack.

20. When directly questioned why he did not report the incident, Grievant told Investigator Dixon, "So what? I didn't see it." See *Grievant's Exhibit 4*.

21. The inmate who was struck by Corporal Pack was nonverbal and could not be interviewed as part of the investigation.

22. Investigator McKinney concluded Corporal Pack reported to Grievant he had struck an inmate in the ribs. Grievant was aware of the incident; however, Grievant failed to report the assault to his supervisor or write a use of force report. See *Grievant's Exhibit 4*.

23. Investigator McKinney submitted her investigation report to the WVCDR Investigation Division concerning employee misconduct for failure to report physical abuse of an inmate report on June 23, 2022. *Id.*

24. Grievant received a letter on September 6, 2022, giving notice of a predetermination conference regarding the use of force incident on January 26, 2022. This letter indicated Grievant committed violations of "Division of Corrections policies and procedures, unacceptable conduct and performance." See *Grievant's Exhibit 10*.

25. A predetermination conference was then held with Grievant on September 8, 2022, with Interim Superintendent Bobby Berry, Acting Major Harold Withrow, and HR Charlotte Underwood. In the predetermination conference, Grievant was given the

reasons why dismissal from employment was being contemplated and was given an opportunity to address those reasons.

26. Interim Superintendent Bobby Berry was familiar with the A-Pod intercom and does not believe there are problems with understanding conversations which take place over the box.

27. Interim Superintendent Bobby Berry determined Grievant should be suspended for forty (40) hours for his failure to report a use of force incident on January 26, 2022.

28. On September 13, 2022, Grievant received a letter from Interim Superintendent Bobby Berry which informed Grievant of his retroactive suspension of forty (40) hours for failure to report a possible use of force incident in violation of WVDCR Policy Directives 129.00 and 303.00. *WVDCR Policy Directive 303 provided at FOF supra.*

29. WVDCR Policy Directive 129.00 dictates that:

Disciplinary Suspension Without Pay – May be issued where there is insufficient or no improvement in the employee’s performance or conduct, continue beyond the written reprimand or when a more serious singular incident occurs. A disciplinary suspension is administered in accordance with subsection 12.3 of the Division of Personnel’s Administrative Rule. Elements of a suspension are:

- a. Predetermination meeting with employee to advise him/her of the contemplated disciplinary action;
- b. Three (3) working days written notice, prior to the effective date of the action;
- c. Specific written reason(s) for suspension;
- d. Specific period of time for disciplinary suspension (except where the employee is the subject of an investigation or a criminal proceeding or indictment);
- e. Written notice of opportunity to respond, either in person or in writing, prior to the effective date; and

- f. Notice of grievance rights specifying to whom the grievance should be directed and the time limits to grieve the suspension [...]

*WVDCR Policy Directive 129.00.*

30. The West Virginia Division of personnel procedural rules address suspension in Section 12.3 by requiring a predetermination conference wherein an employee is advised that suspension is being contemplated, the reason for the contemplated action, and an opportunity to respond prior to the employee being dismissed. W. Va. Code St. R. § 143-1-12.3.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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).

Grievant was employed by Respondent as a Correctional Officer V, a shift supervisor with the rank of Lieutenant and subsequently a Correctional Counselor II. Grievant protests his forty (40) hour suspension from employment for his failure to file a use of force incident report. Grievant asserts several counter arguments as to why Respondent was unjustified in suspending him<sup>4</sup>. Particularly, Grievant asserted the following:

- 1) Grievant asserts he was unaware of the January 26, 2022, conversation with Corporal Pack.
- 2) Grievant asserts his punishment was retaliatory.

---

<sup>4</sup> Not all of Grievant's counter statements are of equal weight. Grievant's credibility will be discussed, infra.

3) Grievant asserts the Respondent's actions violated his due process rights. Respondent maintains it is proper and appropriate to administer disciplinary action to Grievant for his failure to comply with a mandatory reporting requirement pursuant to applicable policy. See WVDCR Policy Directives 303.00. Further, Respondent maintains its actions were not made in retaliation nor violate Grievant's due process rights.

Certain facts surrounding the events which led to Grievant's suspension were the subject of conflicting testimony. It is deemed prudent to address the reliability and due weight that is most readily applicable to Grievant's testimony and provided information during this grievance. An Administrative Law Judge is charged with assessing the credibility of the witnesses. In assessing the credibility of witnesses, some factors to be considered are the witness's: 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 ALJ should consider: 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).

At one time or another, Grievant asserted he could not hear and/or understand what was communicated to him by Corporal Pack. Then, on another occasion, Grievant provided a breakdown of Corporal Pack's exact wording used in the audio recording. During this breakdown, Grievant acknowledged Corporal Pack stating he had struck an



inmate. Further, when directly asked why Grievant did not report the incident, Grievant bluntly told Investigator Dixon, "So what? I didn't see it." Grievant's communications regarding the January 26, 2022, event were truly inconsistent. Grievant's demeanor during the investigation was not cooperative and insincere. At the level three hearing, Grievant's answers were perceived as disingenuous. Merely stating he had no recollection of the conversation is not sufficient to overcome the weight of a recorded conversation kept in the due course of business. Grievant's attempt to disavow the January 26, 2022, recording was juvenile and counterproductive. Saying "So what? I didn't see it" goes against the requirement of mandatory reporting. See *WVDCR Policy Directives 303.00*.

The investigation revealed Grievant was upset that no one else was punished for not filing a use of force report. Grievant has resigned from his position despite only receiving a forty (40) hour suspension. Nevertheless, it is evident that Grievant is motivated to attempt to discredit the audio recording to support his ever-changing set of facts. Grievant demonstrated he has the propensity to attempt to manipulate his story to support his allegations of not needing to file a use of force report despite three (3) investigators hearing the same audio recording and clearly understanding a use of force report should have been filed. Grievant's version(s) of the facts is not credible. Grievant, as Corporal Pack's supervisor, was required to report any use of force incident and failed to do so.

Grievant was disciplined for failing to file a use of force report. Grievant's own statements were inconsistent. Grievant attempted to say it was near impossible to hear a conversation through the twenty-eight (28) year old intercom box. However, it was

clear to everyone else that Corporal Pack had struck an inmate and Corporal Pack informed Grievant of the use of force incident. Further, the inmate was sent to the hospital after being struck. Interim Superintendent Berry testified he was familiar with the A-Pod intercom and said it was clear. Investigator Martin heard the audio recording clearly enough to feel a follow-up investigation needed to be done. The two investigators assigned to the investigation felt the audio revealed an inmate assault occurred. Investigator McKinney ultimately concluded employee misconduct had occurred and a use of report should have been filed by Grievant.

Grievant never denied the conversation took place, only that he thought it occurred in booking and did not rise to the level of needing to file a report. Grievant's interpretation of the events is directly inconsistent with Investigator Martin's interpretation upon hearing the audio recording. Investigator McKinney also determined an assault on an inmate had occurred and concluded Grievant should have filed a use of force report. See *Grievant's Exhibit 4*. The fact that neither Corporal Pack nor the inmate offered testimony is inconsequential to Grievant's credibility. The inmate was taken to the hospital immediately after the assault occurred and Corporal Pack resigned. While it is possible that Corporal Pack or the inmate could have testified that an assault did not occur, it is highly unlikely. The evidence here clearly shows Corporal Pack, more likely than not, struck an inmate and then informed Grievant of the assault. Upon being informed of the use of force, Grievant was required to file a use of force report.

WVDCR Policy Directive 303 clearly directs an employee who is unequivocally aware of a use of force incident to file a written report. Such written reports shall be in

the established Division format and shall be submitted as soon as the individual situation allows. Grievant, acting as Corporal Pack's supervisor, was told about a use of force incident but did not file a report. Grievant offered no evidence that Interim Superintendent Berry was biased or motivated to punish Grievant. Based on the preponderance of the evidence, Respondent proved the disciplinary action taken was justified due to Grievant having engaged in misconduct which violated the mandatory reporting of WVDCR Policy Directive 303.00.

Grievant's assertion that the punishment was retaliatory pursuant to West Virginia Code is not established by fact. In general, a grievant alleging discrimination or retaliation in violation of W.Va. Code § 6C-1-3, must establish a prima facie case by showing:

- a. That the employee is engaged in activity protected by statute;
- b. That the employee's employer was aware of the protected activity;
- c. That, thereafter, an adverse employment action was taken by the employer; and
- d. That the adverse action was the result of retaliatory motivation, or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

*See, Liller va Mineral County Bd. Of Educ.*, Docket No. 99-28-270 (Nov. 19, 1999); *Whatley v. Metropolitan Transit Auth.*, 632 F. 2d 1325, 1328 (5th Cir. 1980). *Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013).

Grievant did not establish a prima facie case of retaliation. Grievant did not identify what protected activity he was engaged in. Grievant did not establish his employer was aware of this alleged protective activity. Grievant merely questioned Investigator Dixon whether he was being singled out or had a vendetta against him.

Investigator Dixon addressed this issue in the investigation. Investigator Dixon's job duty was to investigate the allegations of wrongdoing at the jail after Investigator Martin came across the January 26, 2022, A-Pod audio recordings between Grievant and Corporal Pack. The January 26, 2022, audio recording clearly revealed an inmate assault had occurred and been communicated to Grievant. Grievant was aware of his mandatory reporting duties.

“An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions . . . .’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Respondent successfully rebutted the claim of retaliation by demonstrating by a preponderance of the evidence that a legitimate disciplinary action was justified to be taken against Grievant due to Grievant's failure to report a use of force incident. Further, even if Grievant had made his prima facie case, Respondent's decision to discipline Grievant was not retaliatory. Rather, the discipline was supported by substantial evidence of employee misconduct and was thus justified. Grievant offered no argument as to whether the forty (40) hours was excessive, nor did he offer any evidence of being

owed eighty (80) hours of overtime. As such, the issues are purely speculative and will not be addressed further.

Lastly, Grievant's Due Process violation argument fails as well. In discussing suspension, the Grievance Board has found a predetermination conference is required to protect Grievant's due process rights to be given notice of the charges against him/her and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). *Catalina v. Dep't of Health & Human Res., Docket No. 2011-0885-DHHR* (Aug. 11, 2011).

The facts here show that a predetermination conference was held on September 8, 2022, with Interim Superintendent Bobby Berry, Acting Major Harold Withrow, and HR Charlotte Underwood. In the predetermination conference, Grievant was given the reasons why dismissal from employment was being contemplated and an opportunity to address those reasons. On September 13, 2022, Interim Superintendent Bobby Berry sent a letter to Grievant informing the Grievant of his retroactive suspension of forty (40) hours for failure to report a possible use of force incident in violation of WVDCR Policy Directives. Grievant was suspended on September 13, 2022, after a full investigation and a predetermination meeting was completed. Grievant's due process rights were not violated due to Grievant being given notice of the charges against him, participating in the investigation, provided access to the audio recording, and being given ample time to respond to those charges.

The following Conclusions of Law support the decision reached.

## Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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).

2. In general, a grievant alleging discrimination or retaliation in violation of W.Va. Code § 6C-1-3, must establish a *prima facie* case by showing:

- a. That the employee is engaged in activity protected by statute;
- b. That the employee's employer was aware of the protected activity;
- c. That, thereafter, an adverse employment action was taken by the employer; and
- d. That the adverse action was the result of retaliatory motivation, or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

*See, Liller va Mineral County Bd. Of Educ.*, Docket No. 99-28-270 (Nov. 19, 1999); *Whatley v. Metropolitan Transit Auth.*, 632 F. 2d 1325, 1328 (5<sup>th</sup> Cir. 1980).

3. Grievant did not establish a *prima facie* case of retaliation.

4. Further, Respondent successfully rebutted the claim of retaliation by demonstrating by the preponderance of the evidence that the audio recording between Grievant and Corporal MP clearly indicated that there was a legitimate, non-retaliatory reason for the forty (40) hours suspension of Grievant.

5. The Grievance Board has found a predetermination conference is required to protect Grievant's due process rights to be given notice of the charges against him/her and the right to respond to those charges before disciplinary action is taken.

*See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). *Catalina v. Dep't of Health & Human Res.*, Docket No. 2011-0885-DHHR (Aug. 11, 2011).

6. Respondent did not violate Grievant's due process rights. Respondent conducted a predetermination conference where Grievant was informed of the reasons why suspension was being contemplated and was given ample time to respond.

7. Pursuant to the preponderance of the evidence, Respondent established the disciplinary action taken was justified.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals<sup>5</sup>. Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**DATE:**

---

**Wes White**

---

<sup>5</sup> On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

## **Administrative Law Judge**