WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY MICHAEL OLIVER,
Grievant,

v. **Docket No. 2017-2055-MAPS**

DIVISION OF JUVENILE SERVICES,
SAM PERDUE JUVENILE CENTER,
Respondent.

D E C I S I O N

Timothy Michael Oliver, Grievant, filed this grievance against his employer the West Virginia Division of Juvenile Services ("DJS"), Respondent, protesting a five-day suspension from his duties as a Correctional Officer. The original grievance was filed on April 10, 2017, the grievance statement, in part, states:

> . . .The pre-determination hearing was based on three acts. 1) Use of force resulting in an injury. 2) Incident occurrence. 3) Code of conduct. I am grieving this disciplinary action because of two recent investigations that I do not think deserved a pre-determination hearing resulting in a 5-day suspension.

Grievant requests reimbursement from the five days of work lost. As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.[1] A level three hearing was held before the undersigned Administrative Law Judge on July 10, 2017, at the Grievance Board's Charleston office. Grievant appeared *pro se.*[2] Respondent was represented by Celeste Webb-Barber, Assistant Attorney

[1] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

[2] "*Pro se*" is translated from Latin as "for oneself" and in this context, means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258.

General. This matter became mature for decision on August 10, 2017, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law document. Respondent timely filed a fact/law proposal.

Synopsis

Grievant grieves a five-day suspension he received after being found guilty of improper employee conduct and unnecessary use of force in two interactions with juvenile residents. Grievant's actions were a violation of agency policy and operational procedure. It was further established that Grievant had a history of prior discipline and unsatisfactory conduct. Respondent highlights the concept of progressive discipline and notes prior attempts to correct Grievant's workplace performance. Grievant did not establish that mitigation is warranted. Accordingly, the grievance is DENIED.

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

Findings of Fact

1. Grievant, Timothy Oliver, is employed by Respondent, the West Virginia Division of Juvenile Services (hereinafter "DJS"), as a Correctional Officer II at the Sam Perdue Juvenile Center. Grievant started his employment with DJS on December 1, 2014.

2. Individuals, primarily juveniles, housed in Sam Perdue Juvenile Center are referenced to as residents.

3. On September 24, 2015, Grievant received a written warning and was placed on a Corrective Action Plan for various agency policy violations. *See* R Ex 8.

4. On January 7, 2016, Grievant received a three (3) day suspension for sleeping on duty, failing to perform watch tours and not securing doors. *See* R Ex 10.

5. On October 18, 2016, Grievant received a one (1) day suspension for violating agency policy. *See* R Ex 12.

6. On January 18, 2017, Grievant was involved in an incident, where a resident was allegedly being insubordinate. Grievant provided that the Resident would not go into his room as instructed. Grievant "physically pushed him in." Resident, subsequently, alleged injury. Grievant did not write an incident report on the matter as required by established policy. See R Exs 1a, 3a, 6 and Level 3 testimony.

7. On February 24, 2017, Grievant was involved in a situation with a resident which became a "heated argument." Corporal Justin Hale, Shift Supervisor at the time of the incident, attempted to de-escalate the situation, but Grievant continued to engage in a verbal bantering with the resident even after being asked by the Corporal to leave the area. The actions of Grievant were "unprofessional and very uncalled for." See R Exs 1b, 3b, 6 and Level 3 testimony.

8. On January 18, 2017, Grievant was involved in a use of force incident, which was investigated. *See* R Ex 3a. On February 24, 2017, Grievant was involved in a verbal altercation with a resident which was also investigated. *See* R Ex 3b Stemming from the facts of the two (2) separately identified incidents, Grievant received a five (5) day suspension.

9. Disciplinary action was sought in accordance with relevant West Virginia Division of Juvenile Services Policies (e.g., #125, #313, #138.00, #306 and #129, s*ee* R Ex 2(a) and R Ex 2(b)) and in accordance with the West Virginia Department of Personnel Administrative Rule 12.3.

10. Investigation into both incidents collected witness testimonies and Grievant's statement regarding the facts of the events. The investigation reports are a part of the record. See R Ex 3a and 3b.

11. There is video evidence of each incident. R Ex 1(a) and 1(b) Respondent determined Grievant violated agency policy during each incident. *See* R Ex 6.

12. Grievant does not dispute the January and February 2017 events transpired, nor material facts of the events. Grievant disputes the severity of the disciplinary action.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the

> existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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, a party has not met its burden of proof. *Id.*

Grievant grieved a five-day suspension he received for violation of applicable agency policies. Relevant agency policy was introduced into the record, *See* R Ex 2(a) and 2(b). Respondent argues it was justified in suspending Grievant for five days given his history of prior disciplinary actions and past unsatisfactory performance. Respondent specifically cites the concept of progressive discipline in the context of Grievant's discipline.

The instant conduct being discussed encompassed at least two (2) separate incidents, a January 18, 2017, event where Grievant was involved in a use of force incident, and a February 24, 2017, matter in which Grievant was involved in a verbal altercation with a resident. Gary Patton, Director of the Sam Perdue Juvenile Center, after learning of the events, (verbal and video review of both incidents) referred the matters to DJS Investigations for review. Kathleen Faber, Investigator for DJS, testified regarding her investigation of the use of force incident. (Also see Investigative Report R Ex 3(a)). Investigator Faber testified that she took multiple witness statements, which consistently indicated that Grievant used force on a resident. The overall opinion was

that the force was not necessary. Further, Grievant failed to properly document his use of force as required by policy. *See* R Ex 2(a) and 2(b). Investigator Faber also testified regarding her investigation of Grievant's alleged verbal altercation with a resident. R Ex 3(b) Multiple witness statements were taken. Grievant engaged in an inappropriate verbal altercation with a resident. This too is a violation of agency policy. *See* R Ex 2.

Grievant violated agency policy. There is little to no factual dispute between the parties regarding the identified events, Grievant does not contest material facts of the relevant incident(s). There is also video evidence fortifying the events in discussion. *See* R Ex 1a and 1b. Grievant violated known and applicable agency policy with regard to his participation and/or interaction with residents on more than one occasion within a reasonably short span of time. Grievant argues the disciplinary action(s) taken against him is disproportionate to the offense.[3]

Proper disciplinary action is determined by several factors. Progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. In theory, progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between (i.e. verbal warning, written warning, suspension, demotion, dismissal).

[3] 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. State 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); *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

However, it is important to be mindful of the fact that the level of discipline will be determined by the severity of the violation (frequency may also be relevant). Progressive discipline does not mandate that all the levels of discipline be used. In application, progressive discipline, has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a predetermined disciplinary approach in every instance. Proper disciplinary action is determined by the facts, circumstances, and applicable regulations.

Grievant argues that even if discipline was appropriate, he should not have received such a severe penalty for conduct demonstrated. DOC Policy Directive Number 129.00, sets out the steps for penalties in progressive discipline for Correctional Officers. Discipline starts at the least severe penalty with a verbal warning, progresses to suspension, then demotion, and ends with the most severe penalty, dismissal. This progression is for all practical purposes being implemented. Grievant has been employed with the Division of Corrections for less than three years. During the course of his employment, it is well documented that he has a history of behavioral and security-related issues. Grievant has, in the past, been placed on a corrective action plan, received verbal and written warnings, as well as suspendered for one and three days without pay. *See* April 6, 2017 Suspension letter, also see finding of fact 3-5. The disciplinary action levied against Grievant is not in violation of discretionary progressive discipline principals.

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 is not found to be appropriate in the circumstance of this case. 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. 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgment for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra.*

Progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. Grievant did not demonstrate sufficient evidence to mandate mitigation is warranted.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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. Respondent established Grievant's conduct and said conduct is deemed to be in violation of applicable agency policy and operational procedure.

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).

4. 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. State 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); *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

5. "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).

6. 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). 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." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Mitigation of a penalty is considered on a case-by-case basis. Mitigation is not found to be appropriate in the circumstance of this case.

8. Grievant failed to prove that the penalty levied was clearly excessive or reflects an abuse of discretion. In light of Grievant's previous disciplinary and work history, the disciplinary action taken is not disproportionate or excessive, nor is the penalty arbitrary and capricious.

9. The disciplinary action levied against Grievant is not proven to be in violation of discretionary progressive discipline procedures.

Accordingly, this grievance is **DENIED**.

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: September 1, 2017

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Landon R. Brown
Administrative Law Judge