THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LARRY IZER ALLEN, JR.,

Grievant,

v. **Docket No. 2019-0290-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF PRISONS AND JAILS/ EASTERN REGIONAL JAIL AND CORRECTIONAL FACILITY

Respondent.

DECISION

Grievant, Larry Allen, Jr., was employed by Respondent at Eastern Regional Jail and Correctional Facility. Respondent terminated Grievant on August 17, 2018, during his probationary period. Subsequently, on August 20, 2018, Grievant filed the following grievance against Respondent:

> On June 30 2018 inmate was attempting escape officers [*sic*] assistance was called as I arrived inmate was not responding refusing to put hand cuffs on [*sic*] I co1 attempted to assist inmate was not responding at all [*sic*] I then balled up my fist and brought it towards the inmate body [*sic*] did not mean to hit inmate [*sic*] was just trying to cuff inmate up. Before starting at the jail they teach us to do what ever it takes to get inmate cuffed no matter what when attempting to escape. They even show us a video on it officer all over inmate doing everything it takes to get him cuffed [sic] I seen a officer punching inmate several times to get him to calm down. This job is my life [*sic*] I only did what they show us on the videos before starting. I relies [sic] that is wrong and I will never act or listen to any of my supervisors and or other officers [sic] I'm not aggresive [*sic*] man at all [*sic*] I have none assault and battery charges at all. I am a church guy. Believe in second chances. I was just picked to send my video up to central office because of a corpal Shanburg which does not like me at all. He has been trying to get rid of me since I started. I have seen many officers do way worse than me and supervisors they give them a pat on the back. They put in our heads every day if inmate escape we are all fired. I have made mistake in my life and at work but I always learn by them. I just want to be the officer I was when I first started there and not listen to other officers or supervisors that tell me to be assertive. I had a hearing on 08/02/18 which my administrator told me to speak from my

> heart which I did as I was in my hearing they offered to give me a second chance. The two people that had to make the decision was not in my hearing at all. I believe that was not for on my behalf. I never call off and work all holidays always can't wait to go to work. All I'm asking for is a chance to be who I was when I first started [*sic*] this job is my life

For relief, Grievant states, "I Larry Allen just want reinstated I'm willing to go on probation for 2 years. As I worked there I have seen officers do more then I should of seen. As I first started I was a push over as my supervisors told me to be assertive don't be afraid. They shared videos of officers putting inmates down to the ground."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on August 20, 2018, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*.[2] Respondent was represented by Briana J. Marino, Assistant Attorney General. This matter became mature for decision on December 10, 2018, upon receipt of each party's written proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed by Respondent on a probationary basis as a Correctional Officer. Respondent terminated Grievant after finding that he "willingly used an excessive amount of force against an inmate by punching the inmate with a closed fist numerous times" and then "provided untruthful statements during the investigation" in telling the investigator that he did not strike/punch the inmate. Respondent proved that Grievant engaged in misconduct and that its dismissal of Grievant was not arbitrary and capricious. Grievant alleged that other officers had engaged in similar conduct without

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2]For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

being disciplined and that the punishment he received was too harsh. Grievant did not prove that his termination was discriminatory or unreasonable and in need of mitigation. 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. On October 30, 2017, Respondent hired Grievant as a Correctional Officer I and advised him that he would be on probation for twelve months. (Respondent's Exhibit 14)

2. Grievant was a probationary employee when Respondent terminated him on August 17, 2018. (Respondent's Exhibit 14)

3. On June 30, 2018, at approximately 1800 hours, Inmate D.P. said to Officer Ryan Poole that he "needed to get out of here" and "they are trying to kill me", then pushed Officer Poole aside and began running down the hallway towards Central Control at the Eastern Regional Jail and Correctional Facility. (Respondent's Exhibit 9)

4. Officer Poole made a radio call for officer assistance. Officers from around the facility rushed to assist Officer Poole. Officer Poole took Inmate D.P. down to the ground. Another officer pepper sprayed Inmate D.P. Officer Poole kneed Inmate D.P. on his legs and struck him with his fist in his mid-section in an attempt to gain control. As more officers arrived, they obtained control of Inmate D.P. (Respondent's Exhibit 9)

5. Grievant was one of the last officers to respond to Officer Poole's call for officer assistance. (Respondent's Exhibit 9)

6. When Grievant arrived, Inmate D.P. was on the ground, primarily on his stomach, with his head, right arm, torso, and legs under the control of five officers. He was not in danger of escaping the facility. Inmate D.P.'s left arm was pinned under his body and not under the control of any officer. (Respondent's Exhibit 9, Corporal Shamburg's testimony, and Officer Bean's testimony)

7. Upon kneeling next to Inmate D.P. on the hallway floor, Grievant struck Inmate D.P. approximately five to eight times with a closed fist to his left back/shoulder area of his body. (Respondent's Exhibit 9, Corporal Shamburg's testimony, and Officer Bean's testimony)

8. With each strike, Grievant verbally commanded Inmate D.P. to provide his arm. However, Grievant's strikes were ineffective in gaining control of Inmate D.P.'s arm. (Corporal Shamburg's testimony)

9. Officer Ryan Poole struck Inmate D.P. with his fist once while Grievant was striking the inmate. Officer Poole's strikes both before and after Grievant's arrival were deemed an acceptable use of force. (Respondent's Exhibit 9 and Investigator Roper's testimony)

10. Officer Quinton Dixon struck Inmate D.P. multiple times with his knee. (Officer Dixon's testimony)

11. After Grievant delivered his closed-fisted strikes to Inmate D.P., other officers brought the inmate's left arm under control, handcuffed the inmate, and brought

him to an interview room for medical assessment without Grievant's involvement. (Corporal Shamburg and Captain Quimet's testimony)

12. Officers are trained to gain control of an inmate by applying controlled strikes to nerves and pressure points. (Corporal Shamburg and Captain Quimet's testimony)

13. Grievant did not use any pressure points or joint locks on Inmate D.P. (Respondent's Exhibit 9)

14. All officers involved in apprehending and subduing Inmate D.P. authored incident reports that were submitted to their supervising authority. Per standard operating procedure, all "use of force" occurrences are reviewed by the Chief of Security at the facility, Captain Quimet. (Captain Quimet's testimony)

15. Upon receipt of all documentation and a review of surveillance video, Captain Quimet concluded that Grievant's use of force against Inmate D.P. was excessive in nature and violated the Use of Force Policy and Code of Conduct. Captain Quimet discussed with Superintendent John Sheeley his concern that Grievant's use of force against Inmate D.P. was excessive in violation of West Virginia Regional Jail and Correctional Authority Policy and Procedure Statement #9031 (Use of Force Policy). (Testimony of Captain Quimet and Superintendent Sheeley)

16. Superintendent Sheeley shared Captain Quimet's concerns and requested a referral of the incident to a neutral third-party investigator for review. On July 6, 2018, Investigator Lucas Roper was assigned to conduct an investigation into Grievant's use of force against Inmate D.P. (Sheeley's testimony)

17. On July 6, 2018, Grievant was verbally notified that he was being placed on suspension pending the outcome of the investigation into his use of force against Inmate D.P. during the June 30, 2018, incident. By letter dated July 9, 2018, Director of Human Resources, April Darnell, memorialized Grievant's suspension pending the outcome of the impartial investigation "into allegations of excessive use of force". (Respondent's Exhibit 8)

18. On July 12, 2018, Investigator Roper interviewed multiple officers including Grievant regarding the June 30, 2018, incident with Inmate D.P. Grievant told Investigator Roper that his recollection of the incident with Inmate D.P. was somewhat confused and vague due to the date of the incident being particularly eventful. However, Grievant clearly and unambiguously told Investigator Roper that he was the only officer attempting to gain control of Inmate D.P.'s left arm; that he did not strike Inmate D.P.; and that he used his fist and punch like motion to get Inmate D.P.'s arm out from under him. (Respondent's Exhibit 9 and Investigator Roper's testimony)

19. Investigator Roper viewed surveillance footage of the incident. While the video shows Grievant swing at Inmate D.P. five to eight times with a closed fist, it does not show if and how Grievant's swings make contact with Inmate, as responding officers obscure the view of Inmate D.P. (Respondent's Exhibit 9)

20. On July 18, 2018, Investigator Roper completed his Investigative Report substantiating the allegations of Grievant's misconduct in violation of West Virginia Regional Jail and Correctional Facility Authority Policy Directives. (Respondent's Exhibit 9 and Investigator Roper's testimony)

21. Investigator Roper concluded that Grievant had used excessive force because, even though Inmate D.P. had not provided his hand for cuffing, Inmate D.P. was already under control. (Respondent's Exhibit 9 and Investigator Roper's testimony)

22. Investigator Roper concluded that Grievant had willfully provided untruthful statements during an official investigation into staff misconduct because Grievant had told Roper he did not strike Inmate D.P. (Respondent's Exhibit 9 and Investigator Roper's testimony)

23. Investigator Roper discounted Grievant's inmate escape defense because Inmate D.P. was under control and had not passed the sally port. (Respondent's Exhibit 9 and Investigator Roper's testimony)

24. Upon receiving the Investigation Report from Investigator Roper on August 2, 2018, a pre-determination conference was held between Grievant, Acting Assistant Director of Human Resources April Darnell, Assistant Katrina Kessel, Captain Strider Quimet, and Sargent Richard Bennett. (Respondent's Exhibit 14)

25. By letter dated August 17, 2018, Superintendent John Sheeley terminated Grievant because he "willingly used an excessive amount of force against an inmate by punching the inmate with a closed fist numerous times" and "provided untruthful statements during the investigation" in violation of Respondent's Use of Force Policy and Code of Conduct. The letter cites as grounds for Grievant's termination the non-highlighted sections of each policy detailed below and does not include any of the policy sections mandating cooperation and truthfulness during an investigation. (Respondent's Exhibit 14).

26. Employees are expected to abide by West Virginia Regional Jail and Correctional Authority Policy and Procedure Statement #9031 (Use of Force Policy). The relevant sections of the policy state:

> Policy: It is the policy of the West Virginia Regional Jail and Correctional Facility Authority to use the least amount of force reasonably necessary when resolving situations involving confrontation or aggression by inmates, safeguarding inmates from themselves or a third party and when the need to restore order exists. With exception of the application of restraints without resistance to a subject and / or for the sole purpose of escort outside a regional jail facility, all calculated responses involving the use of force and / or control devices will be videoed in accordance with applicable directives.
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> Procedure A:
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> 4. – Force which is used when unnecessary or which exceeds that which is necessary to accomplish a legitimate purpose, is illegal and constitutes either a tort (assault and battery), a violation of inmate civil rights under the Eighth Amendment or Fourteenth Amendment (Cruel and Unusual Punishment and/or Deprivation of Due Process), or even a crime (assault and battery).
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> **7. – Staff shall only employ that level of control required to overcome the level of resistance encountered.[3]**
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> **8. – Once resistance has ceased, the application of force will cease.**
>
> (Respondent's Exhibit 3)

27. Employees are expected to abide by West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #3010 (Code of Conduct). The relevant sections of the policy state:

[3]All highlighted sections herein were absent from Respondent's August 17, 2018, letter of termination and Respondent's Proposed Recommended Order Denying Grievance, but were in Investigator Roper's Investigative Report.

3. – The use of excessive force shall not be tolerated. The use of force, except in compliance with, Regional Jail Authority policy, shall result in disciplinary action.

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.

18. – All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as valid. All employees are required to provide relevant, truthful, and complete information when required by a supervisor or investigator.

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.

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.

(Respondent's Exhibit 2)

28. The relevant section of the West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #3036 states:

7. – Any staff member questioned by a designated investigator is required to provide relevant, truthful and complete information. Failure to do so will result in disciplinary action, up to and including dismissal.

(Respondent's Exhibit 9)

29. On October 29, 2017, Grievant signed an acknowledgment that he had received West Virginia Regional Jail and Correctional Facility Policy and Procedure Statement #3010 (Code of Conduct) and therefore knew he had a duty, in conjunction with paragraph 18, to provide "relevant, truthful, and complete information when required by a supervisor or investigator." (Respondent's Exhibit 10)

30. Although no signed acknowledgment was submitted showing that Grievant had received the Use of Force Policy, the evidence shows that Grievant received training on and was generally familiar with the Use of Force Policy (West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #9031).

31. No evidence was presented regarding whether Grievant had ever received or knew about West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #3036.

32. Respondent did not include in either its August 17, 2018, termination letter or in Respondent's Proposed Recommended Order Denying Grievance any reference to either Policy and Procedure Statement #3036 or any of the above highlighted sections of Policy and Procedure Statements #3010 & #9031.[4]

[4]Respondent's August 17, 2018, termination letter and Respondent's Proposed Recommended Order Denying Grievance were devoid of any reference to Respondent's policies mandating that an employee cooperate and be truthful during an investigation, even though Investigator Roper concluded in his Investigative Report that Grievant had violated the above highlighted sections of West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statements #3010, #9031, & #3036 mandating that an employee cooperate and be truthful during an investigation.

33. Grievant also acknowledged receiving classroom and specialized training on the Code of Conduct by signing a statement to that effect on November 3, 2017. (Respondent's Exhibit 11)

34. Grievant acknowledged specific classroom instruction regarding use of force, defensive tactics, and associated procedures. (Respondent's Exhibits 12 and 13)

35. Respondent had previously notified Grievant of and reprimanded him for various infractions, none of which were grieved by Grievant.

36. The first infraction was on November 27, 2017, when Grievant put both his and a fellow staff member's safety in jeopardy by opening cells in lock-down without the inmates being first put in restraints. Grievant was notified of this infraction through an Employee Performance Appraisal Form EPA-2. (Respondent's Exhibit 5)

37. The second infraction was on March 23, 2018, when Grievant failed to report an incident where a fellow officer had violated protocol in Grievant's presence. Grievant was notified of this infraction by a letter dated April 30, 2018, which cited West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #3010, Paragraph 18, detailing an employee's obligation to "provide relevant, truthful, and complete information when required by a supervisor or investigator." (Respondent's Exhibit 6)

38. The third infraction was on June 9, 2018, when Grievant failed to disengaged himself from or deescalate a verbal confrontation with an inmate, but instead initiated a takedown of the inmate without officer backup while other inmates were out of their cells and available for a potentially dangerous assault on Grievant.

Grievant was notified of this infraction by a letter dated June 20, 2018. (Respondent's Exhibit 7)

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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 burden has not been met. *Id.*

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is on the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). However, if a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008);

Livingston v. Dep't of Health and Human Res., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

It is undisputed that Grievant was a probationary employee. Whether his alleged transgressions are misconduct or unsatisfactory performance requires further analysis. Misconduct is a transgression that is willful and deliberate, or so careless as to manifest wrongful intent.[5] Unsatisfactory performance lacks the component of willfulness and is akin to poor performance caused by ineptitude or insufficient training. Misconduct also necessitates a level of severity in the transgression. While Respondent did not state in its letter of termination, or in the hearing before the undersigned, whether Grievant's behavior was misconduct or unsatisfactory performance, Investigator Roper concluded that it was misconduct and Respondent stated as much in Respondent's Proposed Recommended Order Denying Grievance.

Respondent alleges that Grievant violated the Use of Force Policy and the Code of Conduct in willfully striking Inmate D.P. numerous times with a closed fist on June 30, 2018, and providing untruthful statements in the subsequent investigation. This alleged behavior amounts to misconduct. Respondent has the burden of proving that Grievant engaged in misconduct.

Grievant contends that he did not punch Inmate D.P., but swung at him with a closed fist, only to open it and go under his body with an open hand at the conclusion of each swing. Grievant contends that he was therefore truthful in telling Investigator Roper that he did not strike Inmate D.P. Grievant claims that his strikes were not excessive but were meant to gain control of Inmate D.P.'s arm. Grievant cites Corporal

[5] See BLACK'S LAW DICTIONARY 999 (6th ed. 1990).

Shamburg who testified that he believed Grievant's strikes were intended to gain control of Inmate D.P. Grievant further contends that Inmate D.P. was attempting to escape and that he was trained to use any means necessary to stop an inmate from escaping. Grievant contends that the surveillance video shows Officer Poole and Officer Dixon striking Inmate D.P. more aggressively, that (unlike him) they had been trained at the academy, and that Respondent did not question them about their strikes. He further contends that he has in the past seen officers use at least the same amount of force that he did without being disciplined. Grievant implies that this difference in treatment is discriminatory and underscores the need for mitigation of his punishment. Grievant has the burden of proving that Respondent's actions were discriminatory and that his punishment should be mitigated.

As there are disputed facts, the undersigned must make credibility determinations. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or

motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

While it is undisputed that Grievant told Investigator Roper that he did not strike Inmate D.P. but that he opened his hand and slid it under the inmate before the point of contact, the undersigned must determine whether Grievant struck Inmate D.P. with a closed fist and whether his conduct was in violation of the Code of Conduct and Use of Force policies. While there is video footage of the incident, the responding officers obscure the view of Inmate D.P. and Grievant's hand as it swings down to Inmate D.P. The responding officers who appeared before the undersigned were consistent in testifying that Grievant struck Inmate D.P., even though some testified that they were unsure if it was a close fist and thought Grievant acted appropriately in striking Inmate D.P. Officer Dixon was sympathetic to Grievant's plight and implied Grievant was being unfairly judged by those who were not on the scene. He testified he did not think Grievant had violated the Use of Force Policy because other officers, including himself,[6] were also striking Inmate D.P. Of the officers who testified with certainty, all stated that Grievant struck Inmate D.P. with a closed fist.

Conversely, Grievant's testimony was inconsistent. On the one hand, he testified that he opened his fist before the moment of contact whereupon he slid his open hand under Inmate D.P. On the other hand, he defended striking Inmate D.P. by stating that officers are taught to use any means necessary to prevent an inmate from escaping and he had seen other officers do as bad or worse on both this and prior occasions. He also

[6]Officer Dixon says in his written statement, included in the Investigative Report, that his were knee strikes.

attempted to justify his strikes by stating that he had not been properly trained on how to handle certain situations, had not been to the academy like other officers on the scene, had been taught to do everything necessary to prevent inmates from escaping, and had used the proper strikes along with accompanying commands in an attempt to gain control.

Of the officers on the scene who testified, Corporal Shamburg gave the most thoughtful and detailed testimony. While he stated that Grievant told Inmate D.P. with each strike to give him his arm, he also testified that Grievant's strikes were closed-fisted and were ineffective and not in line with the controlled use of force officers are trained to utilize to gain control of an inmate. Grievant's statement that he opened his hand with each swing of his fist and slid his palm under Inmate D.P. seems implausible. Corporal Shamburg and Officer Bean were present during the incident and gave a consistent and credible account thereof. Respondent proved that Grievant struck Inmate D.P. multiple times with a closed fist.

Respondent contends that Grievant's strikes violated the Use of Force Policy because they exceeded the amount of force reasonably necessary to bring Inmate D.P. under control. Grievant impugns Respondent's interpretation of the Code of Conduct and Use of Force policies in his contention that Respondent trained him to use any force necessary to prevent an escape and that Respondent enforces the policy in a discriminatory manner. Administrator Sheeley, Captain Quimet, and Investigator Roper each displayed a calm demeanor and did not manifest any bias towards Grievant. Sheeley and Quimet were Grievant's superiors at Eastern Regional Jail and Correctional Facility and had regular interaction with him. They gave him constructive

criticism on how to rectify what they perceived as deficiencies in his performance and saw much potential in him. Grievant neither proved or even attributed to them any motive for singling him out and neither did the undersigned detect any inkling of ill will on their part towards Grievant. Investigator Roper did not know Grievant and had no bias against him. Administrator Sheeley, Captain Quimet, and Investigator Roper were credible witnesses. Multiple officers, including Officer Campbell, testified that they were trained that all rules go out the door when an inmate attempts to escape. The officers who so testified were also credible and did in fact glean from their training an interpretation of the Use of Force Policy that unfortunately happened to be inaccurate. Sheeley and Quimet convincingly testified that there is no use of force exception for escape.

The Use of Force Policy states, in part, that "[s]taff shall only employ that level of control required to overcome the level of resistance encountered." The undersigned deems reasonable Respondent's assessment that Grievant exceeded the force required to overcome the level of resistance he encountered from Inmate D.P. The Code of Conduct states, in part, that "[a]ll employees are required to provide relevant, truthful, and complete information when required by a supervisor or investigator." The undersigned deems reasonable Respondent's assessment that Grievant provided untruthful statements to Investigator Roper. Respondent proved that Grievant struck Inmate D.P. multiple times with a closed fist, that he was untruthful and evasive with Investigator Roper when he stated that he did not strike Inmate D.P., and that he willfully and knowingly violated various policies, including the Use of Force Policy and the Code of Conduct.

Grievant contends that his discipline was unreasonable in light of his lack of proper training. Respondent posits that, even though it has great discretion in terminating probationary employees, the discipline it imposed on Grievant was proportionate to Grievant's infraction. Because Grievant is a probationary employee, Respondent has the authority to terminate him without adhering to the normal employee protection protocol for state employees. The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp.,* Docket No. 01-DMV-582 (Feb. 20, 2002)).

In spite of this low threshold, Respondent provided strong justification for terminating Grievant by proving that Grievant engaged in misconduct when he struck Inmate D.P. multiple times, that he provided false information to Investigator Roper, and that he willfully violated the Use of Force Policy and the Code of Conduct. Respondent's dismissal of Grievant for misconduct and failure to follow policy and procedure was within its discretion.

Grievant also made allegations of discrimination. Grievant contends that other officers have not been disciplined for similar strikes during this and other incidents. Discrimination is an affirmative defense. The burden of proving any affirmative defense by a preponderance of the evidence is upon the party asserting the defense. Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 3 (2016).

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Officer Poole struck Inmate D.P. with his fist and knee multiple times before Grievant arrived. Poole then hit Inmate D.P. once with a closed fist while Grievant was striking him. Officer Dixon delivered multiple knee strikes to Inmate D.P. Even if Grievant's strikes were identical to those of Dixon and Poole, his conduct was markedly different because he provided untruthful statements to Investigator Roper. Also, Grievant was a probationary employee with a disciplinary history. Grievant did not offer any testimony or provide any evidence regarding either officer's disciplinary history, whether they were probationary employees, and whether they were evasive or untruthful with Investigator Roper. Grievant has not proven he was similarly situated to the employees to which he compares himself. As Grievant's claims of discrimination do not meet the first element of discrimination, Grievant has not proven discrimination by a preponderance of the evidence.

Grievant implies that Respondent's non-enforcement of its policies for similar infractions by other officers is arbitrary and unreasonable. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on

criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Further, "'the "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct., Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App., Docket No. 022387 (Apr. 10, 2003).

Grievant had been informed in writing on three prior occasions of his performance deficiencies and his need for improvement. After the latest incident, Respondent lost all trust that Grievant could be relied upon to exercise sound judgment and carry out his responsibilities as a Correctional Officer. While Grievant took issue in

his proposed findings in the current action with the prior disciplinary actions taken against him, he did not do so at the time of these incidents. "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).

In assessing the reasonableness of Grievant's dismissal, West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement #3036 is insightful. It states that "[a]ny staff member questioned by a designated investigator is required to provide relevant, truthful and complete information. Failure to do so will result in disciplinary action, up to and including dismissal." If dismissal is appropriate when a regular employee is untruthful, it is certainly appropriate when a probationary employee does the same. Respondent has immense discretion in terminating probationary employees. Therefore, Respondent's decision to dismiss Grievant was not arbitrary or unreasonable.

Grievant admits that his actions may have been inappropriate and in need of improvement. Grievant contends that the punishment should only be suspension. "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.

The burden of proof in regard to mitigation is on Grievant. Grievant did not establish abuse of discretion or persuasively present any evidence that Respondent's disciplinary action was unreasonable. Grievant implies that his dismissal is unreasonable because he was not properly trained and was taught to use any means necessary to stop an escaping inmate. The undersigned does not find it to be relevant that Grievant may have been misinformed concerning the applicability of the Use of Force Policy to his dealing with an escaping inmate, because Inmate D.P. was not escaping and was under the control of at least six officers at the time Grievant struck him. Even if Inmate D.P. was in the process of escaping, Grievant still violated the Code of Conduct in being willfully untruthful to Investigator Roper when Grievant stated that he did not strike Inmate D.P. Grievant did not present any argument or evidence that would mitigate his untruthfulness. The undersigned cannot say that Respondent's discipline is so clearly disproportionate to Grievant's offense as to be an abuse of discretion and therefore cannot substitute Respondent's determination of discipline with his own.

Respondent has proven that Grievant committed misconduct and that its dismissal of Grievant was not arbitrary or capricious. Grievant failed to prove his allegations of discrimination or that Respondent's disciplinary action was unreasonable and warranted mitigation.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the

evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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 burden has not been met. *Id*.

2. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res.*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 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. 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*.

3. The Division of Personnel's administrative rule describes the probationary period of employment as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of

the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

4. Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009)

(citing *Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

5. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v.*

Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3*, In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1*, Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

7. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities

of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008). "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).

8. 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*.

9. Respondent has proven by a preponderance of the evidence that Grievant struck Inmate D.P. with a closed fist multiple times, that Grievant was untruthful with Investigator Roper, and that Grievant willfully and knowingly violated Respondent's policies, including the Code of Conduct and Excessive Use of Force Policy.

10. Respondent has proven by a preponderance of the evidence that Grievant engaged in misconduct.

11. Respondent has proven by a preponderance of the evidence that its termination of Grievant was not arbitrary and capricious.

12. Grievant did not prove by a preponderance of the evidence that Respondent discriminated against him.

13. Grievant did not prove by a preponderance of the evident that Respondent's disciplinary action was unreasonable.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 16, 2019

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Joshua S. Fraenkel
Administrative Law Judge