

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**PETER WILLIAM KOSTICK, JR.,
Grievant,**

v.

DOCKET NO. 2017-1684-MAPS

**REGIONAL JAIL AND CORRECTIONAL FACILITY
AUTHORITY/POTOMAC HIGHLAND REGIONAL JAIL,
Respondent.**

DECISION

This grievance was filed by Grievant, Peter William Kostick, Jr., on February 13, 2017, after he was demoted. His statement of grievance reads, "I am appealing to have my demotion overturned because I believe that the disciplinary sanction I received with regards to the rule violation I committed and in combination with my service record was excessive and unfair." The relief sought by Grievant is "I seek to have my previous rank of Correctional Officer III (Corporal) and my previous salary restored to me."

A conference was held at level one, and the grievance was denied at that level on March 14, 2017. Grievant appealed to level two on March 28, 2017, and a mediation session was held on May 30, 2017. Grievant appealed to level three on June 8, 2017. A level three hearing was held before the undersigned Administrative Law Judge on October 6, 2013, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented at the hearing by William R. Valentino, Assistant Attorney General. This matter became mature for decision on December 8, 2017, on receipt of Respondent's Proposed Findings of Fact and Conclusions of Law, submitted by Celeste

E. Webb-Barber, Assistant Attorney General. Grievant declined to submit written proposals.

Synopsis

Grievant was demoted from a Correctional Officer III supervisory position to a Correctional Officer II position, with a reduction in pay, for escalating a situation by telling inmates they were all his bitches, resulting in the inmates attacking Grievant and three other officers. Grievant admitted to the conduct, and acknowledged it was inexcusable. Even though Grievant had asked to be demoted because of this incident, he regretted that he had made this request, and argued the discipline imposed was too severe. Grievant did not demonstrate that the discipline imposed 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.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by the Regional Jail and Correctional Facility Authority ("RJA") for 16 years. Prior to his demotion, he was a Correctional Officer III, Corporal, for over 10 years at the Potomac Highlands Regional Jail. As a Corporal, Grievant was a supervisor, and was to serve as a role model to subordinates.

2. The Potomac Highlands Regional Jail has two pods for inmates. Pod A houses various levels of inmates, including the more dangerous inmates housed by the RJA. During the day, the inmates are allowed out of their cells to access what is referred

to as the Day Room, where they may engage in various activities. When officers enter the pods they are armed only with their communication skills, and have been trained in how to de-escalate situations with inmates.

3. On October 1, 2016, it was reported to Grievant that inmates in Pod A were making “hooch” in a cell. Grievant and Correctional Officer Jeremy Hirsch were directed to investigate the report. They searched one cell and found nothing, and then tried to search a second cell. Two inmates stood in front of the second cell, initially preventing entry. When Grievant and Officer Hirsch were able to enter the cell, they smelled an odor which indicated to Grievant that “hooch” was or had been in the cell, but found nothing. As they tried to exit the cell an inmate blocked Grievant’s exit and told him he was going to have to go around him. Grievant told the inmate, “I don’t back down from anybody.” The tower officer called for more officers to respond, and two additional officers entered Pod A. Another inmate stepped in and said, “[i]t’s okay. I got my inmate.” Grievant’s Incident Report states, “[t]hat statement infuriated me. I started yelling ‘Your inmate. Your inmate. Let me tell you something. You are all my inmates. As a matter of fact you are all my bitches.’ It was at this point that the majority of inmates in the section began swarming toward me and started attacking me and [the other three officers], and we literally had to fight our way out of the section to the hallway securing the door behind us.” At this point, Grievant was ordered by Lieutenant Donna Davidson to leave the area, and Lieutenant Davidson was able to talk to the inmates and resolve the situation.

4. When Grievant met with Edgar Lawson, Administrator of the Potomac Highlands Regional Jail, he told Administrator Lawson that he felt he could no longer do the job of a supervisor, and he wanted to be demoted. Administrator Lawson had already

been considering recommending that Grievant be demoted as he had concerns about Grievant continuing to be a supervisor.

5. Grievant regrets asking to be demoted, and attributes this request to “having a bad day.” Grievant did not deny that what he did was wrong, and inexcusable, that his error in judgement caused the incident, that he put his officers in harm’s way, that there is a small margin of error in these situations, and that it was a bad incident and a potentially dangerous situation.

6. Effective February 18, 2017,¹ Grievant was demoted to a Correctional Officer II, with a reduction in pay, for violation of the RJA Policy and Procedure 3010 - Code of Conduct, effective August 26, 2015. The letter advising Grievant of this action specifically refers to Grievant telling inmates, “you are all my bitches,” causing the inmates to approach the officers in an attacking manner. The letter states that Grievant’s “inappropriate conduct make it difficult, if not impossible, to enforce compliance with policy by your staff. Your behavior is not an acceptable behavior for employees to emulate.”

7. Grievant was charged with violating sections 16, 19, and 33 of the Code of Conduct, which state as follows:

#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. . . .

¹ The record does not reflect the reason for the delay from October 1, 2016, to February 18, 2017, nor did either party note this delay in their arguments.

#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.

8. Grievant had been provided with a copy of the Code of Conduct prior to this incident, and was aware that he was to try to de-escalate situations by using his communication skills to talk reasonable to inmates.

9. Prior to this incident, Grievant had an excellent work history, with no previous suspensions, although he had received one or more reprimands. He had at some time in the past been able to de-escalate a situation when an inmate had severely beaten an officer in a pod by using his communication skills.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 and 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.*

However, Grievant 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).

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 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, supra*.

Grievant pointed to his good record as an employee, and as a supervisor for ten years, and noted a particular instance when his good communication skills had de-

escalated a situation. While this is certainly notable, the fact is that in this case, Grievant deliberately acted in a manner he knew was wrong, and he created a dangerous situation for himself and three other employees, calling his judgement as a supervisor into question. He certainly did not act as a role model, and was not thinking of his subordinates. The fact is, he did not think or rely on his experience and training, but simply reacted, creating the hostile situation he had been trained to avoid. Further, "[a]s a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988). Grievant did not demonstrate that the discipline imposed should be mitigated.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "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).

2. 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).

3. Grievant did not demonstrate that the penalty imposed for his 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: January 23, 2018