WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARIAH GODDARD,
Grievant,

v. **Docket No. 2018-0827-MAPS**

REGIONAL JAIL AND CORRECTIONALFACILITY AUTHORITY /NORTHERN REGIONAL JAIL,
Respondent.

D E C I S I O N

Mariah Goddard, Grievant, filed this grievance against her employer the Regional Jail and Correctional Facility Authority, Northern Regional Jail, Respondent, protesting a sanction received (the length of her suspension). The grievance was filed on January 2, 2018, and the grievance statement provides:

> The disciplinary action received to the rule offenses. I was suspended pending the outcome of an investigation. My suspension letter informed me that I would be suspended but once the investigation was complete and the allegations proven unfounded, I would be compensated for my period of suspension and my personnel file would be purged. The investigation into the allegations that resulted in my suspension were proven unfounded. I have never had any disciplinary action before and ended up receiving over 24 days without pay.

The relief requested:

> To be compensated for my time off of work due to the suspension and to have my personnel file purged of this matter.

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 Deputy Chief

[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.

Administrative Law Judge Brenda L. Gould on March 28, 2018, at the Grievance Board's Westover office. Grievant appeared *pro se.*[2] Respondent was represented by Donnie Ames and counsel Melissa L. Starcher, Assistant Attorney General. For administrative reasons, post the level three hearing, this matter was reassigned to Administrative Law Judge Landon R. Brown. The parties were provided the opportunity but were not required to present written argument post level three hearing identified generally as the parties' proposed findings of fact and conclusions of law. Grievant did not avail herself of the opportunity to submit fact/law proposal. The proposed document on behalf of Respondent was received by this Board on or about April 23, 2018.[3] This matter is ripe for decision.

Synopsis

Grievant was disciplined for acknowledged comments. Respondent contends Grievant's conduct violated applicable West Virginia Regional Jail Authority Code of Conduct Policy. Subsequent to an investigation, Grievant was sanctioned for conduct, which was perceived as unprofessional and detrimental to the stability and safety of the facility, residents and employees. Grievant protest the severity of her suspension. The facts, or lack thereof, are not readily established, yet Grievant acknowledges a significant

[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.

[3] At the level three hearing, the identified mailing date for the submission of proposed findings of fact and conclusions of law was April 16, 2018. The file is silent as to whether an extension was granted providing the parties additional time to submit written fact/law proposals. Extensions are granted routinely upon timely request.

amount of identified behavior. Grievant acknowledges the conduct but contends that the penalty ultimately imposed was excessive and too severe a penalty. Respondent's undertaking with regard to the severity of the disciplinary measure tends to indicate arbitrary action; nevertheless, Grievant failed to establish an abuse of discretion or that mitigation is warranted. This 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. At all relevant times pertinent to this grievance, Grievant has been employed by Respondent as a Correctional Officer at the Northern Regional Jail. Grievant has been employed by Respondent for approximately four years.

2. As part of Grievant's duties as a Correctional Officer, Grievant is to provide security of the building, maintain control of the residents, provide for the resident's welfare and encourage their rehabilitation within structured programs.

3. Grievant's conduct as a Correctional Officer among other applicable rules and regulation is recognized as being governed by West Virginia Regional Jail Authority Code of Conduct Policy-Procedure.

4. Grievant provides, and it is not contested, that she has not had any other disciplinary actions levied against her record of service.

5. Respondent contends Grievant used language that encouraged acts of violence between and among inmates.

6. Respondent alleges that Grievant's spoken words violated appropriate Correctional Officer's conduct.

7. Donnie Ames is the Director of Field Operations for Respondent (formerly Deputy Chief of Operations). His duties as Director include, but are not limited, to day-to-day operation of all ten facilities maintained by Regional Jail and Correctional Facility Authority, overseeing the management, operational, administrative and fiscal functions.

8. Correctional Officers receive training identified as inner-personal skills, how to talk to and handle inmates.

9. Pursuant to an October 16, 2107 correspondence, Grievant was verbally suspended on October 13, 2017, pending the results of an investigation into allegations of misconduct. Further, the document specifically stated, "If the allegations are determined to be unfounded, you will be compensated for the period of suspension and your personnel file will be purged of any documentation thereof." *Also see* DOP Admin Rule 12.3.

10. Respondent did not identify a specific witness that testified that he or she heard Grievant's statements. Respondent provided little context of the alleged statements. It is contended that Grievant violated applicable code of conduct by making comments about an inmate getting "his ass beat," "I hope they beat his ass" and that "a throat punch works wonders," in the presence of inmates. Respondent's PFOF/COL.

11. Grievant acknowledges a significant portion of Respondent's allegations. L-3 hearing.

12. Respondent's internal procedure to investigate and determine a Correctional Officers level of culpability was not clarified with much specificity at the level three hearing. A copy of the investigation report was not placed into the record of the level three hearing.

13. Grievant was notified by a hand delivered December 12, 2017 document which advised Grievant of the "decision to suspend [her] without pay for one hundred eighteen hours and twenty-two minutes (118.37) from [her] position as a Correctional Officer."

14. One hundred and eighteen hours and twenty-two minutes roughly translates to (14½) fourteen and half days of eight-hour workdays.

15. Grievant was separated from her workplace from October 13, 2017, through December 5, 2017. A total of (54) fifty-four calendar days passed from the commencement of this matter until Grievant's return to work. Not all of the 54 days were unpaid days.

16. Pursuant to an Amended Order/Decision dated December 20, 2017, Grievant was informed:

> . . . In October 2017, you had inappropriate conversations with inmates. You suggested to one inmate that he should kick another inmate's ass. You also advised an inmate that if he wanted to shut other inmates up he could throat punch them. Although the investigation concluded that allegations that you deliberately directed an inmate to assault another inmate was unfounded, your behavior associated with the inmates violate the following West Virginia Regional Jail Authority Code of Conduct Policy – Procedures:
>
> *16. All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.*

> *19. All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service. Employees are required to perform duties with discretion, enthusiasm, and loyalty.*
> *26. Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates are not allowed. It is recognized that inmates and staff are encouraged to interact on a personal level; however, this association shall be limited to those times when the individual employee is performing duties directly related to matter pertaining to Authority interests.*
> *33. At all times, employees shall maintain a professional demeanor and are to be respectful, polite, and courteous and refrain from using abusive and obscene language in their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility.*
> Conduct of this nature is not only unprofessional and in violation of multiple sections of the Code of Conduct. It also erodes your authority as a Correctional Officer and could foreseeably lead to harm of the inmates whose care, custody and control is your primary responsibility while in the employ of the Authority.

R Ex 1

17. Respondent did not present a witness at level three that testified that he or she specifically heard Grievant's statements. Yet, Grievant acknowledges the conduct and does not dispute the alleged action.

18. Pursuant to the Amended Decision dated December 20, 2017, Grievant was advised of the decision to suspend her for one hundred ninety hours and twenty-two minutes (190.37) from her position as a Correctional Officer.

19. Grievant was not without pay for that total amount of time she was separated from employment. Grievant received compensation via the use of annual leave for a significant portion of the lost days of work.

20. One hundred and ninety hours and twenty-two minutes roughly translates to twenty-three and ¾ days of eight-hour workdays. Grievant was permitted to use annual leave to receive pay for a portion of time she was separated from the workforce.

21. Grievant received pay for (119.18) one hundred and nineteen hours (approx. 15.51 days) during the time period she was separated from her workplace (period of investigation and suspension).

22. Grievant was without pay for 71.24 hours which translates to approximately 9 days of suspension without pay.

23. Grievant was not without pay for that total amount of time she was separated from employment. Grievant received compensation via the use of annual leave for a sizable portion of the loss days of work.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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.*

Respondent contends Grievant demonstrated conduct which violates applicable West Virginia Regional Jail Authority Code of Conduct Policy. *See* FOF 16. Grievant acknowledges the conduct and does not dispute the charges. Rather, Grievant argues that the punishment imposed is too severe for the infraction. "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. 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).

Donnie Ames, Director of Field Operations, testified on behalf of Respondent. Director Ames was not present at the event in discussion. He testified regarding his role in review of the information provided to him. Director Ames', (formerly Deputy Chief of Operations), independent recollection of information was not impressive. It is clear that Director Ames regularly makes decisions regarding the lives of others; nevertheless, it is not demonstrated that he has retained much information regarding the specifics of the instant events. April M. Darnell, Human Resource Director, testified by phone. Respondent asserts there is no standard suspension penalty.

Respondent's witnesses do not provide a large degree of specificity. The witnesses are true administrators, it was evident they stand by the process used to

determine the sanction levied. There was a Mitigation Team which reviewed Grievant's work record, the known facts of this event and what is thought to be relevant factors. An abundance of generalities was presented in the administrators' testimony. The Agency's investigative report was not placed into the record. This piece of evidence would have been informative and enlightening. Grievant admits measured culpability.

Ultimately, responsible agents of Respondent made the determination that Grievant's penalty would be "timed served". The rationale for this conclusion was not well explained. Nevertheless, Grievant did not persuasively challenge Respondent's determination. Grievant did little, if anything, to rebut Respondent's discretion. Further, it is noted that the disciplinary suspension was not for the full time Grievant was separated from her workplace (period of investigation and suspension). As authorized by applicable Department of Personnel Administrative Rules, Grievant used and was recredited the amount of annual time used during her period of separation. *See* DOP Admin Rule 12.3.b, 12.3.b.1 and 12.3.b.2 Ultimately, Grievant was without pay for 71.24 hours which translates to approximately 9 days of suspension without pay.

"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). Grievant did not meet this burden.

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. 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 judgement 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.*

Mitigation of a penalty is considered on a case by case basis. In this case, Grievant did not establish abuse of discretion or persuasively present any argument that Respondent's disciplinary action was unreasonable.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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.

2. 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. 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)

3. 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). This 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 her judgement 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 v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

4. Grievant did not demonstrate that the penalty imposed by Respondent was clearly excessive or an abuse of discretion.

5. Grievant did not demonstrate that the penalty imposed for her admittedly improper actions was clearly excessive or so clearly disproportionate to the offense that it indicated an abuse of discretion, or that there were mitigating circumstances which should have been considered.

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: May 18, 2018

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Landon R. Brown
Administrative Law Judge