

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHANE MATTHEW FOUTTY,

Grievant,

v.

Docket No. 2019-1185-MAPS

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

Respondent.

DECISION

Grievant, Shane Matthew Foutty, filed a grievance¹ against his employer, Respondent, West Virginia Division of Corrections and Rehabilitation, Bureau of Prisons and Jails, Parkersburg Correctional Center and Jail ("WVDCR") dated February 27, 2019, stating as follows: "[w]rongful termination/Progressive discipline policy 129.00/ Memo put out after incident directing responsibility by Deputy Aaron K. Westfall on January 4, 2019/ Also no official training for transportation/Didn't sign for custody of inmate/Others were not fired that work at the holding center." As relief sought, Grievant stated "[r]einstated/Annual time and sick time credited/All future raises/Automatic promotion to CO3 in March 2019/ All wages that would have been earned after February 22, 2019 or lump sum payment of 25 thousand dollars."

A level three hearing was held on May 30, 2019, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office.

¹ Grievant's statement of grievance filed on February 27, 2019, indicated that he was filing for default; however, as it was the initial filing, default was not applicable. By Order entered March 11, 2019, the Chief Administrative Law Judge interpreted Grievant's filing as an attempt to begin the grievance process and transferred the matter to the level three docket.

Grievant appeared in person, *pro se*. Respondent appeared by counsel, Briana J. Marino, Esquire, Assistant Attorney General. This matter became mature for decision on July 8, 2019.

Synopsis

Grievant was employed by Respondent as a Correctional Officer II. Respondent asserts that Grievant violated policy while performing his duties as a Transportation Officer for the North Central Regional Jail, and that such contributed to the escape of an inmate. Respondent dismissed Grievant from employment. Grievant denies Respondent's claims and asserts that while he may have violated one policy, he is not responsible for the inmate escape. Grievant further asserts that Respondent engaged in discrimination and favoritism as he was dismissed from employment when others involved were not. Respondent proved its claims by a preponderance of the evidence. Grievant failed to prove his claims of discrimination and favoritism by a preponderance of the evidence. Grievant also failed to prove that mitigation of his discipline was appropriate. Therefore, this 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 was employed by Respondent, West Virginia Division of Corrections and Rehabilitation, as a Correctional Officer II at the Parkersburg Correctional Center and Jail. Grievant had been so employed since 2016. However, at all times relevant herein, Grievant was temporarily assigned to work at the North Central Regional Jail and Correctional Facility (NCRJ) as a Transportation Officer. In this position, Grievant

was responsible for transporting inmates between NCRJ and the Wood County Holding Center (WCHC) in Parkersburg, West Virginia. Grievant had been serving in this temporary capacity since on or about September 8, 2018.²

2. The West Virginia Division of Corrections and Rehabilitation was created by statute on July 1, 2018. Within the WVDCR are the Bureau of Prisons and Jails, the Bureau of Community Corrections, and the Bureau of Juvenile Services. WVDCR replaced the Division of Corrections, Regional Jail and Correctional Facility Authority, and Division of Juvenile Services.

3. Aaron Westfall is employed by Respondent as the Superintendent of the Parkersburg Correctional Center and Jail (PCCJ) and Wood County Holding Center (WCHC).

4. WCHC became a part of the WVDCR after the agency's July 1, 2018, reorganization. Prior to that WCHC was a county facility and was not part of the Division of Corrections.³

5. WCHC is used as a holding facility for inmates who are transported there for court appearances. Also, people arrested in Wood County are brought to WCHC for booking and pending arraignment. WCHC operates two twelve-hour shifts each day, with three officers working each shift. Therefore, at any time, only three employees are working as correctional officers at WCHC.⁴

6. Cpl. Gary McDonald, Correctional Officer Amber Willis, and Correctional Officer Zachary Bibbee were the three employees on duty at WCHC during the day shift

² See, Respondent's Exhibit 2, Memo dated August 31, 2018.

³ See, testimony of Aaron Westfall.

⁴ See, testimony of Aaron Westfall.

of January 2, 2019. Cpl. McDonald was the shift commander on January 2, 2019. He was the highest ranking officer and was in charge of WCHC operations.

7. As a Transportation Officer, Grievant worked with a partner, John Gragg. In this position, Grievant and Officer Gragg worked anywhere between seventy and eighty hours per week. The additional hours were largely due to the various transportation needs of the inmates. Inmates are transported for things including, but not limited to, court appearances and medical appointments. As court proceedings and appointments vary in length, it was common for Grievant and Officer Gragg to finish their transports as late as 7:00 p.m. to 9:00 p.m.

8. On January 2, 2019, Grievant and Officer Gragg began their day at or about 6:30 a.m. at NCRJ pulling inmates who were to be transported that day from cells. Grievant and the other transportation officers prepared all the inmates for transport. Grievant and Officer Gragg, then received the list of inmates they were to transport that day. Grievant and Officer Gragg got the inmates who were on their list and began the transport.

9. Grievant and Officer Gragg arrived at WCHC at or about 8:24 a.m. with the seven inmates who were to be transferred into the custody of WCHC for court appearances. Custody of the inmates was transferred to WCHC staff and Grievant and Officer Gragg left WCHC to take the other inmate to the medical appointment.

10. Once WCHC took custody of the seven inmates WCHC became responsible for all the inmates' care, as well as their comings and goings, and movement within the facility.⁵

⁵ See, testimony of Darin Cool.

11. At some point during the afternoon following inmate A.D.'s return to WCHC from his court proceeding, Officer Bibbee transported inmate A.D. from the secure area at WCHC to the interview room to speak with a sheriff's deputy.

12. It is unknown how long the sheriff's deputy met with inmate A.D. However, when the meeting was done, the deputy left the interview room and shut the door. Inmate A.D. remained in the interview room. After exiting the interview room, the deputy made contact with Officer Bibbee and told him that he was finished with the inmate. Officer Willis followed the deputy out of the booking area and unlocked the door for him to exit. Neither Officer Willis nor Officer Bibbee returned to the interview room to retrieve inmate A.D. and return him to the secure area.⁶

13. Grievant and Officer Gragg returned to WCHC at or about 5:00 p.m. When they had returned, one inmate was still in court; therefore, they waited for his or her return before getting the rest of the inmates ready for transport.

14. When all the inmates were back from court, Officer Gragg went to the Control Office where Officer Willis was stationed. Officer Willis handed him a stack of papers, those being one custody transfer sheet for each inmate, as this is the point when the inmates were transferred back into the custody of the transportation officers for transport to NCRJ. Officer Willis said something to the effect of, "[h]ere is your seven," as she handed the papers to Officer Gragg. He replied something to the effect of, "[d]on't you mean eight?" To which, she replied, "[s]even." Officer Gragg noticed at that time that the "count board" for the inmates at WCHC had been erased.⁷

⁶ See, Respondent's Exhibit 1, Report of Investigation, Tab #9; Tab#1, pp.6-8.

⁷ See, testimony of John Gragg.

15. Officer Gragg took the paperwork from Officer Willis, and without reading or reviewing the same, he signed each page where indicated. It is unknown whether Officer Willis gave him a copy of this paperwork after he had signed.⁸

16. Transportation officers do not always transport back to NCRJ the same inmates they had transported to WCHC earlier in the day. During court proceedings, inmates can be released by the courts; therefore, transport back is not needed. Also, during the day, new inmates may be ordered to NCRJ.⁹

17. While Officer Gragg was dealing with the paperwork, Grievant, Cpl. McDonald, and Officer Bibbee went to the secure area of WCHC and began pulling inmates from their cells and preparing them for transport. None of the officers had a list of which inmates needed to be transported back to NCRJ. As inmates are not allowed to stay overnight at WCHC, all the inmates wearing orange uniforms had to be transported back to NCRJ that day. So, the officers were pulling everyone from their cells.¹⁰

18. Grievant, Officer Bibbee, and Cpl. McDonald prepared each of the inmates for transport without positively identifying any of them.¹¹ Positive identification could have been checking their ID bracelet if they had one, pulling their photos from the computer system and comparing them to the inmates present, or even saying their names out loud to get a response.¹²

⁸ See, testimony of John Gragg; Respondent's Exhibit 1, Report of Investigation, Tab #10, "Inmate Release from Custody" form.

⁹ See, testimony of John Gragg.

¹⁰ See, testimony of Gary McDonald; Report of Investigation, Tab#1.

¹¹ See, testimony of Darin Cool; Respondent's Exhibit 1, Report of Investigation, Tab #1; testimony of John Gragg.

¹² See, testimony of Darin Cool; testimony of Gary McDonald; testimony of Aaron Westfall; testimony of John Gragg.

19. Grievant and Officer Gragg, assisted by Cpl. McDonald and Officer Bibbee, loaded the inmates into the vehicle and transported them back to NCRJ. Officer Gragg and Grievant left WCHC at or about 5:20 p.m. Even though Officer Gragg had signed a transfer of custody form for inmate A.D. indicating that he was being taken back to NCRJ, inmate A.D. was not in the vehicle. Inmate A.D. was still in the interview room at WCHC. Grievant signed none of the paperwork on this trip.

20. Upon arrival at NCRJ, Officer Gragg and Grievant transferred custody of the seven inmates to NCRJ staff who marked all seven, including inmate A.D., as present and accounted for. Apparently, the NCRJ staff also did not positively identify each inmate during the transfer of custody.

21. Inmate A.D. was left in the WCHC interview room for an unknown amount of time on January 2, 2019. The light in the room had been turned off and the door was locked from the outside. So, inmate A.D. could not just get up and walk out the door. The evidence is unclear as to who turned off the light; however, the deputy's statement indicates that he shut the door upon his exit.¹³

22. At some point while locked in the interview room, inmate A.D. began using a piece of metal like a light switch cover to cut the drywall on the back wall of the room in an effort to free himself. Then, using his hands, inmate A.D. made a hole in the wall. After forcefully kicking the wall hard enough for gun cabinets hanging on the opposite side of the wall to fly open, inmate A.D. made a hole in the wall large enough to fit his body through. He crawled through the hole, and eventually ran through the lobby of the building before going out a side fire door, which did not alarm, and fled on foot from the

¹³ See, Respondent's Exhibit 1, Report of Investigation, Tab #9, "Documented Statement."

building. It is estimated by investigators that inmate A.D.'s escape from WCHC occurred at about 6:38 p.m.¹⁴

23. The Investigation Report indicates that there is video of inmate A.D. bursting through the wall captured by a security camera in the Home Confinement area. However, the ALJ was not shown any such video, and no such recordings were submitted as exhibits to the investigation report.

24. Even though inmate A.D. apparently escaped from WCHC on January 2, 2019, at or about 6:38 p.m. before shift change, it was not until about 4:30 a.m. on January 3, 2019, about ten hours later, before the night shift staff discovered the hole in the wall and called Superintendent Westfall.

25. At the time WCHC staff called Superintendent Westfall, no one knew who, if anyone, had escaped from WCHC, or when.

26. Superintendent Westfall ordered investigation into the possible inmate escape in the early morning hours of January 3, 2019. Superintendent Westfall assigned Investigators Shawn Carson and Darin Cool to conduct the same.

27. On the morning of January 3, 2019, Grievant and Officer Gragg returned to WCHC to retrieve some inmate property that had not been given to them the evening before. When they arrived, Superintendent Westfall was there, as well as an Officer Brogdon. Officer Brogdon asked Grievant and Officer Gragg if they had seen the big hole in the interview room wall and stated that an escape was suspected. Officer Brogdon told

¹⁴ See, Investigation Report, Respondent's Exhibit 1, Tab #1, page 9; See, Investigation Report, Respondent's Exhibit 1, Tab #28, 22 photos of the hole in the wall, drywall dust and debris, and the metal plate.

them that it was not one of their inmates from the day before because their count was good at NCRJ.

28. After speaking to Officer Brogdon, Officer Gragg suspected it was one of the inmates that he and Grievant had transported the morning before. Officer Gragg called NCRJ, and was again assured by an Officer Abner that all of their inmates were accounted for.

29. Grievant and Officer Gragg returned to NCRJ after leaving WCHC. Officer Gragg and Grievant went to the pod where the inmates they transported the day before were housed. Officer Gragg asked the inmates where A.D. was, and they all told him that A.D. had been released on home confinement. Officer Gragg and Grievant then suspected that inmate A.D. was missing. Officer Gragg contacted facility Administration, and asked for a standing count of NCRJ, which confirmed that inmate A.D. was missing. Officer Gragg then called Officer Brogdon at WCHC and told him it was A.D. who was missing.

30. Grievant and Officer Gragg went on to continue to perform their transport duties on January 3, 2019. They made three transports that day, even returning to WCHC. That day, Grievant and Officer Gragg made extra efforts to check paperwork and to positively identify the inmates in their transports.

31. Officer Gragg, Grievant, Officer Willis, and Officer Bibbee did not draft incident reports regarding the escape of inmate A.D. Cpl. McDonald drafted an incident report regarding the escape by January 9, 2019, but the exact date of the same is unknown and such does not appear to be included in the Report of Investigation.¹⁵

¹⁵ See, Respondent's Exhibit 1, Report of Investigation, Tab #26,

32. Superintendent Westfall issued the following memo to WCHC and Gary McDonald on January 4, 2019, regarding “Regional Jail Court Transports:”

Effective immediately, upon receiving the regional jail court docket, our staff will immediately print off a (sic) OIS picture sheet of the inmates that we are receiving to go to court for the scheduled day. When we are sending inmates back to the regional jail the inmate photo and name **has** to match before the inmate transport leaves the Wood County Holding Center. This process of verifying the inmates going back to the regional jail will **not** be conducted by the transport officer, it has to be done by the staff at the Holding Center.¹⁶ (Emphasis included in original).

33. Inmate A.D. was apprehended at or about 10:45 a.m. on January 3, 2019, and returned to the WCHC.

34. Superintendent Westfall took Grievant and Officer Gragg off transportation duties sometime after January 3, 2019. Grievant was returned to work as a correctional officer at WCHC, and Officer Gragg was returned to PCCJ as a correctional officer.

35. WVDCCR Policy Directive 300, “Short-Term Holding Facilities,” states, in part, as follows:

A. General Release Procedures: 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 WVDCCR facilities shall follow standard procedures to ensure proper computation of release dates, documentation of release, collection and retention of WVDCCR property, return of inmate’s lawful personal property, and collection and storage of records related to the inmate’s incarceration and release. . .

6. Prior to releasing *or transferring* any inmate for any reason from any facility, the inmate shall be positively identified using file photos, OIS

¹⁶ See, Grievant’s Exhibit 1, Memo dated January 4, 2019.

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. . .

14. All other appropriate Post Orders or any other appropriate special instructions or orders shall be complied with prior to the release of any inmate. . . .¹⁷ (Emphasis added.)

36. On February 6, 2019, Cpl. McDonald sent out a "Certificate of Understanding" to the WCHC staff for signature, which stated, "I do hereby acknowledge that I have read, understand and will comply with Memo: Short Term Holding Facilities P.D. 300 dated 1 July 2018." Grievant signed on February 7, 2019. There is no record indicating that Grievant was provided a copy of Policy Directive 300 prior to February 7, 2019.¹⁸

37. There was no evidence presented to indicate that Policy Directive 300 was disseminated to all the WCHC staff members at the time it became effective in July 2018.

38. The investigation was completed on or about January 11, 2019. The Report of Investigation was dated January 14, 2019, and sent to Superintendent Westfall.

39. The investigators interviewed all the staff involved, as well as, inmate A.D. during their investigation. The investigators concluded that "[t]he Policy Violations by Correctional Staff at the Wood County Holding Center directly resulted in the escape of Inmate [A.D.]."¹⁹

¹⁷ See, WVDCCR Policy Directive 300, "Short-Term Holding Facilities," Section II, "Release from Short-Term Holding Facilities," Respondent's Exhibit 1, Tab 6, pp. 10-15.

¹⁸ See, Grievant's Exhibit 2, "Certificate of Understanding" signature sheet.

¹⁹ See, Grievant's Exhibit 1, Report of Investigation, Tab #1, pg. 12.

40. The investigators concluded that Grievant, Officer Gragg, Officer Willis, Officer Bibbee, and Cpl. McDonald each committed a number of policy violations. The investigators as stated in their Investigation Report as follows:

Amber Willis:

WV DOC Policy Directive 129.00 subsection “J” as follows:

1. Failure to comply with Policy Directive’s (sic), Operational Procedures or Post Orders.

Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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.

C/O Willis did not positively identify Inmate [A.D.] prior to his transportation to NCRJ.

5. Instances of inadequate or unsatisfactory job performance.

C/O Willis did sign the Inmate Release of Custody Form, and the daily log book, but did not positively identify Inmate [A.D.].

32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

C/O Willis did sign the Inmate Release of Custody Form, and the daily log book, but did not positively identify Inmate [A.D.].

C/O Willis did complete log book entries of “all secure” but did not complete security checks.

42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.

C/O Willis (sic) failure to remove Inmate [A.D.] from the interview room directly resulted in the escape of Inmate [A.D.].

C/O Willis did not perform security checks which directly resulted in the escape of Inmate [A.D.].

John Gragg:

WV DOC Policy Directive 129.00 subsection "J" as follows:

1. Failure to comply with Policy Directive's (sic), Operational Procedures or Post Orders.

Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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 legal 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.

C/O Gragg did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

5. Instances of inadequate or unsatisfactory job performance.

C/O Gragg did sign the Inmate Release of Custody Form but did not positively identify Inmate [A.D.].

C/O Gragg did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

C/O Gragg did sign the Inmate Release of Custody Form, and the daily log book, but did not positively identify Inmate [A.D.].

C/O Gragg did not complete an Incident Report concerning the escape of Inmate [A.D.].

42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.

C/O Gragg did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

Shane Foutty:

WV DOC Policy Directive 129.00 subsection "J" as follows:

1. Failure to comply with Policy Directive's (sic), Operational Procedures or Post Orders.

Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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.

C/O Foutty did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

5. Instances of inadequate or unsatisfactory job performance.

C/O Foutty did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

C/O Foutty did not complete an Incident Report concerning the escape of Inmate [A.D.].

42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.

C/O Foutty did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

Zachary Bibbee:

WV DOC Policy Directive 129.00 subsection "J" as follows:

1. Failure to comply with Policy Directive's (sic), Operational Procedures or Post Orders.

Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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.

C/O Bibbee did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

5. Instances of inadequate or unsatisfactory job performance.

C/O Bibbee did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

C/O Bibbee did not perform security checks which directly resulted in the escape of Inmate [A.D.].

32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

C/O Bibbee did not complete an Incident Report concerning the escape of Inmate [A.D.].

42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.

C/O Bibbee did not perform security checks which directly resulted in the escape of Inmate [A.D.].

C/O Bibbee's failure to remove Inmate [A.D.] from the interview room directly resulted in the escape of Inmate [A.D.].

Gary McDonald:

WV DOC Policy Directive 129.00 subsection "J" as follows:

1. Failure to comply with Policy Directive's (sic), Operational Procedures or Post Orders.

Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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.

Cpl. McDonald did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

5. Instances of inadequate or unsatisfactory job performance.

Cpl. McDonald did not positively identify any of the inmates that were to be transported to NCRJ, to include Inmate [A.D.] which directly resulted in his escape.

42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.

Cpl. McDonald did not perform security checks which directly resulted in the escape of Inmate [A.D.].

Cpl. McDonald[']s failure to remove Inmate [A.D.] from the interview room directly resulted in the escape of Inmate [A.D.].

41. Despite the Investigator's conclusions and the policies Respondent introduced at the level three hearing, Policy Directive 300 does not contain the numbered paragraphs (5), (32), and (45) as quoted in the investigators' report and the Respondent's proposed Findings of Fact and Conclusions of Law. No other policy containing such paragraphs and language was introduced as evidence in this matter. Such may be included in Policy Directive 129.00; however, that policy was not presented as evidence in this matter.

42. Upon receipt and review of the Report of Investigation, Superintendent Westfall made recommendations regarding discipline for all the officers involved to Anne Thomas, Assistant Commissioner of the Bureau of Community Corrections. Westfall recommended that Grievant be dismissed. Thomas concurred.

43. Grievant attended the predetermination conference with Superintendent Westfall on February 22, 2019, at which time they discussed Grievant's actions and

conduct on January 2, 2019. Grievant was informed that his dismissal was being considered and he was given the opportunity to argue against his dismissal.

44. By letter dated February 22, 2019, Superintendent Westfall informed Grievant of his decision to dismiss him from employment, effective March 9, 2019, stating, in part, as follows:

After reviewing your response and having considered all the information made known to me, I have decided that your dismissal is warranted.

So that you may understand the specific reason for your dismissal I recount the following:

The investigation determined you were assigned on 02 January 2019 to transport Inmate A.D. to North Central Regional Jail & Correctional Facility. According to log entries you were responsible for transporting seven inmates to NCRJ&CF at 1720hrs on 02 January 2019. By your own admission, you failed to positively identify the inmates [to] be transported at 1720hrs on this date. You failed to follow Policy Directive 300 Short-Term Holding Facilities by not positively identifying the inmates. Your actions on this date assisted in facilitating the escape of Inmate A.D. due to Holding Center log entries showing the transport of A.D. at 1720hrs to NCRJ&CF, however this inmate was still located in the interview room at the Holding Center. There were eight actual inmates to take back and only seven were taken which would have been the one that escaped from the interview room.

Per the investigative report the following policy violations and notes were concluded from the final report:

- **Failure to comply with Policy Directive's (sic), Operational Procedures or Post Orders.**

You violated Policy Directive 300, Short Term Holding Facilities, II. Release from Short Term Holding Facilities. A[.] General Release Procedures:

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.

- **5. Instances of inadequate or unsatisfactory job performance.**
- **32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.**
- **42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.**

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of Parkersburg Correctional Center and Jail, thus warranting your dismissal.

The number one priority of Parkersburg Correctional Center and Jail along with the Division of Corrections and Rehabilitation is ensuring custody and maintaining public safety at all times when supervising our inmates. During your orientation with the Division of Corrections and Rehabilitation, you were given a class about Inmate Counts and the importance of proper identification which you did not implement. . . .²⁰

²⁰ See, Respondent's Exhibit 5, February 22, 2019, Dismissal Letter.

45. Respondent dismissed Grievant, Officer Gragg, and Officer Willis from employment stemming from the escape of inmate A.D. Respondent suspended Cpl. McDonald and Officer Bibbee for two weeks without pay.²¹

46. Neither party called Officer Bibbee or Officer Willis as witnesses in this matter at the level three hearing.

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. 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.*

Respondent asserts that it properly dismissed Grievant from employment for violating policy by failing to positively identify inmates before transport, and that such “assisted in facilitating the escape of Inmate A.D.” Grievant denies that he assisted in facilitating the escape of the inmate, but has admitted that he did not positively identify each inmate before the transport from WCHC to NCRJ. Grievant argues that he was performing his duties as he had been taught, that he was not trained to identify the inmates as Respondent argues, and as all the inmates did not have ID bracelets, he was without the ability to identify them before transport. Grievant also asserts that he did not sign any of the paperwork taking custody of the inmates, he was not responsible for the

²¹ See, testimony of Aaron Westfall.

movement of the inmate while he was housed at WCHC, and that the WCHC staff were responsible for the mistakes, paperwork and otherwise, that resulted in the inmate's escape. Grievant argues that as two of the three WCHC officers on duty at the time of the events at issue were each only suspended for two weeks and not dismissed for their actions, such amounts to discrimination and favoritism. Grievant also avers that his dismissal should be mitigated to a lesser discipline.

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Much of the evidence Respondent presented at the hearing concerned the Report of Investigation drafted and compiled by Investigator Darin Cool. Investigator Cool testified concerning statements made to him and the other investigator during the interviews of those involved, including inmate A.D., Officer Bibbee, and Officer Willis; however, none were called as witnesses at the level three hearing. Respondent did not introduce transcripts of the interviews or audio recordings. Investigator Cool also testified

about security video footage that he had reviewed during his investigation, but Respondent did not introduce the video at the level three hearing.

“Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990). As such, Investigator Cool’s report and his testimony regarding statements made to him during the investigation are hearsay. “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 investigative report being assigned significant weight regarding how the investigation into the inmate escape was conducted and the facts of the inmate's escape and apprehension because there were no eye witnesses to the escape other than the inmate, and it does not appear that the inmate's account is disputed. The facts of the escape are being used herein to explain how it was that inmate A.D. was not ever actually in the physical custody of Grievant. There appears to be no dispute as to how the inmate came to be in the interview room, that he was left there alone, and that he eventually escaped as a result. As such, there was no need for inmate A.D. to testify at the level three hearing. Also, this ALJ is making no findings or conclusions regarding the appropriateness of any charges brought against Officers Bibbee, Willis, Gragg, and Cpl. McDonald or any discipline imposed upon them, if any.

The evidence presented demonstrated that during the early morning of January 2, 2019, Grievant and Officer Gragg transported inmates to WCHC from NCRJ for court appearances and transferred custody of them to WCHC when they arrived at the facility. There were three officers on duty at WCHC that day, Cpl. McDonald, Officer Willis, and Officer Bibbee. These three officers work twelve-hour shifts at the WCHC. Grievant and Officer Gragg then left WCHC and transported another inmate to a medical appointment in the Wood County area.

After Grievant and Officer Gragg had left WCHC, sometime during the afternoon of January 2, 2019, Officer Bibbee transported inmate A.D. from the secure area inside WCHC to an interview room at the request of a sheriff's deputy. Inmate A.D. and the Deputy met in the interview room for an unknown amount of time. When the meeting was over, the deputy exited the interview room and closed the door. The deputy saw Officer

Bibbee and told him that he was done meeting with inmate A.D. Officer Willis followed the deputy out of the booking area so that she could unlock the door to let him exit. Inmate A.D. was left in the interview room and not returned to the secure area. The interview room was locked from the outside and the light had been turned off despite the fact that inmate A.D. was still in there. There is debate as to how the WCHC officers came to leave inmate A.D. in the interview room. Such is not relevant to the instant grievance, and as neither Officer Bibbee nor Officer Willis testified at the level three hearing, the ALJ will make no findings as to who was responsible for leaving inmate A.D. in the interview room.

Grievant and Officer Gragg returned to WCHC at or around 5:00 p.m. to transport inmates back to NCRJ. All of those being held at WCHC were to be transferred because none are allowed to stay at WCHC overnight.²² Officer Gragg went to WCHC control to get the transfer paperwork for the inmates. Officer Willis was working control. She handed Officer Gragg a stack of paperwork, supposed to be one piece of paper for each inmate being transferred, for his signature. Officer Willis told Officer Gragg “here is your seven.” Gragg replied, “don’t you mean eight?” Officer Willis again said “seven.” Officer Gragg did not review the paperwork, but signed each sheet where required.

While Officer Gragg was dealing with Officer Willis in control, Grievant went to the secure area within WCHC and began “pulling” inmates from the cells and preparing them for transport. Cpl. McDonald and Officer Bibbee assisted Grievant. From the evidence presented, none of them had a list of inmates to be pulled and there was nothing displayed on the “count board.” It had been erased.²³ As all the inmates had to go to NCRJ for the

²² See, testimony of Gary McDonald.

²³ See, testimony of John Gragg.

night, they all had to be pulled and prepared for transport. At no time did Officer Bibbee, Cpl. McDonald, or Grievant positively identify the inmates by checking their ID bracelets, photographs, or calling their names, while preparing them for transport.

Officer Gragg met Grievant, Cpl. McDonald, Officer Bibbee, and the seven inmates being to be transported at the vehicle. At no time did Officer Gragg positively identify the seven inmates prior to transport. It is unclear as to whether Officer Willis gave Officer Gragg a copy of the transfer of custody paperwork he had signed. The seven inmates were loaded into the transport vehicle and taken back to NCRJ. NCRJ then took custody of the seven inmates from Officer Gragg and Grievant. NCRJ staff marked all seven present and accounted for at NCRJ. Therefore, NCRJ staff also did not positively identify the inmates when they took custody of the inmates.²⁴

However, all the while, despite Officer Gragg signing the form taking custody of inmate A.D. and NCRJ taking custody of A.D. from Grievant and Officer Gragg, A.D. remained locked in the interview room alone at WCHC. Then, at or about 6:38 p.m., inmate A.D. burst through the back wall of the interview room totally undetected, and somehow made his escape from the facility, in part, by running through the WCHC main lobby and out a disarmed fire door on the side of the building.²⁵ He then left the immediate area on foot. The escape occurred before the day shift left; however, the person-sized hole in the wall was not discovered until about 4:30 a.m., near the end of the night shift, despite there being three other WCHC employees on duty the entire shift. Then, the identity of the inmate who had escaped was not discovered until several hours later.

²⁴ No evidence was presented concerning what, if any, investigation or action was taken at NCRJ as a result of this failure to identify.

²⁵ See, Respondent's Exhibit 1, Report of Investigation, Tab #1, pg. 9.

Inmate A.D. was finally apprehended and returned to WCHC at or about 10:45 a.m. on January 3, 2019.

Investigators reviewing the incident found that all five of the officers involved violated numerous policies. In fact, the investigators found that they each had violated all the same policies in various ways, except for one. All the officers except for Cpl. McDonald were found to have violated policy by failing to draft an incident report about the escape. Otherwise, the five officers were found to have violated the same policies. Of the five, Grievant, Officer Gragg, and Officer Willis were dismissed from employment. Cpl. McDonald and Officer Bibbee were suspended from their jobs without pay for two weeks. Superintendent Westfall decided what discipline to recommend for each employee involved, and the same was approved by Assistant Commission Thomas, and eventually, Commissioner Betsy Jividen.

Superintendent Westfall recommended Grievant be dismissed for his actions. Superintendent Westfall testified that Grievant was dismissed because of the escape of inmate A.D. He explained during his testimony that he looked at each employee's responsibilities as opposed to what had occurred. As Grievant and Officer Gragg "took custody" of A.D. by Gragg signing the release of custody form stating that they had A.D., even though he was still in the building through no fault of theirs, no one at WCHC had any reason to believe that A.D. was still in the building or that he had escaped. The paperwork said A.D. had been transported and he was no longer in the secure area. Such wound up assisting A.D. in his escape and prolonging his time on the run. Based upon his testimony, this appeared to be very important in Superintendent Westfall's decision to dismiss Grievant and Officer Gragg. Additionally, had Grievant and/or Officer Gragg

taken the time to positively identify each of the inmates for transport, as policy requires, and compare with the documents Officer Gragg had signed, they would have found that A.D. was not present for transport. This one act had the potential of preventing the entire escape debacle. Given their policy violations, the seriousness of the consequences of their actions, and the risk caused to the public and other employees, Superintendent Westfall recommended Grievant's dismissal. It is noted that Superintendent Westfall testified that he disagreed with the investigators' conclusions that all of those involved committed gross negligence, despite Grievant's dismissal letter which he signed noting gross negligence. He also disagreed with the investigators' conclusion and Gary McDonald's testimony that there was no formal count procedure in place at WCHC. So, it appears Superintendent Westfall did not accept the investigators' report entirely. To be very clear, the ALJ is not making any determination as to whether any discipline administered to the other four employees was proper. The only issue to be addressed in this grievance is whether Grievant's dismissal was proper based upon the evidence presented.

The issue now becomes, whether Respondent's actions in dismissing Grievant from employment were arbitrary and capricious. 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).

“[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).

“The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.” *Graley v. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm’n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax &*

Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012). "The employing authority's right to dismiss a Civil Service protected employee for gross misconduct is not conditioned upon or limited by the outcome of any criminal charges which may have been brought against the employee." Syl. 3, *Thurmond v. Steele*, 159 W.Va. 630, 225 S.E.2d 210 (1976).

No policy regarding discipline was presented as evidence in this matter. Further, Policy Directive 129.00, as cited in the dismissal letter and investigation report, addressing the charge of "failure to comply with policy directives, operational procedures or post orders" was not presented as evidence in this matter. Also, while the investigative report and the dismissal letter cite "instances of inadequate or unsatisfactory job performance, falsifying any records whether through misstatement, exaggeration, or concealment of facts, and gross negligence on the job which results in the escape, death or injury of an inmate or any other person" as being violations of Policy Directive 300, such are not listed in that policy. No policy introduced as evidence contained such provisions. Without knowing what policy directive 129.00 states and what policy says regarding these other charges, there is no way for this ALJ to determine whether Grievant violated the same. Therefore, Respondent has failed to prove these charges by a preponderance of the evidence. However, Respondent introduced Policy Directive 300 which requires the positive identification of inmates prior to transfer, and Grievant has admitted that he did not positively identify the inmates before transport. Given that this misconduct helped to facilitate an inmate's escape, which placed the public at risk, Grievant's failure to positively identify the inmates before transport is gross misconduct

and constitutes good cause for his dismissal. Accordingly, given the severity of the consequences of Grievant's actions, the ALJ cannot conclude that Respondent's decision to dismiss Grievant from employment was arbitrary and capricious. The ALJ cannot simply substitute her judgment for that of the employer in such circumstances.

Grievant argues that Respondent engaged in discrimination and favoritism as he was dismissed for his actions while Cpl. McDonald and Officer Bibbee were only suspended for two weeks without pay. Discrimination for purposes of the grievance process has a very specific definition. "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). "Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Therefore, in order to establish discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

- (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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has failed to prove that he, Cpl. McDonald, and Officer Bibbee were similarly situated. The investigators concluded that Grievant and Officer Bibbee violated the same policies, but not exactly in the same way, and that that Grievant and Cpl. McDonald violated the same policies except for one, because McDonald wrote an incident report and Grievant did not. While it is true that all three were correctional officers, they were not the same kind of correctional officer. They had different assignments, duties, and responsibilities. Based upon Superintendent Westfall's testimony, such was a consideration when determining disciplinary action to be taken. Grievant was a Correctional Officer II temporarily assigned to work for NCRJ as a Transportation Officer. His entire job was transporting inmates and preparing them for transport. Officer Bibbee was a Correctional Officer I and worked at WCHC. He did not work as a Transportation Officer and did not transport inmates as part of his job. Cpl. McDonald was a Correctional Officer, numeric classification unknown, but he is a corporal and was the senior officer assigned to WCHC on January 2, 2019, and was the shift supervisor, or commander. He was in charge that day. He did not transport inmates as part of his duties. Also, Cpl. McDonald and Officer Bibbee were not assigned to NCRJ. However, Officer Gragg was similarly situated to Grievant as he was a correctional officer assigned to NCRJ as a Transportation Officer. He was also dismissed from employment.

Grievant also alleged that there have been other inmate escapes and the correctional officers involved were not dismissed from employment. Other than some testimony from Superintendent Westfall about a past escape from PCCJ that he attributed to the lack of an officer being assigned to a certain unit, Grievant produced no other evidence to support his claim. Also, the situation described by Westfall did not sound at

all similar to what occurred in this grievance, and there was no evidence presented to contradict his testimony. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Therefore, Grievant has failed to prove the necessary elements of his claims of discrimination and favoritism.

While Grievant does not use the term “mitigation,” he argues that as he was a good employee and had no disciplinary history, he should have received a lesser discipline than dismissal for his policy violation. “[A]n 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 agency 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).” *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). “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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff’d*,

Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). “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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RaLED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Both Respondent and Grievant failed to produce as evidence any policy regarding discipline, or defining conduct warranting dismissal. The parties failed to introduce any policy pertaining to progressive discipline. Respondent has proved that Grievant’s failure to positively identify the inmates before the transport in violation of policy contributed to an inmate’s escape from WCHC. Given the seriousness of the consequences of his actions, Grievant’s misconduct rises to the level of gross misconduct. While the evidence presented demonstrates that Grievant had otherwise been a good employee and had no disciplinary history, given that an inmate escape resulted, at least in part, from his misconduct, the ALJ cannot conclude that dismissal is clearly excessive, an abuse of agency discretion, or that there exists an inherent disproportion between the offense and the personnel action. Accordingly, Grievant failed to prove that he is entitled to mitigation of his discipline.

Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct in violation of WVDCR Policy Directive 300 by his failure to positively identify

the inmates before the transport. It is true that Grievant did not move the inmate to the interview room, leave him there, or fail to notice or prevent the inmate's later escape, effected by bursting through an interior wall and running out the building somehow undetected. However, had Grievant followed the policy by positively identifying all the inmates he was to transport, he would have learned that while there was a signed transfer of custody form for inmate A.D., A.D. was not in his custody, and such would have alerted everyone that A.D. was missing, and likely prevented the escape. Grievant's transport left WCHC at about 5:20 p.m., before A.D.'s escape. Nonetheless, Grievant's misconduct contributed to the same. For the reasons set forth herein, this grievance is DENIED.

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. 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.*

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151

(1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. 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).

4. “[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).

5. Discrimination for purposes of the grievance process has a very specific definition. “‘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).

6. “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

7. “[A]n 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 agency 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).” *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

8. “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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

9. “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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Respondent proved by a preponderance of the evidence that Grievant engaged in gross misconduct by violating WVDCR Policy 300 which contributed to an inmate escape, thereby justifying his dismissal from employment.

11. Grievant failed to prove by a preponderance of the evidence his claims of discrimination and favoritism. Grievant also failed to prove that mitigation of his dismissal was warranted.

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: August 26, 2019.

Carrie H. LeFevre
Administrative Law Judge