

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

JOHN EDWARD ROACH, II,

Grievant,

v.

DOCKET NO. 2018-0932-MAPS

**REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY/SOUTH CENTRAL
REGIONAL JAIL,**

Respondent.

DECISION

On February 2, 2018, John Edward Roach, II (“Grievant”) filed a grievance at Level One of the grievance procedure challenging the decision of his employer, the Regional Jail and Correctional Facility Authority, South Central Regional Jail (“Respondent” or “RJA”)¹ to demote him from Correctional Officer IV (Sergeant), Pay Grade 12, to Correctional Officer II, Pay Grade 10, on January 29, 2018, with an effective date of February 17, 2018. The grievance was not resolved at Level One and Grievant appealed to Level Two on March 11, 2018. Following mediation at Level Two on April 11, 2018, Grievant appealed to Level Three on April 19, 2018. When Grievant did not receive notice of a hearing at Level Three, he followed up with the Grievance Board on August 15, 2018. A Level Three hearing was subsequently scheduled for November 20, 2018. On November 7, 2018, Respondent filed a motion requesting a continuance of the November hearing date because certain of Respondent’s essential

¹ Administrative notice is taken that effective July 1, 2018, the West Virginia Regional Jail and Correctional Facility Authority was reorganized and integrated into the newly-created West Virginia Division of Corrections and Rehabilitation pursuant to W. Va. Code § 15A-3-1, *et seq.*

witnesses would not be available on the scheduled hearing date. Over Grievant's objection, the Level Three hearing was continued for good cause shown until December 4, 2018. On November 24, 2018, Respondent moved for a continuance of the December hearing date, based upon a conflict requiring Respondent's counsel to appear in the Circuit Court of Kanawha County on the scheduled hearing date. Once again, over Grievant's objection, a continuance was granted for good cause shown, and the matter rescheduled for a Level Three hearing in January 2019.

On January 29, 2019, a Level Three hearing was held before the undersigned Administrative Law Judge at the Grievance Board's office in Charleston, West Virginia. Grievant appeared *pro se*. Respondent was represented by Assistant Attorney General Briana J. Marino. RJA presented testimony from three Correctional Officers assigned to the South Central Regional Jail, Corporal Traci Hunt, Lieutenant Terry Jaburs, and Captain Christopher Mason. Respondent also called RJA Director of Field Operations Donald Ames, and RJA Chief of Operations J.T. Binion, as witnesses. Grievant testified under oath on his own behalf.

This matter became mature for decision on February 11, 2019, upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law. Grievant waived filing a written post-hearing argument at the close of the hearing.

Synopsis

Grievant, a supervisory correctional officer, was demoted from Sergeant, Correctional Officer IV, to Correctional Officer II by Respondent for failing to take appropriate action in response to an inmate escape attempt at a site outside the South

Central Regional Jail. Grievant failed to take the initiative to send an additional officer and additional restraints to the site, and further failed to take any action to respond after being given specific instructions by a superior officer. Based upon a violation of Grievant's right to procedural due process, allegations that Grievant failed to timely submit notifications of an unusual event to his superiors were not sustained. Nonetheless, Respondent proved the most serious charges against Grievant, and demonstrated good cause for his demotion.

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

Findings of Fact

1. Grievant was employed by the West Virginia Regional Jail and Correctional Facility Authority ("RJA" or "Respondent") as a Correctional Officer for more than 20 years.

2. Corporal Traci Hunt ("Cpl. Hunt") is employed by RJA as a Correctional Officer III at its South Central Regional Jail ("SCRJ").

3. Lieutenant Jaburs Terry ("Lt. Terry") is employed by RJA as a Shift Commander at SCRJ. Lt. Terry has worked for RJA at SCRJ for 15 years.

4. Captain Christopher Mason ("Capt. Mason") is employed by RJA at SCRJ.

5. Capt. Mason has been employed by RJA since 2006 and has held the rank of Captain since 2016.

6. Capt. Mason worked with Grievant on numerous shifts when they were serving as Corporals at SCRJ.

7. At the time of the events giving rise to this disciplinary action, Donald Ames was employed as RJA's Director of Field Operations. Mr. Ames has been employed by RJA since 2005 and currently serves as the Superintendent of Mount Olive Correctional Facility.

8. J.T. Binion is employed by RJA as its Chief of Operations. In that capacity, Mr. Binion provides oversight to all RJA facilities in West Virginia.

9. On September 1, 2017, Grievant was notified that he had been selected for promotion to Sergeant, effective September 16, 2017. R Ex 4. Grievant was not promoted on a probationary basis.

10. As a Sergeant, which carries the classification of a Correctional Officer IV, Grievant is expected to serve as a shift or unit supervisor responsible for "enforcement of rules, regulations and state law, necessary for the control of offenders and the maintenance of public safety." See R Ex 3.

11. On November 13, 2017, Grievant was working as the Day Shift Supervisor at SCRJ. Grievant was the highest ranking officer on duty in the facility during that shift.

12. On November 13, 2017, Cpl. Hunt was performing hospital duty at CAMC General Hospital in Charleston, West Virginia, having being sent to the hospital to relieve a Kanawha County Deputy Sheriff who had taken Inmate ES² to the Emergency Room, after the inmate experienced a medical emergency at the courthouse.

² Consistent with Grievance Board practice, the initials of the inmate will be used in place of her full name, and her inmate number will be redacted when quoting from documents. See *Thompson v. Div. of Corr.*, Docket No. 2014-1484-MAPS (Nov. 9, 2015); *Sites v. Div. of Corr.*, Docket No. 2015-0710-MAPS (July 29, 2015).

13. Cpl. Hunt allowed the inmate to go to the bathroom, removing her handcuffs, but leaving her leg restraints in place about her ankles.

14. Cpl. Hunt was sitting in a chair on the other side of the room from the inmate. When the inmate was finished going to the bathroom, she stood up and bolted through the curtain at the entrance to the treatment room, heading toward the street entrance to the Emergency Room.

15. Cpl. Hunt followed the inmate yelling for assistance. A hospital security guard, an emergency medical technician, and one or more nurses grabbed the inmate and wrestled her to the ground.

16. Cpl. Hunt gave her handcuff key to one of the emergency medical technicians, and he retrieved the handcuffs from the bed and brought them to Cpl. Hunt who was watching the inmate.

17. Cpl. Hunt placed the handcuffs on the inmate who refused to get up. The inmate was carried back to the bed in the treatment room where Cpl. Hunt secured the inmate to the bed at two points, using the restraints she had available.

18. Cpl. Hunt recalled that the inmate was returned to the bed and restrained at 5:36 PM. See R Ex 1 at p. 16.

19. Cpl. Hunt then called SCRJ at approximately 5:43 PM and spoke to Grievant, relating the forgoing events. See R Ex 1 at p. 16.

20. Cpl. Hunt notified Grievant that the inmate had attempted to escape but was now restrained to the bed using the two available restraints.

21. Grievant did not indicate what particular action, if any, he was intending to take in response to Cpl. Hunt's telephone notification.

22. Grievant called Capt. Mason at his residence at approximately 6:00 PM, relaying the information he received from Cpl. Hunt involving a prisoner escape attempt. See R Ex 1 at p. 12.

23. Capt. Mason instructed Grievant to send at least one additional officer to the hospital with additional restraints. Grievant indicated that he would comply. See R Ex 1 at p. 12. Capt. Mason also instructed Grievant to prepare an Internal Notification Form ("INF").

24. Capt. Mason considered his instructions to be an order.

25. Any experienced Corrections Officer would be expected to recognize the need to send at least one additional officer and another set of restraints to Cpl. Hunt's location following an inmate escape attempt. If no officers were available due to other events of an urgent nature, the Charleston Police Department could be contacted to provide immediate assistance, while waiting for additional SCRJ personnel to arrive on the scene.

26. Capt. Mason recalled training Grievant on RJA's requirement to provide two officers for any inmate who poses an escape risk, or has attempted to escape, on multiple occasions, in the course of conducting firearms training.

27. Driving from SCRJ off Corridor G to CAMC General takes approximately 20 minutes.

28. Sometime within the 30 to 45 minutes following Cpl. Hunt's telephone conversation with Grievant at SCRJ, the inmate was trying to get out of bed and Cpl. Hunt attempted to calm her, when the inmate grabbed Cpl. Hunt by the shirt collar, pulling Cpl. Hunt toward her with one hand, grabbing Cpl. Hunt by the hair with the other hand, and biting Cpl. Hunt on the side of her face near her right eye.

29. Cpl. Hunt called for security and was able to escape the inmate's grip, with assistance from hospital personnel.

30. Hospital staff further secured the inmate using additional hospital restraint equipment.

31. Lt. Terry had arrived for the oncoming night shift at SCRJ and was preparing for roll call between 6:45 and 7:00 PM on November 13, 2017, when he received a frantic telephone call from Cpl. Hunt relating that she had been assaulted by an inmate in CAMC's Emergency Room.

32. Upon receiving Cpl. Hunt's call, Lt. Terry immediately determined that he needed to proceed to CAMC with another female officer to relieve Cpl. Hunt, and to bring additional restraints for the inmate.

33. After receiving Cpl. Hunt's telephone call, Lt. Terry saw Grievant for the first time that evening and Grievant told Lt. Terry there had been an escape attempt by the inmate earlier in the day. Grievant stated that Cpl. Hunt would be completing paperwork on the escape when she returned to SCRJ.

34. From the time of Cpl. Hunt's telephone call describing the inmate's escape attempt at approximately 5:43 PM to the initial conversation with Lt. Terry at

approximately 7:00 PM, Grievant had taken no meaningful action to send assistance to Cpl. Hunt at CAMC. Further, Grievant had not taken any action to comply with Capt. Mason's instructions to provide assistance to Cpl. Hunt. See R Ex 1 at pp. 14-15.

35. Lt. Terry advised Grievant that he would be proceeding immediately to CAMC with another officer, Dixie Keese, to assess the situation.

36. On the way to the hospital, Lt. Terry called Capt. Thompson, SCRJ Administrator Bradley Douglas, and Mr. Ames.

37. When Lt. Terry and Officer Keese arrived at the Emergency Room, Lt. Terry replaced the hospital's restraints on the inmate with stronger jail-quality restraints, insuring the inmate was secured to the bed at four points. The inmate was still acting combative and belligerent, resisting being further restrained.

38. Cpl. Hunt was then seen as a patient in the Emergency Room where her wound was stitched up.

39. Upon learning that Cpl. Hunt had been injured by an inmate, Mr. Ames went to CAMC to personally check on Cpl. Hunt's condition. He arrived at CAMC after Lt. Terry and Officer Keese.

40. Lt. Terry returned to SCRJ with Cpl. Hunt later on November 13, 2017.

41. While Lt. Terry was at the hospital with Cpl. Hunt and Officer Keese, he received multiple telephone calls from Grievant asking if he (Grievant) had done anything wrong, asking if he (Grievant) was going to get in trouble, and stating that he (Grievant) was working on his paperwork regarding the incident.

42. Cpl. Hunt later saw a vision specialist to make sure she had not suffered any damage to her eye during the assault.

43. Cpl. Hunt missed two days of work at SCRJ due to her injuries.

44. On September 13, 2017, Grievant reported the incident involving Inmate ES and Corporal Hunt at 7:57 PM on an Internal Notification Form, as follows:

On Monday, 13 November 2017 at approximately 1745 hours [5:45 PM], Cpl. Traci Hunt called SCRJ and stated that she let inmate ES #[redacted] use the bathroom at CAMC General Hospital when she ran out of the room in leg restraints to the ambulance entrance when she was restrained and taken to the ground by Cpl. Hunt and an EMT. She had her handcuffs off to let her wipe after urinating. Inmate ES was then taken back to her ER room and secured back to the bed. Approximately 1815 hours [6:15 PM], Cpl. Hunt called back and stated that the female was trying to get out of the bed but couldn't. She had her restrained to the bed. At approximately 1900 hours [7:00 PM], Cpl. Hunt called back and told Lt. Jaburs Terry that at approximately 1845 hours [6:45 PM] she had her hair pulled and got bitten in her face by inmate ES. Lt. Terry then took female officer Dixie Reese to the hospital with an extra set of restraints to take over custody and get Cpl. Hunt checked at the hospital for injuries.

R Ex 1 at p. 7 (conversion from military time to regular time added).

45. Grievant also prepared a hand-written statement on an incident report form addressed to SCRJ Administrator Brad Douglas on November 13, 2017, in which he stated the following:

On Monday, 13th November 2017, at approximately 1748 hours [5:48 PM], I, Sergeant John E. Roach, II (Day Shift Supervisor), received a phone call from Corporal Traci Hunt who was at CAMC General Hospital with female inmate ES # [redacted]. Cpl. Hunt stated that she had let inmate ES use the bathroom with only leg irons on, when afterwards, she ran towards the ambulance entrance. She stated that she did not put handcuffs on her so she could wipe herself after urinating. Cpl. Hunt stated that she and an EMT took inmate ES to the ground. Cpl. Hunt stated that she now had her secured to the bed and all was O.K. I, Sgt. Roach then called Capt. Christopher Mason, who advised to send an extra set of restraints down and 4-point restrain her to the bed. He also stated for Cpl. Hunt to do a Use of Force Packet when she returns to the

Facility. I, Sgt. Roach called Cpl. Hunt back and relayed this information to her. At approximately 1815 hours [6:15 PM], Cpl. Hunt called back and stated that inmate ES was "thrashing" around the bed, but she was still secured. I, Sgt. Roach told Cpl. Hunt that I was checking schedules to send 2 officers down there to the hospital to relieve her. At approximately 1900 hours [7:00 PM], Lt. Jaburs Terry told myself, Sgt. Roach, that he had just received a phone call from Cpl. Hunt who stated that inmate ES had just pulled her hair and bit her across her face. Lt. Terry stated that he would send out Internal Notifications and make phone calls. I, Sgt. Roach completed the paperwork and assisted in making outside phone calls to Administration. At approximately 1902 hours [7:02 pm], Lt. Terry and Officer Dixie Keese went to CAMC General Hospital to relieve Cpl. Hunt while she gets checked for injuries. Lt. Terry was notified of the attempted escape regarding inmate ES by myself, Sgt. Roach at approximately 1830 hours. End of Report.

R Ex 1 at pp. 14-15 (conversion from military time to regular time added).

46. Cpl. Hunt prepared a written report on November 14, 2017 at 12:37 AM.

See R Ex 1 at pp. 16-17.

47. On November 14, 2017, at 12:57 AM, Lt. Jaburs Terry completed an Incident Report Summary in which he stated the following:

On Monday, November 13, 2017 at 1858 hours [6:58 PM] I received a call from Cpl. Traci Hunt, who was at the hospital sitting with a female inmate. Cpl. Hunt stated that she was assaulted by the inmate she was with at the hospital. I could not understand much after that due to Cpl. Hunt being upset. I called Capt. Thompson and informed him of what I knew. I spoke with Sgt. Roach before I left and he stated earlier around 1545 hours [3:45 PM] Cpl. Hunt called and stated that Inmate ES had attempted to escape by running out of the bathroom and Cpl. Hunt took her down to stop her. Sgt. Roach also stated that Cpl. Hunt will be doing the paperwork when she got back. I went to the Hospital with Officer Keesee (*sic.*) to assess what was going. When I arrived Cpl. Hunt was bleeding from the right side of her face by her eye. Cpl. Hunt stated that Inmate ES grabbed her by the hair and bite (*sic.*) her on the side of her face. Inmate ES only had two points secure, so I secured the other two points. While I was securing Inmate ES grabbed at me and started spitting at Officer Keesee (*sic.*) and myself. One of the Nurses was upset that I secured the other two points. She was secured by 4 points due to her attempting to escape and that she assaulted an officer causing Cpl. Hunt to receive 2 stiches to the right side of her face. After the inmate

was secured I notified Mr. Douglas and Mr. Ames and gave them an update of the situation. Mr. Ames arrived at the Hospital and spoke with Cpl. Hunt. I also contacted the WV State Police and informed them of the Assault. I stayed at the hospital with Cpl. Hunt while she was being treated.

R Ex 1 at p. 13 (conversion from military time to regular time added).

48. On November 14, 2017, Mr. Ames and Mr. Binion interviewed Grievant regarding the events that took place at CAMC on November 13, 2017. See R Ex 8.

49. Grievant was advised by Mr. Ames that he and Mr. Binion were conducting an inquiry into the events from the previous day. Grievant was not placed under oath, nor advised of his Miranda rights, nor were his statements to Mr. Binion and Mr. Ames recorded.

50. During the interview with Mr. Binion and Mr. Ames, Grievant told them that he did not send another officer and extra restraints to the hospital after receiving Cpl. Hunt's telephone call because it was near the end of his shift, and he was waiting for the night shift to come on duty. See R Ex 8.

51. During the interview with Mr. Binion and Mr. Ames, Grievant acknowledged that Capt. Mason told him to send extra restraints to the hospital, but did not send the restraints because he was waiting for the next shift to come on duty. See R Ex 8.

52. Mr. Ames reviewed surveillance video from SCRJ which showed Grievant in his office with other officers standing around during the time frame following the telephone call from Cpl. Hunt.

53. During the interview with Mr. Binion and Mr. Ames, Grievant stated that he did not put out an internal notification about the attempted escape because he was down the hallway helping to serve dinner. See R Ex 8.

54. After being confronted by Mr. Ames who related that he had observed the SCRJ surveillance video which did not show Grievant down the hall assisting with serving dinner, Grievant changed his story to state that he was getting ready to go down the hall to help. See R Ex 8.

55. During the interview with Mr. Binion and Mr. Ames, Grievant acknowledged that he received a second telephone call from Cpl. Hunt following the inmate's escape attempt. Grievant received this call around 6:15 PM, and Cpl. Hunt complained that the inmate was secured to the bed but still thrashing around. Grievant nonetheless failed to send additional restraints to the hospital at that time. See Rex 8.

56. Mr. Ames documented the interview which he and Mr. Binion conducted in written form. See R Ex 8.

57. On November 16, 2017, three days following the incident at CAMC, Capt. Christopher Mason submitted an Incident Report in which he stated the following:

On Monday, November 13, 2017, I, Capt. Christopher Mason, received a phone call from Sergeant John Roach around 1800 hours [6:00 PM]. Sgt. Roach told me that we had an Inmate sent from the courthouse to the Hospital and Cpl. Traci Hunt took over the hospital duty. I said ok and then he told me while in the ER Cpl. Hunt let Inmate ES #[redacted] use the rest room and when she was finished inmate ES took off running and Cpl. Hunt had to tackle her and place her back into the bed and she had secured her back to the bed. At this time, I was at home sick and I needed to get off the phone for a minute so I could throw up. Before I could call back Sgt. Roach had called me back this being around four minutes later he told me that Night shift only had Officer William Miller to send for hospital duty and he would have to send Officer Dixie Keesee (*sic.*) with him unless I would approve just Miller to go. I told him no that

inmate ES tried to escape and we needed to put two Officers on her. Sgt. Roach said ok and that he had someone going to the Hospital to take more restraints[.] I said good and he asked if he should do a INF and I said yes and we hung the phone up. Around 1900 hours [7:00 PM] I reserved (*sic.*) a phone call from Mr. Ames telling me that Cpl. Hunt had got bitten and I told him the above aforementioned report.

R Ex 1 at p. 12 (conversion from military time to regular time added).

58. On August 10, 2015, RJA promulgated Policy and Procedure Statement No. 2015, entitled "Notification of Unusual Incidents." The policy states as follows: "To ensure prompt, accurate and complete response to all serious or unusual incidents occurring at each facility, the Administrator, or designee, shall notify the Regional Jail and Correctional Facility Authority's Deputy Chief of Operations by telephone of all such occurrences. The Deputy Chief of Operations will then notify the Chief of Operations. The Chief of Operation (*sic.*) will then notify Deputy Executive Director and Executive Director." R Ex 6.

59. Policy Number 2015 lists certain events which are defined as serious incidents or unusual occurrences to include escape of an inmate and any incidence or occurrence that requires off-site or on-site treatment of an employee, and any inmate on officer assault. See R Ex 6.

60. Over the years prior to this incident, Capt. Mason and Grievant worked together to prepare numerous reports in compliance with Policy 2015.

61. On August 26, 2015, RJA promulgated Policy and Procedure Statement No. 3010, entitled "Code of Conduct." See R Ex 7.

62. Policy 3010 states, in pertinent part: "Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes

to their attention indicative of an unusual incident, a violation of the law, rules, and/or regulations by either an employee or inmate.” See R Ex 7.

63. On January 9, 2018, Grievant was handed a letter from April M. Darnell, RJA Director of Human Resources, notifying him of a predetermination conference to be held on January 10, 2018. The notice letter stated, in pertinent part:

This meeting will be held to provide you with the opportunity to respond to the tentative conclusion that you should be dismissed from your employment as a Sergeant (CO IV) with the South Central Regional Jail for poor performance. Specifically, it has been determined that, in violation of Regional Jail policy and procedures, you failed to conduct your supervisory duties as Shift Supervisor on November 13, 2017. You failed to assist a fellow officer who had contacted you via telephone of an inmate that had tried to escape their custody while in the hospital. The inmate was comprehended (*sic.*) and restrained to the bed but was thrashing around in the bed, so the officer contacted you for extra restraints. You did not send additional officers to assist the officer nor did you send extra restraints to be placed on the inmate. Your failure to provide assistant (*sic.*) and additional restraints, resulted in the officer getting bit in the face by the inmate which required stitches.

R Ex 5.

64. Grievant complained of the short notice and that he was ill, resulting in the predetermination conference being postponed.

65. Grievant was issued a new notice of a predetermination conference dated January 9, 2018, advising of a meeting on January 18, 2019, containing an identically worded notice of potential dismissal from employment. See R Ex 10.

66. Grievant participated in the rescheduled predetermination hearing on January 18, 2019.

67. On January 29, 2018, April M. Darnell, Respondent’s Director of Human Resources, issued a letter to Grievant stating as follows:

The purpose of this letter is to advise you of my decision to demote you from your position as a Correctional Officer IV (Sergeant), Pay Grade 12, to the position of Correctional Officer II, Pay Grade 10, which results in a **reduction in your hourly rate from \$19.9040 to \$17.5156 effective February 17, 2018**. This action constitutes a *demotion with prejudice* because of poor performance in your supervisory capacity which has resulted in my loss of confidence in your ability to perform the functions of your position and which has undermined the efficient operation of the South Central Regional Jail. Although this demotion is not effective until February 17, 2018, you are hereby relieved of your supervisory responsibilities, effective immediately, as it relates to a Sergeant.

This personnel action is taken in accordance with the *Administrative Rule* of the West Virginia Division of Personnel, Section 11.4, and provides for a fifteen (15) calendar day written notice. Section 11.4 of the *Administration (sic.) Rule* of the West Virginia Division of Personnel states: *A demotion with prejudice is a reduction in pay and/or a change in job class due to the inability of an employee to perform the duties of a position or for improper conduct.*

On January 18, 2018, you met with me, Brad Douglas, Administrator, Christopher Mason, Captain, J.T. Binion, Chief of Operations[,] Katrina Kessel, Assistant HR Director and Mary Cain, Human Resources Manager for a predetermination meeting. At that time, it was shared with you that disciplinary action, up to and including dismissal, was being considered. Your response was as summarized:

You said that Officer Hunt, who was posted on hospital duty, called you and told you that the inmate in her custody had tried to escape, but she was fine. Officer Hunt then called back and told you that the inmate had bitten her on the face. You said that you contacted Lt. Terry thirty (30) minutes later and told him what had happened. You said you did all the necessary paperwork and notified everyone. You said you sent people and restraints to the hospital. You said you apologized to Officer Hunt and if you had it to do over, you would go to the hospital yourself. You said you're always stuck at the jail for all holidays. You were sick and couldn't go to the doctor because you couldn't leave work. You said you were guilty for the delay for sending the restraints and an additional officer to assist Officer Hunt and you were sorry for what happened to Officer Hunt and that nothing was done in malice.

So that you may understand the specific reasons for your demotion, I relate the following: On November 13, 2017, you failed to assist a fellow officer who had contacted you via telephone of an inmate that had tried to escape their custody while in the hospital. The inmate was apprehended

and restrained to the bed but was thrashing around in the bed, so the officer called you again and asked you to send extra restraints. Instead of immediately sending someone to assist the officer with additional restraints, you waited thirty (30) minutes before you contacted the Lieutenant of the issue (sic.). Your relaxed response resulted in the inmate biting the officer in the face requiring medical attention.

Your actions have placed you in violation of the following WV Regional Jail Authority Policy and Procedure:

1015 – Notification of Unusual Incidents:

- #1 – *The following are defined as serious incidents or unusual occurrences:*
 - A. *Escape of an inmate;*
 - D. *Serious injury or death of an inmate, staff member, or visitor to the facility;*
 - I. *Any other incident that may result in litigation or negative publicity with regard to the facility or Authority;*
 - K. *Any incident or occurrence that requires off-site or on-site treatment of an employee.*

3010 – Code of Conduct:

- #9 – *All employees shall promptly and faithfully execute all lawful orders / instructions of a supervisor. An employee, believing in good faith that an order is of a questionable nature, may appeal such order at a later time through the administrative structure or the grievance process. Insubordination or refusal to follow a lawful order of a supervisor shall constitute grounds for disciplinary action.*
- #14 – *Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of the law, rules, and/or regulations by either an employee or inmate.*
- #16 – *All employees shall remain, alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.*
- #18 – *All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as*

valid. All employees are required to provide relevant, truthful, and complete information when required by a supervisor or investigator.

As a supervisor, you are required to observe a higher standard of conduct as you serve as a role model for employees. It is your basic responsibility to set an example for employees as to how they are to interpret and apply WV Regional Jail Authority policies and procedures, and how to respond to problems they confront in their daily activities. The employees under your supervision rely on you for training, leadership, and direction in complying with the rules and regulations. It is then the subordinate's responsibility to apply your instructions in the workplace. I conclude that your performance makes it difficult, if not impossible, to enforce compliance with policy by your staff. Your performance is not acceptable for employees to emulate.

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 upon the abilities and integrity of their employees, or create suspicion with reference to their employees' capability. I believe the nature of your behavior is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the WV Regional Jail Authority, South Central Regional Jail, thus warranting this demotion.

* * *

R Ex 9 (emphasis in original).

68. Prior to this incident, Grievant had not been disciplined in the course of his employment by RJA.

69. After the incident, Grievant apologized to Cpl. Hunt for what happened to her, while still insisting that he did nothing wrong.

70. At the time of the incident involving the attempted inmate escape and subsequent assault on Cpl. Hunt, Grievant had returned to work following the death of his sister, and was under stress related to grief from that event, financial issues relating to paying for his sister's funeral, as well as distress resulting from custody of his late sister's youngest daughter being transferred to her father in another state. Grievant did

not make his superiors at RJA aware of his emotional issues until after the events leading up to his demotion transpired, nor did he seek any form of leave to recover from this stressful situation and any resulting medical conditions. Grievant acknowledged that he came back to work too soon, before he was emotionally ready to perform his duties.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490

(1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Grievant contends that he was not adequately trained on his duties as a Sergeant or Shift Commander, and that he had never encountered a situation like the events which occurred on November 13, 2017, an escape attempt at a location outside the jail. However, Grievant had previously served for an extensive period of time as a Corporal, which is also a supervisory position. Moreover, the expected response from Grievant as a supervisory officer was to lead, not simply adhere to some established step-by-step procedure. The credible testimony of Grievant's co-workers established that any experienced Correctional Officer would recognize that a prisoner's escape from custody in the hospital emergency room required the assistance of at least one more officer with an additional set of restraints, so that the inmate could be secured to her bed in the emergency room at four points (both arms and both legs fastened to the metal bed rails). Moreover, this was the explicit instruction Grievant received from Captain Mason at approximately 6:00 PM, and Grievant still failed, without any cogent explanation, to initiate an appropriate response. Grievant admitted that he told Capt.

Mason that he would take care of the situation, and then claimed credit for meeting that promise when, nearly an hour later, Lt. Terry took another officer and went to the hospital to assist Cpl. Hunt, after she had already been assaulted.

Employers are not expected to train experienced employees on taking the initiative, prioritizing multiple tasks and effective decision-making, skills and abilities which distinguish supervisors from their subordinates. Grievant's assertion that he acted appropriately in the circumstances is completely absurd, and is not supported by any credible evidence. Grievant may not have simply clocked out and walked off the job after receiving notice that a prisoner had briefly escaped from Cpl. Hunt, but what Grievant did thereafter represented a total lack of inertia. Grievant's insistence that he has somehow been victimized by his superiors, when he was not terminated for a serious dereliction of duty, is completely unrealistic.

With regard to the allegations that Grievant failed to make timely notification of unusual incidents in accordance with RJA Policy 1015, the evidence is not as compelling. It does appear that someone was expected to notify the Deputy Chief of Operations by telephone of the escape attempt, and that Grievant only called Capt. Mason, who was not serving in the capacity of Deputy Chief of Operations at that time. Further, unlike the expected response of a supervisory Corrections Officer serving as a Day Shift Supervisor to an off-premises escape attempt, Respondent did not establish who Grievant should have notified, nor which individual was considered to be the "Administrator's designee" within the meaning of Policy 1015 at the time of the incident. In addition, Grievant credibly testified, and stated in his contemporaneous written

report, that Lt. Terry indicated to Grievant that he would accomplish required notifications regarding the assault on Cpl. Hunt, and Lt. Terry did proceed to make several such notifications by mobile phone on his way to CAMC with Officer Keese.

Moreover, there are due process issues extant in regard to the allegations concerning failure to timely provide notification of an unusual incident. As a tenured state employee, Grievant has property and liberty interests which entitle him to procedural due process when facing a potential dismissal or, ultimately, a demotion with prejudice resulting in a significant loss in pay. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); *Large v. Dep't of Health & Human Res.*, Docket No. 2017-0210-DHHR (July 20, 2017); *Adkins v. Dep't of Health & Human Res.*, Docket No. 2013-0264-DHHR (July 19, 2013). Accordingly, where an act of misconduct is asserted in a decision letter imposing a disciplinary demotion, it should be identified in a reasonably specific manner so as to allow the affected employee to prepare a responsive defense at a subsequent hearing. *Adkins, supra*. *See Arnett v. Kennedy*, 416 U.S. 134 (1974); *Clarke, supra*; *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977). *See also Mangum v. Lambert*, 183 W. Va. 184, 394 S.E.2d 879 (1990).

The predetermination notice issued to Grievant focuses upon his alleged failure to provide timely assistance to Cpl. Hunt, and makes no mention of any failure to make required notifications to agency administrators. The decision letter advising of his demotion, in addition to confirming Grievant's failure to respond to an inmate escape attempt in a timely and proper manner, further cites to violations of provisions in Policy

1015, Notification of Unusual Incidents, and Policy 3010, Code of Conduct, item 14, without describing how Grievant's conduct fell short of the requirements in those policies. In other words, RJA's Code of Conduct and Notification policies are merely recited without any effort to connect those requirements to Grievant's actions, or lack thereof, at the time of the events at issue. In accordance with principles of constitutional due process, Grievant was entitled to a more specific statement of who should have been notified and what the time frame for completing such notification applied in the circumstances presented. See *Snyder, supra*. This is particularly problematic where there is evidence that Grievant made some oral and written notifications to superiors, and that some further notifications were made by other personnel.

Grievant insisted that he completed all notifications to the best of his ability. Perhaps, as a supervisor, Grievant should have known exactly what reports needed to be made, to which particular officials, and the time limits for completing such requirements. However, Grievant's deficiencies in this regard have never been described in adequate detail to allow the undersigned Administrative Law Judge to definitively determine whether he succeeded or failed. Therefore, to the extent Grievant is alleged to have violated established RJA policies by failing to make timely and appropriate notifications following an inmate escape attempt at CAMC General Hospital, or a subsequent inmate assault on an officer at that same location, while serving as Day Shift Supervisor on November 13, 2017, such charges are not sustained.

At the time of the events giving rise to this disciplinary action, Grievant held the position of Sergeant (Correctional Officer IV), and was serving as the Shift Commander for the day shift at SCRJ. When considering whether Grievant was appropriately disciplined for his culpable conduct, the employer may properly hold Grievant to a higher standard of conduct, because a supervisor is expected to set an example for those employees under his supervision, and to enforce the employer's rules and regulations, as well as implement the directives of his supervisors. *Hileman v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2017-2054-CONS (Mar. 26, 2018), *aff'd*, Cir. Ct. of Kanawha County, No.18-AA-205 (Nov. 29, 2018); *Wiley v. W. Va. Div. of Natural Res., Parks & Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1998). See *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997).

Where, as here, the employer proves some, but not all, of the charges against an employee, the Grievance Board must determine whether the penalty imposed, in this case, demotion by two grades, is otherwise supported by the charges which were proven. See *Adkins, supra*. Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Any determination whether the penalty imposed is excessive must necessarily be made on a case-by-case basis.

In this particular matter, RJA established that Grievant failed to perform his supervisory duties as a Sergeant and Shift Commander at SCRJ in response to an

inmate escape attempt at a local hospital several miles from the jail. It is this failure to provide timely and appropriate assistance to the single officer at the hospital which represents the most serious charge at issue in this grievance. The alleged failure to make timely notifications were not life threatening. RJA's failure to establish those charges does little to reduce the gravamen of the offense. Although Grievant had worked as a Correctional Officer for more than twenty years, he had only been serving as a Sergeant for less than two months. Mr. Binion credibly testified that, based upon Grievant's failure to properly respond in a fluid situation involving a prisoner escape attempt, RJA had lost confidence in Grievant's ability to satisfactorily perform his supervisory duties. Further, Mr. Binion stated that Grievant had adequately performed his duties as a Correctional Officer II over an extended period of time. Thus, rather than terminate Grievant's employment, RJA elected to demote him two grades to a non-supervisory position where it could be expected that Grievant would perform at an acceptable level.

Mr. Binion's assessment of the situation is consistent with the established facts. Grievant did not engage in malfeasance, or misfeasance, but rather nonfeasance, a failure to act in a timely and appropriate manner. Although Grievant insists that he would act differently if confronted with this same situation in the future, the Respondent's difficulty in accepting this explanation is that the next unusual incident confronting Grievant may be just as unusual as the events involved here. Thus, if it is not a matter that is substantially like one that Grievant has previously encountered, what is the likelihood that Grievant would deal with that incident any more effectively?

Mr. Binion's rationale for the penalty imposed, proposing that Grievant can be expected to perform the duties of a Correctional Officer effectively, while lacking confidence in his ability to perform his supervisory duties in the event of an unanticipated crisis, supports the Respondent's exercise of its discretion to impose the discipline chosen, a demotion to a non-supervisory employment status, and an Administrative Law Judge may not simply substitute his judgment for that of the Employer, when it has not been shown that the penalty imposed represented an abuse of the employer's discretion, or involved an arbitrary and capricious determination. *Kostick v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2017-1684-MAPS (Jan. 23, 2018); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "Mitigation of the punishment imposed by the 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 & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

3. In assessing a penalty imposed by an employer, whether to mitigate the punishment depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question, as well as any mitigating circumstances, all of which must be determined on a case-by-case basis. See *Kostick v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2017-1684-MAPS (Jan. 23, 2018); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

4. Although Respondent failed to provide due process to Grievant in regard to allegations that he failed to properly report one or more unusual incidents in accordance with established RJA policies, Respondent proved by a preponderance of the evidence the most serious charge against Grievant concerning his failure to properly respond to an inmate escape attempt by immediately sending appropriate assistance to an officer at an off-site location, and thus demonstrated good cause for his demotion.

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 30 days of receipt of this Decision. See W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

LEWIS G. BREWER
Administrative Law Judge

Date: February 25, 2019.