

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**NATHANIEL RYAN DEULEY,**

**Grievant,**

**v.**

**DOCKET NO. 2024-0337-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
BUREAU OF COMMUNITY CORRECTIONS,**

**Respondent.**

**DECISION**

Grievant, Nathaniel Ryan Deuley, is employed by Respondent, Department of Homeland Security, through the West Virginia Division of Corrections and Rehabilitation as a Probation and Parole Officer 1 ("PPO 1"). On October 10, 2023, Grievant filed a lengthy statement of grievance directly to level three, which is incorporated in full by reference. In summary, Grievant asserts that Respondent did not follow its progressive discipline policy when it suspended Grievant without pay for three days without first giving a verbal warning or written reprimand. Grievant also asserted that he was being targeted for prior conduct for which he did not receive any disciplinary action. As relief, Grievant seeks to have the disciplinary action expunged and removed from his personnel file. Grievant further seeks back pay for the days that he was suspended without pay and "payment for pain and suffering myself and my family have endured during this process."<sup>1</sup> *See Grievant's Statement of Grievance.*

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<sup>1</sup> Grievant withdrew his pain and suffering claim by acknowledging through his counsel that 'tort-like' damages have been found to be unavailable under the grievance procedure. *See Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009).

Grievant filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on March 6, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by William ("Bill") Merriman, Esquire, of Bill Merriman PLLC. Respondent appeared by representative Ann Thomas, Asst. Commissioner of Division of Corrections and Rehabilitation, and was represented by Jodi Tyler, Esquire, Assistant Attorney General. This matter became mature for decision on April 5, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed by Respondent as a Probation and Parole Officer

1. Grievant protests his three-day suspension without pay. Grievant argued that Respondent failed to follow its progressive discipline policy when it suspended him before issuing a verbal warning or written reprimand. Respondent established by a preponderance of the evidence that the disciplinary action taken was lawful and within its authority after Grievant committed two incidents following two separate counseling sessions for unsatisfactory work performance and certain violations of policy. Grievant also failed to meet his burden to show that he was entitled to an affirmative defense to mitigate his punishment. 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 was employed by Respondent as a PPO 1 since August of 2022. As part of Grievant's duties and responsibilities, Grievant was required to attend parole hearings for all cases assigned to him.

2. When Grievant began his employment with Respondent, he had a caseload of approximately 70 parolees assigned to him. As time progressed, Grievant's parolee assignment had grown to approximately 115 parolees. *See Grievant's Statement of Grievance.*

3. Grievant's direct supervisor, Clarissa Hill, is the Parole Services Regional Director for Region 5, and oversees the Region 5 parole offices located in Parkersburg and Wheeling, West Virginia. Ms. Hill has served in this capacity for approximately one year. *See Clarissa Hill's Testimony; Respondent's Exhibit No. 1.*

4. In January of 2023, Ms. Hill participated in Grievant's initial Employment Performance Appraisal ("EPA 1"). Grievant's EPA 1 outlined Grievant's performance standards and expectations and stated that Grievant performed his job in a satisfactory manner. *See Clarissa Hill's Testimony; Respondent's Exhibit No. 3.*

5. In the following month of February 2023, Grievant received two separate counseling sessions based on unsatisfactory work performance and certain violations of policy. *See Clarissa Hill's Testimony; Respondent Exhibit No. 10-11.*

6. The first counseling session occurred on February 22, 2023, with the Director of Parole Services, Robert Arnold. Mr. Arnold counseled Grievant based on his actions in an incident at the Parkersburg Correctional Center where Grievant brought a firearm into an area where firearms are prohibited.

7. The February 22, 2023, incident occurred when Grievant overheard someone yelling for help in a secure area of the facility where Grievant was aware firearms are prohibited. Grievant had previously been employed as a law enforcement officer for 16 years and when he overheard someone yelling for help, he immediately responded to assist despite knowing he was in violation of a policy of being in an area that prohibits firearms. Despite being a violation of policy, Grievant was not disciplined for this incident. *See Robert Arnold's Testimony; Respondent's Exhibit No. 10.*

8. On or about February 27, 2023, Grievant was further counseled by Parole Services Region 8 Director, Bryan Thompson. Mr. Thompson oversees the enhanced supervision of sex offenders and parolees with GPS monitoring. Grievant was counseled by Mr. Thompson via email after he failed to properly contact a parolee whose GPS monitoring unit was not connecting. Grievant also misinformed his supervisors about making face-to-face contact with a parolee after being directed to do so. *See Bryan Thompson's Testimony; Respondent's Exhibit No. 11.*

9. After Grievant was counseled by Mr. Thompson, Grievant complained about Mr. Thompson to another parole officer and Assistant Commissioner Anne Thomas. While complaining, Grievant used profane language.

10. Ms. Thomas had a verbal conversation with Grievant regarding his language towards his supervisors. Ms. Thomas reported this incident to Grievant's District Supervisor, Matthew Currence, who then engaged in an email conversation with Grievant discussing these incidents and Grievant's professionalism. *See Anne Thomas Testimony; Respondent Exhibit No. 11.*

11. On July 28, 2023, Grievant's mid-year evaluation was documented in his EPA 2. Grievant's EPA 2 indicated that he needed to improve his attendance at work and to continue working towards the performance standards and expectations as outlined in Grievant's EPA 1. *See Respondent's Exhibit No. 4 "EPA 2".*

12. The practice to assign parolees to parole officers is via alphabetical order of the parolee's last name. Based on the alphabetical assignment system Grievant was assigned the parolee Mr. S.<sup>2</sup>

13. A "Preliminary Waiver/Final Request" form, dated July 19, 2023, listed Grievant as the parole officer assigned to Mr. S. The Preliminary Waiver/Final Request form showed Mr. S was scheduled for a final parole hearing on August 24, 2023. *See Respondent Exhibit No. 7, "Preliminary Waiver/Final Request."*

14. Grievant was previously scheduled to attend a mandatory training session on August 23-24, 2023.

15. Grievant was unaware Mr. S was assigned to him or that Mr. S's final parole hearing was scheduled for August 24. *See Grievant's Testimony.*

16. On August 24, 2023, Grievant failed to appear for Mr. S's final parole hearing. The parole hearing was continued until the next day, August 25, 2023.

17. On August 25, 2023, Grievant was scheduled to assist in a pre-planned transport of another parolee and did not attend Mr. S's final parole hearing that had been continued to August 25, 2023. Mr. S's parole hearing occurred without a parole officer in attendance.

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<sup>2</sup> The parolee's name has been shortened to "Mr. S" due to him currently being incarcerated.

18. Grievant's supervisor, Ms. Hill wanted someone to attend Mr. S's parole hearing and would have preferred Grievant attend or had someone cover the parole hearing instead of Grievant assisting in transporting another parolee. Ms. Hill believed Grievant should have been aware Mr. S had been assigned to him due to an email of assignments that was circulated to every parole officer. *See Clarissa Hill's Testimony.*

19. On September 14, 2023, Ms. Hill emailed all Region 5 officers directing them to check and ensure that all parolees in jail, awaiting a hearing, have a hearing date scheduled.

20. It is undisputed that Grievant did not follow Ms. Hill's directive to ensure that all his parolees in jail awaiting a hearing had a date scheduled for their parole hearing.

21. By failing to ensure all his parolees in jail had a date scheduled for a parole hearing, Grievant failed to timely submit a particular parolee's paperwork to schedule a parole hearing. Due to Grievant's error, Grievant was forced to submit a parole release form to the jail for a parolee to be released from jail and placed on GPS monitoring. The parolee that was released from jail was not a good candidate for parole and would not have been released had it not been for Grievant's error. *See Clarissa Hill's Testimony.*

22. The parolee that was released from jail committed another criminal act shortly after he was released and was subsequently arrested and placed back in jail.

23. Due to Grievant's failure to follow a directive that allowed an inmate to be released from jail early, Ms. Hill wanted to meet with Grievant to discuss possible disciplinary action.

24. On September 29, 2023, Ms. Hill met with Grievant regarding Grievant's August and September's incidents. During this meeting, Grievant was provided with

notice that suspension was being considered due to the policy violations. See *Clarissa Hill's Testimony*.

25. Before taking any action disciplining Grievant, Ms. Hill sought guidance from her superiors. Ms. Hill's superiors advised her that due to Grievant's incidents, unpaid suspension is an appropriate disciplinary action.

26. On September 29, 2023, Grievant was provided a suspension letter. The suspension letter described in detail the conduct for which Grievant was being suspended and stated Grievant was suspended without pay for three days, and further identified the specific policy violations pursuant to the WVDCCR's Policy Directive #129.00: Code of Conduct and Progressive Discipline. See *Respondent's Exhibit No. 5*.

27. The September 29, 2023, Suspension letter also detailed Grievant's August and September incidents, Grievant's prior counseling sessions, and included reference to Grievant's supervisor's concern regarding Grievant's attendance issues. *Id.*

28. Following Grievant's suspension, Grievant was provided with a "Performance Discussion Documentation" that identified Grievant's specific performance issues and their adverse impact, the disciplinary action taken against Grievant, and Grievant's "next steps" to improve his work performance. The next steps included Grievant working on time management for parole hearings; ensuring Grievant schedules time to attend parole hearings; Making sure Grievant is sending paperwork to be approved in the allotted time frame and for Grievant to continue to work on attendance. See *Respondent's Exhibit No. 12 "Performance Discussion Documentation."*

## 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant is contesting his three-day suspension without pay. Grievant argues Respondent did not follow its progressive discipline policy when it suspended Grievant without first giving a verbal warning or written reprimand. Grievant also asserted that he was being targeted for prior conduct for which he did not receive any disciplinary action. Respondent argues it was justified suspending Grievant for three days without pay due to Grievant's August and September incidents.

Respondent proved it was justified in suspending Grievant for three days without pay after Grievant committed two incidents following two separate counseling sessions for unsatisfactory work performance and certain violations of policy. The record reveals that in February 2023, Grievant received two separate counseling sessions based on unsatisfactory work performance and certain violations of policy. Subsequently, in August and September 2023, Grievant had two policy violation incidents. The last incident was the most severe because it resulted in an inmate being prematurely released from jail when that inmate was not a good candidate for parole merely because Grievant forgot to file a parolee's paperwork to schedule a parole hearing. Shortly after the inmate was



released on parole, he committed a subsequent criminal act and was arrested again and put back in jail. The record shows that had Grievant followed Ms. Hill's instructions the subsequent criminal act of the inmate would not have occurred. Due to his erroneous action, Grievant was informed by Ms. Hill that disciplinary action, including possible suspension, was being considered.

At the level three hearing, Ms. Hill discussed the steps of discipline according to policy standards and stated that the steps can be bypassed due to the severity of the offense. Before taking any disciplinary action for Grievant's error that allowed an inmate to be prematurely released from jail, Ms. Hill sought disciplinary guidance from two superiors. Both of Ms. Hill's superiors informed her suspension without pay was appropriate due to Grievant's actions. It is reasonable that two superiors would advise Ms. Hill to take appropriate disciplinary action and Ms. Hill did not increase the suggested disciplinary actions against Grievant. The preponderance of the evidence shows Respondent was justified in suspending Grievant without pay for three days for having multiple incidents after being counseled for poor work performance. Nothing in the records reveals Grievant's discipline was disproportionate to the offense. Grievant failed to establish that Respondent failed to follow its own discipline policies.

Grievant's second argument asserting he was targeted fails as well. Nothing in the record demonstrates any form of singling out Grievant. In fact, the record demonstrates that Grievant's work performance progressively worsened. Grievant's early incidents were not so severe that written reprimands were required. Grievant spent a great deal of time at the level three hearing discussing his early incidents to show how he was supposedly targeted. Grievant explained how he was unaware of being assigned Mr. S

because mistakes happen frequently and that he did not receive the email showing Mr. S was assigned to him.

Grievant's attempted to mitigate his poor performance for his early incidents. However, the record is clear Grievant's performance progressively worsened. Particularly, after receiving two counseling sessions for poor performance, Grievant failed to follow a supervisor's directive. Grievant's failure allowed an inmate to be released from jail prematurely, and that parolee went on to commit another crime. It is reasonable that a parole officer's job entails working to keep the community safe by knowing which inmates are good versus poor candidates for parole. Grievant failed to introduce any evidence showing he was targeted when his progressively poor performance put the community at risk.

Grievant alternatively argues that his punishment should be mitigated. "[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).

Grievant failed to meet his burden to show that he was entitled to mitigate his punishment. Grievant failed to establish any evidence showing his punishment was disproportionate to the offenses committed. Grievant offered no evidence of other parole officers who committed similar incidents being punished less severely than him. Grievant failed to show Ms. Hill arbitrarily and capriciously disciplined him. The record shows that before taking any disciplinary action, Ms. Hill sought guidance from her superiors, and those superiors’ advised suspension without pay was proper. Ms. Hill did not abuse her discretion giving Grievant a harsher punishment than her superiors suggested. As such,

Grievant is not entitled to offer any affirmative defense to mitigate his punishment. Therefore, Grievant's grievance should be 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "[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).

3. "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).

4. “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).

5. Respondent proved it was justified in suspending Grievant for three days without pay after Grievant committed two incidents following two separate counseling sessions for unsatisfactory work performance and certain violations of policy. Grievant also failed to meet his burden to show that he was entitled to an affirmative defense to mitigate his punishment.

Accordingly, the 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 be named 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: July 10, 2024.**

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**Wes White**  
**Administrative Law Judge**