WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHEN BOYCE,

Grievant,

v. **Docket No. 2024-0437-DHS**

DEPARTMENT OF HOMELAND SECURITY/
SALEM CORRECTIONAL CENTER & JAIL,

Respondent.

DECISION

Grievant, Stephen Boyce, is employed as a Correctional Officer at the Salem Correctional Center by Respondent, Division of Corrections and Rehabilitation, a division of the Department of Homeland Security. On November 15, 2023, Grievant was given a disciplinary demotion and reduction in pay for not timely providing a requested break to a subordinate and then misleading the investigator. On December 1, 2023, Grievant filed this grievance claiming a lack of progressive discipline and failure to account for circumstances which caused the delay. As relief, Grievant requests that he instead be given a suspension and improvement plan.

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held by videoconference before the undersigned on April 24, 2024. Grievant appeared and was represented by coworker Jeremiah Willey. Respondent appeared by Superintendent John Anderson and was represented by Jonathan Calhoun, Assistant Attorney General. This matter became mature for decision on May 28, 2024. Only Respondent submitted proposed findings of fact and conclusions of law.

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievance to proceed directly to level three of the grievance process when the grievant has been demoted with resulting loss in compensation.

Synopsis

Grievant was employed as a Correctional Officer IV when Respondent demoted him to Correctional Officer III and reduced his pay. Respondent determined that a subordinate urinated herself because Grievant failed to provide a requested restroom break and that he then misled the ensuing investigation. In light of Grievant's supervisory role and prior discipline, Respondent proved that demotion was justified. Grievant did not prove that mitigation is warranted. 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 is employed as a Correctional Officer (CO) at the Salem Correctional Center Jail (SCC) by Respondent, Division of Corrections and Rehabilitation (DCR).

2. On September 23, 2023, Grievant was classified as a CO IV, Pay Grade 12, with an hourly wage of $24.0385.

3. As the A-Group Rover on September 23, 2023, Grievant was tasked with providing allotted and emergency breaks to COs on Units 203 to 209, in ascending order. (Respondent's Exhibit 2).

4. CO II Aimee Hammond was on Unit 207 that day. While Grievant was providing the Unit 205 officer an allotted break, between 8:46 am to 9:01 am, CO Hammond informed Grievant that she urgently needed to use the restroom. Grievant told CO Hammond he would relieve her when the Unit 205 officer returned. (Superintendent John Anderson's testimony, Respondent's Exhibit 3 & 7).

5. However, instead of relieving CO Hammond when the Unit 205 officer returned, Grievant went to Unit 206 to provide the officer there his allotted break. Grievant proceeded to Unit 206 from 9:04 am to 9:25 am, during which CO Hammond again called Grievant about a restroom break. (Superintendent John Anderson's testimony, Respondent's Exhibit 3 & 7).

6. After 9:25 am, Grievant went to Unit 207 to relieve CO Hammond. However, CO Hammond had already been relieved at 9:22 am by a coworker she summoned from Unit 205. (Respondent's Exhibit 7).

7. An investigation was triggered when CO Hammond claimed she urinated herself due to Grievant's delay.

8. Colonel Sean Markey, Chief of Security at SCC, conducted the investigation.

9. Grievant initially told Colonel Markey, verbally and then in writing, that he was on Unit 206 when CO Hammond requested a restroom break, leaving out that he was on Unit 205 when he received the initial request. Grievant thus initially attempted to downplay the length of his delay in providing the break. After further prompting, Grievant gradually came clean in telling Colonel Markey that "[the first call] may have been 205" and then fully clarifying that he was on Unit 205 for CO Hammond's first call and on Unit 206 for her subsequent call. (Respondent's Exhibit 2 & 3).

10. On September 29, 2023, Colonel Markey sent SCC Superintendent John Anderson a letter, stating in part:

> On Saturday 23 September 2023, it was reported that an officer urinated herself due to not being given a bathroom break. COII Amiee Hammond stated she contacted Sgt. Stephen Boyce when he was giving the officer on Unit 205 a

> break and stated she needed to use the restroom. She stated Sgt. Boyce then went to Unit 206 and offered the officer a break, ignoring her request. Sgt. Boyce wrote a memorandum stating he was on Unit 206 when he received the phone call from COII Hammond …
>
> On … 28 September 2023, … I spoke with Sgt Stephen Boyce again to clarify …. Sgt Boyce was asked if he received the initial phone call … on 205 or 206. Sgt Boyce replied, "It may have been 205." He was then asked if he was attempting to deceive me with our earlier conversation and what he documented in his memorandum when he stated that she called him when he was giving a break on Unit 206? He stated that she did call him when he was giving a break to Unit 206, but the first call was received when he was on Unit 205. Sgt Boyce was asked why he did not go to Unit 207 to offer COII Hammond a break? He replied that "Triplett does not usually take break." **He was informed that if an officer is requesting a break due to needing to use the bathroom, they should be moved up in priority. Boyce stated that he forgot** … because he was distracted on Unit 206 by singing inmates … It was pointed out that he was only on Unit 205 for 10 minutes according to the sign in/out log. Sgt Boyce then commented that he gives breaks in a certain pattern and became complacent giving breaks. … [emphasis added].

(Respondent's Exhibit 3).

11. A predetermination conference occurred on November 8, 2023. Grievant was informed that a demotion was being considered. Grievant replied that he told CO Hammond that he would give her a break after he was finished on Unit 205 but that he forgot because he was signing inmates in off the yard and that he only remembered when Hammond again called when he was on Unit 206. Grievant also told Respondent that he was suffering from sleep apnea and was being treated at the VA Hospital.

12. Respondent determined that CO Hammond urinated on herself and that she did so because Grievant proceeded to Unit 206 from Unit 205 instead of going straight to Unit 207 as he had promised. (SCC Deputy Superintendent Katherine Hess' testimony).

13. On November 15, 2023, Respondent sent Grievant a letter demoting him to CO III, as well as reducing his Pay Grade to 11 and his hourly wage to $23.077. Respondent reasoned that Grievant did not readily honor CO Hammond's request for a bathroom break and attempted to mislead the investigator by initially reporting he was on Unit 206 when he received her request. (Respondent's Exhibit 7).

14. The letter provided the following policy violations:

> The above noted actions reveal violations pursuant to **Policy Directive #129.00, Code of Conduct and Progressive Discipline**, which are identified as the following:
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> **Policy Directive 129.00 "Code of Conduct and Progressive Discipline"** Section II, Paragraphs A, B, and C.
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> II. The Division expects its employees to:
>
> A. Conduct themselves in such a manner that their activities both on and off duty will not discredit themselves, other employees, or the Division.
> B. Conduct themselves in a manner that creates and maintains respect for the Division and the State of West Virginia; and
> C. Avoid any action which might result in, or create the appearance of, affecting adversely the confidence of the public in the integrity of the Division or the State of West Virginia.
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> **Policy Directive 129.00 "Code of Conduct and Progressive Discipline"** Section IV; paragraph F; subparagraphs 5, 12, 24 and 28.
>
> IV. The basic principle underlying disciplinary procedures is that the Division must demonstrate cause for disciplining a classified employee.
>
> F. The following list of violations is intended to be an illustrative but not all-inclusive code of conduct covering all employees regardless of their employment status with the Division. Accordingly, a violation or other misconduct although not listed below, but found by management to undermine the effectiveness of the Division's activities or the employee's

> performance, should be treated consistent with the provisions of this policy.
>
> 5. Instances of inadequate or unsatisfactory job performance.
> 12. Failure or delay in following a supervisor's instructions, performing assigned work, or otherwise complying with applicable, established written instructions.
> 24. Unprofessional treatment of persons contrary to Division written instructions, court order, or philosophy.
> 28. Falsifying any information whether through intentional misstatement, exaggeration, omission or concealment of facts.

15. The letter went on to state:

> As a Correctional Officer IV, you are required to observe a higher standard of conduct as you serve as a role model for employees. … It is your primary responsibility to ensure the successful performance of the employees under your supervision. … I find that your neglect of supervisory responsibilities and unacceptable conduct in your supervisory capacity warrants your demotion ….

16. In practice, COs can call someone other than the Rover to relieve them if the Rover is busy. Rovers are typically occupied without a break during their morning rounds for 2 to 2 and a 1/2 hours. (Testimony of coworkers Lisa Ayers and Marshall Tallman).

17. Grievant had multiple prior incidents for which he was disciplined. On September 6, 2022, Grievant received a written warning for failure to secure the door to the inmate loading area on August 18, 2022, resulting in a security breach. On February 16, 2023, Grievant received a written reprimand for use of a racial slur and derogatory comments. (Respondent's Exhibit 1 & 4).

18. Before this, on June 30, 2022, Grievant received non-disciplinary counseling for failing to ensure an inmate's appearance by video at a court hearing. (Respondent's Exhibit 5).

19. Respondent did not cite or provide the policy that purportedly requires a Rover to move an officer up in priority if the officer requests to use the bathroom. However, when Grievant was told by Colonel Markey on September 29, 2023, that it was protocol to do so, he did not contest this. Grievant offered the excuse that he forgot, that he was preoccupied signing inmates in from the yard, and that he became complacent due to giving breaks in a predetermined order. (Respondent's Exhibit 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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2,1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

As part of progressive discipline, Respondent demoted Grievant and reduced his pay after determining that Grievant should have provided a subordinate with a restroom break sooner, that the subordinate consequently lost bladder control, and that Grievant subsequently misled the investigator.

Respondent's Policy Directive 129.00 states in relevant part:

> IV. The basic principle underlying disciplinary procedures is that the Division must demonstrate cause for disciplining a classified employee. …
>
> F. The following list of violations is intended to be an illustrative but not all-inclusive code of conduct covering all employees regardless of their employment status with the Division. Accordingly, a violation or other misconduct although

> not listed below, but found by management to undermine the effectiveness of the Division's activities or the employee's performance, should be treated consistent with the provisions of this policy. …
>
> 5. Instances of inadequate or unsatisfactory job performance.
> …
> 24. Unprofessional treatment of persons contrary to Division written instructions, court order, or philosophy. …
> 28. **Falsifying any information whether through intentional misstatement, exaggeration, omission or concealment of facts**. … [emphasis added].

While Respondent's policy clearly prohibits Grievant from misleading the investigation through omission, its policy regarding provision of restroom breaks appears murky. Policy apparently requires a Rover to provide an officer with a restroom break out of turn if the officer urgently communicates a need to go. Respondent did not provide or reference the purported policy. Nevertheless, Grievant does not challenge its existence. Nor does Grievant contest that he failed to timely provide a requested restroom break or that he misled the investigator. Grievant does, however, question the reported loss of bladder control. While this reported loss of control triggered the investigation, it is irrelevant since protocol apparently hinges on the urgency of the request rather than the consequence of ignoring it.

Respondent decided to give Grievant another chance in demoting rather dismissing him. Respondent reasoned that Grievant could improve his performance despite prior coaching and progressive discipline. The more severe infraction of misleading the investigator alone was sufficient to warrant the discipline enacted. Respondent proved by a preponderance of the evidence that its discipline was justified.

Grievant hints at affirmative defenses for his delay in providing the requested break. "Any party asserting the application of an affirmative defense bears the burden of

proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Grievant told the investigator and stated as a defense during the predetermination conference that he had fallen into the habit of giving breaks in a set order and had also been distracted through signing inmates in from the yard. Yet, Grievant did not provide any evidence thereof at the level three hearing. Grievant thus failed to prove an affirmative defense to his infractions.

Grievant argues for mitigation, pointing to the circumstances surrounding the delay. "[A]n allegation that a particular 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 agency 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-

94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.,* Docket No. 2014-0028-RalED (Apr. 30, 2014), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

However, Grievant overlooks the more severe infraction of misleading the investigator. Even though this emanated from the investigation of the primary infraction, it is the more severe infraction and cannot be downplayed. Grievant's role as a supervisor heightens the egregiousness of his conduct. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res*., Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res*., Docket No. 2010-1490-CONS (Dec. 5. 2012).

Further, Grievant had, within the last few years, received coaching, a verbal reprimand, and a written reprimand, albeit for infractions unrelated to those in the current matter. Nevertheless, Respondent gave Grievant the benefit of doubt in determining that he simply had performance issues that could be improved through further discipline. This

despite evidence revealing that Grievant was calculating in attempting to mislead the investigation. In failing to initially mention that he first received the request for a restroom break when he was on Unit 205, Grievant attempted to hinder the investigation by downplaying the length of his delay in providing the break. The adage that an attempted coverup is at times worse than the underlying infraction applies here. Grievant failed to prove that mitigation is warranted. Thus, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer 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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Respondent proved by a preponderance of the evidence that Grievant failed to timely provide a restroom break, that he misled the investigator in the ensuing investigation, and that the resulting discipline was justified.

3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

4. Grievant failed to prove an affirmative defense by a preponderance of the evidence.

5. “[A]n allegation that a particular 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 agency 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).”

6. Grievant failed to prove by a preponderance of the evidence that mitigation is warranted.

Accordingly, this grievance is **DENIED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. Va. Code § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. Va. Code § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be4named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. Va. Code § 29A-5-4(b) (2024).

Date: June 21, 2024

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Joshua S. Fraenkel
Administrative Law Judge