

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHASITY MAUPIN,

Grievant,

v.

Docket No. 2023-0925-DHS

**DIVISION OF CORRECTIONS AND REHABILITATION/
EASTERN REGIONAL JAIL,**

Respondent.

DECISION

Grievant, Chasity Maupin, is employed by Respondent, Division of Corrections and Rehabilitation, as a Correctional Officer II, at the Eastern Regional Jail and Correctional Facility. On June 15, 2022, after Respondent suspended her for three days without pay, Grievant filed a grievance requesting that the suspension be reversed.

Grievant filed directly to level three of the grievance process.¹ A level three hearing was held by videoconference before the undersigned on October 11, 2023. Grievant appeared in person and was represented by coworker Ryan Squires. Respondent was represented by Jonathan M. Calhoun, Assistant Attorney General. This matter became mature for decision on October 30, 2023. Only Respondent submitted proposed findings of fact and conclusions of law.

Synopsis

While employed by Respondent as a correctional officer, Grievant received a written reprimand which she did not grieve. A few months later, as part of progressive discipline, Grievant received a three-day suspension for refusing to recount inmates, not timely reporting an inmate fight, failing to control inmates, and not reporting the resulting

¹West 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 suspended without pay.

security breach. Respondent proved the three-day suspension was justified. 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, Chasity Maupin, is employed by Respondent, Division of Corrections and Rehabilitation, as a Correctional Officer II, at the Eastern Regional Jail and Correctional Facility.

2. On March 8, 2023, Grievant informed an inmate that a nurse flipped the inmate off.

3. On March 15, 2023, Deputy Superintendent Guy Nicholson sent Grievant a written reprimand, stating, in part:

On 3/8/23 you were present ...while inmates were undergoing blood sugar checks. ... During an inmate's interaction with the nursing staff, there was a disagreement wherein the inmate became upset. As the inmate proceeded to return to the medical waiting area, the attending nurse inappropriately gestured with her middle finger in the direction of the individual You witnessed this incident and inexplicably chose to then inform the inmate of the nurse's actions rather than just reporting it to a supervisor. ... Such actions are in violation of Policy Directive 129-Code of Conduct ...

Unfortunately, this is not the first time that a supervisor has had to speak to you regarding your conduct. In an effort to assist you in meeting a standard of performance consistent with my expectations, I am establishing a 60-day improvement period, beginning 3/15/23 through 5/14/23 to allow you to bring your faltering performance to acceptable standards. ...

(Respondent's Exhibit 1).

4. On May 18, 2023, after submitting an incorrect inmate count, Grievant refused a supervisor's directive to recount inmates.

5. That same day, Grievant failed to maintain control of inmates she was escorting and failed to report the ensuing security breach after inmates took items from a bin in the corridor.

6. On May 24, 2023, Grievant was the first officer to respond to an inmate fight but failed to do an incident report prior to the end of her shift.

7. On May 26, 2023, Grievant finally prepared an incident report on the inmate fight. (Grievant's Exhibit 3).

8. On June 8, 2023, Deputy Superintendent Nicholson sent Grievant a letter suspending her without pay for three days. (Respondent's Exhibit 2).

9. The letter details the basis for suspension as follows:

The reason for this suspension is your continued unacceptable conduct and performance, particularly pertaining to a series of incidents occurring on 18 May 2023 wherein you refused a supervisor's directive to recount a section, failed to maintain control of several inmates you were tasked with escorting, and permitted an inmate to be housed in the wrong section. Additionally, following your response to an inmate fight on 24 May 2023, you failed to complete an incident report before the end of your shift. Your actions and inactions resulted in a multitude of policy and procedural violations that compromised security and potentially jeopardized the safety of other inmates and officers. ...

On 6/8/23, Guy Nicholson, Deputy Superintendent, held a discussion with you regarding the nature of your instances of inadequate or unsatisfactory job performance. At that time, it was shared with you that suspension was being considered. Your response was one of indignation and denial. You claimed that the allegations were inaccurate, however, presented no evidence to the contrary. After reviewing your response and having considered all the information made

known to me, I have decided that your suspension is warranted.

More specifically, the reasons for this personnel action are as follows:

On 18 May 2023, you submitted an incorrect count of one of the sections in your assigned pod and you were subsequently directed to recount. You stated that it had just been an error on your count sheet and attempted to resubmit an amended number. You were again instructed that you needed to recount to verify that it was only an error. At that time, you stated that you would not recount resulting in the lieutenant intervening and having another officer conduct a recount of the section in question.

On the same date as above, while escorting a group of inmates back to your pod, you failed to maintain order among the group resulting in a lapse of adequate observation. As a result, several of the inmates were able to obtain blankets, spray bottles, and various other unauthorized items from a bin in the corridor and proceed to return them to their housing assignments. Furthermore, the lack of control allowed inmates to brazenly communicate to individuals in other sections and, in one case, resulted in you allowing an inmate housed in section 5 to enter section 4 where you proceeded to secure him until he notified staff moments later. Despite being a clear breach of security, which could have resulted in injury to one or more inmates, among many other potential security concerns, you did not notify a supervisor of the occurrence until hours later in the shift.

On 24 May 2023, you were the first officer responding to an inmate fight in section one of 8-pod that involved multiple combatants. Despite clearly being on scene, issuing numerous verbal commands, and directly interacting with several inmates you failed to complete an incident report on the matter. You are a tenured officer, this was a significant event, and your presence was indisputable yet you did not see fit to complete the obligatory documentation. ...

10. The letter detailed policy violations, in part, as follows:

Further, your conduct violated Policy Directive 129.00 "Code of Conduct and Progressive Discipline," Section IV,

Paragraph F; Subparagraphs 1, 5, 6, 12, 37, 41, 42 and 48.

...

12. Failure or delay in following a supervisor's instructions, performing assigned work, or otherwise complying with applicable, established written instructions.

37. Refusal to obey security-related instructions.

41. Breach of facility security or failure to report any breach or possible breach of facility security.

42. Failure to properly conduct and document inmate/resident count.

48. Failure to file a written report by the end of the duty shift concerning any incident, violation of the law, rules and/or regulations, or information relative to the safety and security of the agency or any of its locations, its employees, persons under agency custody or supervision, or the public.

You recently completed a Performance Improvement Plan on 5/14/23. You were placed on this plan in the hopes that your performance would improve and would bring your work up to an acceptable level. However, this has not been the case. ...

(Respondent's Exhibits 2 & 3).

11. The only witness to testify in this action was Deputy Superintendent Nicholson. He was not an eyewitness to the underlying incidents that resulted in Grievant's suspension.

12. Respondent's *Offender Count Procedures Student Handout* states, in part:

An Emergency Count would be implemented anytime a formal count fails to clear after the initial count and one recount. Should an initial count fail to clear, a different employee will conduct the recount of the affected area.

(Grievant's Exhibit 2).

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.*

A few months prior to the disciplinary suspension at issue in this grievance, Grievant was given a written reprimand for telling an inmate that a nurse flipped him off as he walked away. Grievant never grieved the reprimand. Grievant now challenges Respondent’s representation of events that led to the reprimand. “If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff’d*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Thereafter, as part of progressive discipline building on the written reprimand, Respondent suspended Grievant for further infractions. These were that Grievant refused an order to recount inmates, failed to maintain control of inmates when they took items from a bin, did not report this incident, and did not do a timely incident report after an inmate fight. Respondent's Policy Directive 129.00 *Code of Conduct and Progressive Discipline*, Section IV, Paragraph F, sets forth a list of violations that can result in employee discipline, including "[f]ailure to file a written report by the end of the duty shift...", "[b]reach of facility security or failure to report any breach or possible breach of facility security," and "[r]efusal to obey security-related instructions."

The only witness to testify at level three was Deputy Superintendent Guy Nicholson. Mr. Nicholson was not present for the underlying incidents. While Grievant did not provide any evidence to the contrary and did not submit proposed findings of fact and conclusions of law challenging Respondent's rendition, the undersigned surmises from Grievant's exhibits and cross examination of Mr. Nicholson that Grievant does not contest this rendition. Thus, a hearsay assessment of Deputy Superintendent Nicholson's testimony is unnecessary.²

²"Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). 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

As for the first charge, the parties appear to agree that after conducting the initial count, Grievant refused an order to recount based on the policy mandating that a different employee do the recount. Respondent's *Offender Count Procedures Student Handout* states, in relevant part: "Should an initial count fail to clear, a different employee will conduct the recount of the affected area." The basis of this charge is insubordination. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). If an employer's policy forbids certain conduct, an order contrary to that policy, that is to say, an order which directs an employee to engage in the forbidden conduct, is an unreasonable or invalid order. *Id.*

Respondent's policy appears to have prohibited Grievant from performing a recount because Grievant did the initial count. Without the testimony of Grievant's supervisor who issued the order to explain the circumstances of the order, Respondent cannot prove that the order was valid. In this limited circumstance, Respondent failed to prove it was justified in disciplining Grievant for this charge. However, as a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. See *Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

statements. *Id.*; *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-H-115 (June 8, 1990).

However, Respondent was certainly justified in suspending Grievant for the remaining charges. Grievant does not contest that she failed to control inmates, that this resulted in a security breach, that she failed to report the security breach, or that she failed to timely report an inmate fight. Further, Grievant's report on the inmate fight is dated two-days after the fight and was thus filed untimely. Security footage verifies that Grievant failed to control inmates and shows the ensuing security breach. As record keeper for the facility, Deputy Superintendent Nicholson testified that Grievant never reported the security breach. Thus, Respondent proved the remaining allegations.

Grievant posits affirmative defenses to some of these incidents. Grievant contends inadequate staffing caused the security breach and that she was improperly trained on reporting security breaches. "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). The evidence does not show that there was inadequate staffing or that Grievant was improperly trained in reporting a security breach. Grievant failed to prove an affirmative defense to excuse her failure to control inmates resulting in a security breach, to report the ensuing security breach, and to timely submit an incident report following an inmate fight. In conjunction with progressive discipline, these incidents alone are sufficient to justify Grievant's three-day suspension. 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. While Respondent failed to prove that Grievant was insubordinate, Respondent did prove by a preponderance of the evidence that Grievant failed to control inmates, report the ensuing security breach, or timely submit an incident report following an inmate fight.

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 to her actions.

5. Respondent proved by a preponderance of the evidence that Grievant’s violations of policy under progressive discipline warranted her three-day suspension.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

³On 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.

§ 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: December 14, 2023

Joshua S. Fraenkel
Administrative Law Judge