THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ZACHARY STEPHEN BIBBEE,
Grievant,

v. **Docket No. 2019-1241-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/
PARKERSBURG CORRECTIONAL CENTER AND JAIL,
Respondent.

DECISION

Grievant, Zachary Stephen Bibbee, is employed by Respondent, Division of Corrections and Rehabilitation within the Bureau of Prisons and Jails at the Parkersburg Correctional Center and Jail, Wood County Holding Center. On March 14, 2019, Grievant filed this grievance directly to level two of the grievance process but by email dated April 2, 2019, Grievant corrected that he intended to file to level three and his grievance was accepted at that level pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievance statement states,

> I feel that a suspension in this matter is not only unwarranted, but excessive. The policies and regulations that claim to have been violated can be misproven, as policy continues not to be followed. There have been plenty of policy violations as well as false statements within the letter that I was provided that I intend to prove to be false. The course of action taken upon me I feel is excessive in nature as well as unfair due to the lack of discipline across the agencies, especially within the same circumstances. My performance has not been unsatisfactory, and my evaluations have never been poor during my time in any division within the state. The statements made against me are untruthful, disrespectful, and unacceptable.

For relief, Grievant sought "[r]emoval of suspension from my personnel file and all according action removed also. Protection from retaliation in regards to this filling and

previous fillings still being heard. No further action in regards to this matter and backpay for the 80 hours that I am serving."

A level three hearing was held on July 29, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*[1]. Respondent appeared by Superintendent Aaron K. Westfall and was represented by counsel, Briana J. Marino, Assistant Attorney General. At the beginning of the hearing, Grievant stipulated that discipline was warranted but asserted he should only have received a written reprimand. Grievant also withdrew his request for back pay. This matter became mature for decision on September 24, 2019, upon final receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant elected not to file written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Correctional Officer I at the Wood County Holding Center. On January 2, 2019, an inmate at the holding center, who was left unattended in an interview room for four hours, eventually kicked his way through the drywall wall and escaped. The inmate's escape went unnoticed until the next day as it was incorrectly reported that he had been transported back to a regional jail facility. Grievant was suspended for eighty hours for failure to comply with policy regarding the transfer of inmates, unsatisfactory job performance, and falsifying records. Respondent failed to prove Grievant violated the transport policy or falsified records. Respondent proved that Grievant's failure to perform security checks was a serious failure of job

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

performance warranting suspension. Grievant failed to prove his suspension should be mitigated. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Correctional Officer I at the Wood County Holding Center (WCHC).

2. The WCHC is a short-term holding facility for inmates who are transported there for court appearances and for new bookings. Superintendent Aaron K. Westfall is the chief administrator of the WCHC.

3. Corporal Gary McDonald, Correctional Officer I Amber Willis, and Grievant were the three employees on duty at WCHC during the day shift on January 2, 2019.

4. Officer Willis was the booking officer and Grievant and Cpl. McDonald were the floor officers.

5. Floor officers are responsible for performing security checks wherein the officers physically walk the facility checking for inmate welfare, locked doors, and anything out of the ordinary. During a security check the officer is to consult the inmate count on the "board" and positively identify that each inmate is present in the proper cell.

6. On January 2, 2019 an inmate, A.D., was transported from a regional jail facility to the WCHC for a court appearance.

7. While A.D. was at the WCHC he was interviewed by Deputy Cody McClung of the Wood County Sherriff's Office.

8. Grievant placed A.D. into an interview room for the interview with Deputy McClung.

9. Deputy McClung interviewed A.D. for approximately one-half hour.

10. Upon exiting the interview room, Deputy McClung told Grievant and Officer Willis that the interview had concluded.

11. Officer Willis escorted Deputy McClung from the building.

12. No one returned A.D. to his cell and A.D. remained in the interview room for approximately four hours.

13. At some point during the four hours, A.D. pried a metal plate off the wall and began scraping through the drywall wall. Eventually, A.D. kicked through the drywall wall entirely, creating a large hole from which he escaped the room into the home confinement hallway, which is located adjacent to the booking area, and then exited the holding center.

14. Breaking through the wall would have caused unusual noise and the kicking was violent enough that it opened cabinet doors located on the other side of the wall.

15. During this time, Grievant failed to properly perform security checks.

16. Later in the day, the transport van arrived to return inmates to the regional jail. A.D. was supposed to be returned to the jail and was counted as present for the transport even though he was not present and had, in fact, escaped from the WCHC.

17. Although Grievant assisted in preparing inmates for transport, it was Officer Willis, as the booking officer, and the two transport officers who were responsible for the identification and count of the inmates.

18. The hole in the wall was finally discovered in the early morning hours on January 3, 2019. It was several hours more before it was discovered that it was A.D. who was missing.

19. Superintendent Westfall, Investigator III Shawn Carson, and Investigator II Darin Cool reported to the WCHC on the morning of January 3, 2019.

20. The investigators viewed the crime scene and reviewed video surveillance and documents.

21. Later that morning, A.D. was apprehended and returned to the custody of the WCHC.

22. On the same date, the investigators interviewed the involved officers and obtained a signed and sworn statement from Deputy McClung.

23. Investigator Cool filed the *Report of Investigation* on January 11, 2019.

24. At the time of the report, Grievant had not filed an incident report.

25. After reviewing the *Report of Investigation*, Superintendent Westfall discussed the appropriate discipline with the Commissioner's office. Assistant Commissioner Anne Thomas believed Grievant should be terminated. Superintendent Westfall, considering Grievant's past good performance, both at the WCHC and in his work with the Division of Juvenile Services, with which Superintendent Westfall was familiar, believed that suspension was the appropriate discipline. Assistant Commissioner Simmons agreed that a two-week suspension would be sufficient.

26. On February 27, 2019, Superintendent Westfall held a predetermination conference with Grievant during which Grievant denied that Deputy McClung told him the interview was complete, admitted that he should have checked the door but that the

standard practice was not to check if the light was off, and asserted that he was not responsible for A.D. being left in the interview room because he had taken the word of Officer Willis that A.D. had been taken back to a cell.

27. By letter dated February 27, 2019, Superintendent Westfall suspended Grievant for eighty working hours for failing to escort A.D. back to a cell, failing to identify inmates being transported, and failing to perform security checks, all in violation of policy directives. Grievant was specifically charged with failure to comply with Policy Directive 300 regarding transfer of inmates, unsatisfactory job performance, and falsifying records.

28. Respondent's progressive discipline policy, Policy Directive 129.00, states that suspension is "[i]ssued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs." The policy includes a list of offenses for which Respondent considered discipline to be warranted. Grievant was charged with the following from that list:

> 1. Failure to comply with Policy Directives, Operational Procedures or Post Orders.
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> . . .
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> 5. Instances of inadequate or unsatisfactory job performance.
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> . . .
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> 32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

29. Grievant was specifically charged with violating WVDCR Policy Directive 300, "Short-Term Holding Facilities," states, in part, as follows:

> A. <u>General Release Procedures:</u> All inmates who have completed their adjudicated sentence in accordance with WV Code of Laws, or whose sentence has been modified by a judicial officer of a lawfully constituted

> jurisdiction shall be assured timely release from incarceration. All WVDCR facilities shall follow standard procedures to ensure proper computation of release dates, documentation of release, collection and retention of WVDCR property, return of inmate's lawful personal property, and collection and storage of records related to the inmate's incarceration and release. . .
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> . . .
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> 6. Prior to releasing or transferring any inmate for any reason from any facility, the inmate shall be positively identified using file photos, OIS System Photo, face-to-face recognition, wristband identification, and if necessary, fingerprints, or any other means necessary to assure that positive identification is made and that the inmate being released has been legally authorized to be released by the court of proper jurisdiction and no other charges or detainers exist in the inmate's file or in OIS. . .

30. Respondent dismissed Officer Willis and the two transport officers from employment. Respondent suspended Cpl. McDonald.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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*.

Respondent asserts it does not hold the burden of proof because "Grievant and Respondent have stipulated that the charges against Grievant are taken as true for purposes of establishing that disciplinary action against Grievant is appropriate" such that the only issue remaining is mitigation. This is incorrect. At the hearing, no written stipulations were offered. Grievant stipulated orally only that discipline was warranted but that he should have received a written reprimand rather than a suspension. Grievant did not stipulate as to the charges or to any specific facts. In fact, in his testimony, Grievant only admitted that he did not perform proper security checks by identifying that each inmate was in the proper cell per the count on the "board." Grievant denied failing to file a report, asserted that he was not responsible for conducting a security check of the interview room, disputed that Deputy McClung told him that he was finished interviewing A.D., and did not admit to any misconduct regarding the transport. Without a proper stipulation of fact, it remains Respondent's burden to prove the charges against the employee.

Respondent presented no direct witness testimony regarding the event. As proof of Grievant's misconduct it offered only the *Report of Investigation* and the testimony of Investigator Cool. Superintendent Westfall and Assistant Commissioner Thomas testified regarding the decision to suspend Grievant. The report, written statements included in the report, and the testimony of the investigator contain hearsay. Although audio recordings were made of the interviews, and that audio was an attachment to the report, the audio recordings were not attached to the report submitted as evidence in the hearing.

Therefore, both credibility and hearsay determinations must be made. 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).

Grievant is not credible. Although Grievant was polite and serious during the hearing, he did not appear forthright. Grievant's testimony appeared to be an attempt to minimize his responsibility for the escape. Grievant's assertion that the interview room was not a required part of the normal security check is not plausible. Most troubling is that Grievant testified during the hearing that he had a folder which contained printed copies of his incident reports that he had left at home. The undersigned left the record open for five days after the hearing to permit Grievant to submit copies of the reports. Grievant failed to submit copies of the reports. Grievance Board staff then contacted Grievant by email regarding the status of his submission and in response Grievant emailed, "The original reports that I had on file are no longer there for me to access." This

is contradictory to Grievant's testimony that he had physical copies of the records in a folder and had just left them at home the day of the hearing.

Investigator Cool was credible, although he appeared to have little personal memory of the investigation. His demeanor was professional and appropriate. The investigation appeared to be conducted in the normal course of business and was thorough, although portions of the investigation were not provided to the undersigned. There is no inference of bias or interest. Specifically, Investigator Cool's assertion that he checked the system and that Grievant filed no incident report was credible.

Superintendent Westfall was credible. Superintendent Westfall was forthright, professional, and made good eye contact. Superintendent Westfall obviously thinks quite favorably of Grievant despite the incident so does not appear to have any prejudice against Grievant. Superintendent Westfall appeared to have a good memory of events.

"Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other

information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

The most important hearsay statement is that of Deputy McClung. This places responsibility for the failure to return A.D. to his cell on Grievant. Although Respondent did not specifically address the issue, Respondent clearly did not call Deputy McClung because it mistakenly believed it did not hold the burden of proof. However, there is ample reason to conclude Deputy McClung's statement is reliable. Deputy McClung's statement was signed, sworn, given in the course of the investigation, and made the day after the event. It has not been suggested that Deputy McClung has any bias or interest in this matter. There appears to be no motive for Deputy McClung to state that he specifically told Grievant he was finished with the inmate if that were not so as Deputy McClung was not accused of any wrongdoing. Therefore, Deputy McClung's written statement is entitled to weight.

As to the parts of the incident that are undisputed, the report will be accepted as true. Further, Investigator Cool's testimony involving his direct knowledge of the observation of the damage to the room caused by the escape and to his review of the records of the incident report was credible and is entitled to weight.

Therefore, Respondent proved that Grievant failed to return A.D. back to his cell after Deputy McClung informed him the interview was finished, that Grievant failed to do

proper security checks, which allowed A.D. the opportunity to escape, and that Grievant failed to file an incident report. The question then turns to whether Respondent was justified in suspending Grievant for eighty hours for these failures.

The only specific policy Grievant was charged with violating was the transfer policy. Respondent failed to prove Grievant violated the transfer policy. Although the suspension letter states that Grievant violated the transfer policy, in his testimony Superintendent Westfall specifically stated that the booking officer was "solely responsible" for identifying the inmates for transport and that Grievant did not have a direct role in making sure the right inmates got on the van.

Respondent failed to prove Grievant "[f]alsifyi[ed] any records whether through misstatement, exaggeration, or concealment of facts." Although Grievant testified that he had filed a report under Officer Willis' name in the computer system due to a problem with his own account, which might be considered falsification of records, Respondent found in the investigation and the suspension letter that Grievant had failed to file a report and the undersigned has found the same. Failure to file a report is not falsifying a record. Certainly, there must be some policy or procedure that requires officers to file a report in such circumstances but Respondent did not charge Grievant with any such violation or enter any such policy or procedure into evidence.

However, Respondent certainly proved Grievant's failure of performance was serious and unacceptable. Grievant left an inmate in an interview room alone despite being told that the interview was concluded. Grievant utterly failed in performing the most basic of security checks for hours. His assertion that a proper security check would not have included the area in which the interview room was located is preposterous. The

interview room was part of the facility and Grievant, himself, had placed the inmate in that room that day. Grievant admits that he heard noise but that he thought that the noise was caused by another inmate. The noise of the inmate kicking his way through a wall would have been substantial and would not have been in the same direction as the cells. Grievant's choice not to conduct thorough security checks even after hearing suspicious noise shows a very serious and concerning lack of attention to his duties. But for Grievant's failure to do even the most cursory check of the area, the inmate would not have been able to escape. But for Grievant's failure to confirm the presence of inmates in the proper cells based on the "board" count, the inmate would not have been able to escape. In addition, while Respondent failed to prove that Grievant's failure to file a report was in violation of the policy named, the failure to file a report in this circumstance is clearly a troubling performance issue. Respondent was justified in suspending Grievant for these failures.

Grievant asserts he should only have received a written reprimand due to his "limited" role in the escape and his prior good performance. "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). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating

that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

Grievant's punishment was already mitigated by Superintendent Westfall. Assistant Commissioner Thomas believed Grievant should be terminated from employment. It was Superintendent Westfall's assertion of what he viewed to be Grievant's lesser culpability and prior good performance that led to the decision to suspend, rather than terminate, Grievant.

Grievant's failures were serious with serious consequences. Other involved officers were terminated from employment and the other floor officer was given the same suspension as Grievant. The penalty of suspension was not disproportionate or an abuse of discretion. Further, Grievant still refuses to accept responsibility for his role in the escape stating, it was "not my fault." Clearly, upholding the suspension is necessary to impress upon Grievant the seriousness of his failures in this instance. Mitigation is not warranted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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. Although Respondent failed to prove all the charges against Grievant, it proved charges of a serious enough nature to justify suspending Grievant.

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. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No.

94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

6. Grievant failed to prove mitigation is warranted.

Accordingly, the 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: November 6, 2019

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Billie Thacker Catlett
Chief Administrative Law Judge