WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DON EDWARD VANCE,
Grievant,

v. **Docket No. 2019-0376-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF PRISONS AND JAILS/SOUTHWESTERN REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.

D E C I S I O N

Don Edward Vance, Grievant, filed this grievance against his employer the Division of Corrections and Rehabilitation/Bureau of Prisons and Jails/Southwestern Regional Jail and Correctional Facility,[1] Respondent, protesting disciplinary action taken and the sanctions levied. The original grievance was filed on September 19, 2018, provides:

> The Grievant was discharged for allegedly failing to perform required checks on inmates who were on suicide watch while the Grievant was on temporary assignment at South Central Regional Jail from South Western Regional Jail. The Grievant asserts that the basis for the discharge/termination is unwarranted.

The relief sought states:

> Reinstatement to position as Correctional Officer with back pay.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.[2] Grievant appealed to level three on September 19, 2018.

[1] (WVRJA)(*now* Division of Corrections and Rehabilitation)

[2] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

A level three hearing was held before the undersigned Administrative Law Judge on March 19, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel Robert Kuenzel, Esquire of Kuenzel Law, PLLC. Respondent was represented by agency counsel, Briana Marino, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. A mailing date for the parties' proposals was established. Prior to the submission date, a request was received requesting an extension. An extension for the filing of proposed fact/law documents was granted, establishing a new mailing date for submission of fact/law proposals. A phone conference transpired on July 17, 2019, among the parties at the behest of the undersigned Administrative Law Judge. This matter is now mature for decision and became such shortly after the assigned August 26, 2019, date for the submission of fact/law proposals.

Synopsis

The incident(s) giving rise to the termination of Grievant's employment transpired during his assignment at the South Central Regional Jail located in Charleston, West Virginia, in June of 2018. Grievant submits that his termination was unwarranted and overly punitive considering the totality of circumstances. Respondent alleged that Grievant engaged in conduct that is and/or was in violation of applicable WV Regional Jail Authority Policy and Procedure. Respondent, by a preponderance of the evidence, established that Grievant did not perform his duties within the standard of conduct established by policy, procedure and/or training. Respondent established Grievant, as

a correctional officer charged with the care, custody, and control of female inmates, had violated multiple policies, allowed the inmates to violate multiple policies, and failed to report the violations. The nature of the misconduct was significant enough for Respondent, within its scope of discretion, to reasonably conclude that termination of Grievant's employment was warranted. Grievant has not provided adequate rebuttal to overturn or significantly mitigate the disciplinary actions of Respondent. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by Division of Corrections and Rehabilitation ("Corrections" or "Respondent") as a permanent employee in the classified service, a Correctional Officer II assigned to the Southwestern Regional Jail (SWRJ) in Holden, West Virginia. Grievant has been employed by Respondent since August 15, 2015.[3]

2. At the time of the incidents giving rise to the instant disciplinary action Grievant was on temporary assignment to the South Central Regional Jail (SCRJ), Charleston, West Virginia. SCRJ was experiencing staffing complications, e.g. shortage of correctional officers.

3. Employees from other regional jails were used to cover South Central Regional Jail staffing issue. This practice while not necessarily ideal is implemented

[3] At the time of the June 11, 2018, incidents giving rise to the instant disciplinary action Grievant was two months shy of three years' service with Respondent.

among and between the regional jails to cover, staffing quotas and short term employment concerns.

4. Grievant had filled in and/or worked assignment at the South Central Regional Jail (SCRJ), Charleston, West Virginia prior to June 11, 2018.

5. On June 13, 2018, agency personnel received a phone call from an individual outside of the facility, reporting that a male correctional officer was making lude comments to female inmates and suggesting that one or more of them show him their privates to him. This prompted Lieutenant Jaburs Terry to view security video and take note of officers' activities. L-3 testimony, also see Lt. Terry's June 13, incident report.

6. Lieutenant Terry has been employed with Respondent for fifteen (15) years. He is currently serving in a supervisory role and is relatively familiar with Correctional Officers Code of Conduct.

7. There are agency wide policies, which are consistent with and throughout all regional jails and there are staff notices which are more individualized to a specific facility. *See* Wv Regional Jail and Correctional Facility Authority, Policy and Procedure Statements, R Ex 13, 14, 16, 17; Staff Notice R Ex 15[4]

8. Lt. Terry, after viewing some or part of the security video for June 11, 2018,[5] identified Grievant and was of the opinion that Grievant's actions did not conform with WV Regional Jail Authority Policy and Procedure applicable to the circumstances.

[4] R Ex 13: Subject "Notification of Unusual Incidents"; R Ex 14: Code of Conduct; R Ex 16: *Prevention and Intervention of Inmate Sexually Abusive behavior and Staff Sexual Misconduct*; R Ex 17: Subject Internal Investigations and Staff Notice, R Ex 15: Duty Post for Special Management Unit.

[5] Grievant was relieving a female Correctional Officer from the Female Special

9. Lt. Terry wrote an incident report.[6] Lt. Terry burned a copy of the security video and contacted his superiors. Further investigation of the matter commenced. Lt. Terry also made arrangements to secure sworn statement from inmates housed in the unit depicted in the security video (SCRJ Housing Unit A Pod Section 7).

10. Statements from four female inmates housed in the unit depicted in the security video were secured. The inmates were conversed with regarding what occurred in separate interview rooms.

11. Lt. Terry initially required Cpl. Ashlee Tomblin to obtain a sworn statement from A.G., regarding her knowledge of the allegations.[7] Then subsequently believed it warranted to obtain sworn statements from three (3) other female inmates who were either alleged victims or witnesses: C.D.C., V.L.H., and R.L.D.

12. There was a formal grievance filed regarding Grievant by one or more of the inmates. Agency officials, after reviewing the sworn statements, were of the opinion that all the inmates told a similar story with only minor differences. Further investigation was warranted.

13. An investigation was conducted on behalf of Respondent by Investigator II Michael A. Wayne and then newly hired Investigator II Barry Blair. Investigator Wayne

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Management Unit of SCRJ for lunch between 22:50 hours and 24:00 hours on the 11th of June 2018. Date of this security video not necessarily controversial but incidents are cited as June 11, and/or June 12, difference seems to be in relation to perspective, the evening shift before the investigation.

6 Copy of Lt. Terry's June 13, 2018 incident report is included in Respondent's Investigative Report, R Ex 2.

7 The names of the female inmates will not be used in this decision. Initials or algebraic symbols will be used to identify inmates. The proper names of the inmates are contained in the official investigative reports and/or statements.

of (DMAPS) provided Respondent with a thirty-two page report, with exhibits and other support documentation. R Ex 2 The report is dated June 14, 2018.

14. Sworn statements from female inmates housed in the unit depicted in the security video were included as support evidence to the investigative report. Further, written depictions of phone conversation between identified inmates and individuals outside of the facility were made exhibits.

15. A primary purpose of the investigation was to determine whether any violations of the Prison Rape Elimination Act ("PREA") had occurred. A DVD/jump drive of the alleged Prison Rape Elimination Act Allegation of June 11, 2018, is an exhibit of the instant grievance, and was an exhibit of Respondent's Investigation report. The video has no sound. The security video provides vision data of some of Grievant's conduct. The video includes Grievant sitting at the dayroom table when he should have been performing security checks on suicidal inmates, talking to female inmates that he had released from their cells to order commissary, speaking to female inmates off camera, allowing female inmates to whisper in his ear and within an inappropriate distance from him, and allegedly allowing a female inmate to expose her buttocks to him without reporting the behavior.

16. The video also revealed multiple actions by inmates, which Grievant failed to report, including multiple female inmates freely roaming around the jail pod, including walking up to the unsecured pod door and looking out, inmates approaching "bean holes"(or food service slots) in cell doors of other inmates and communicating through them, and female inmates being out of cells without wearing appropriate attire.

17. The June 14, 2018, investigation report provided a variety of data, (not all information as present is relevant to this grievance). The thirty-two page report contained a section identified as findings of fact. The findings were not numbered. Among that information the report provided:

> Finding of fact:
>
> "[t]here is insufficient evidence to prove that {Grievant} engaged in any type of forced or consensual physical/sexual contact with inmates "x", "y", "z", or "xx" therefore the allegations are unsubstantiated.
>
> There is also insufficient evidence to prove that {Grievant} sexually harassed any of the female and or encouraged them to engage in sexual contact with one another in exchange for providing them contraband.
>
> There is however sufficient evidence to prove the following:
>
> {Grievant} failed to document that he observed the buttocks of Inmate Y.
>
> {Grievant} allowed his suicide watches to go over the 15-minute time requirement due to having conversations with other female inmates in housing unit A-7.
>
> {Grievant} did allow female inmates to be in the dayroom area of the special management housing unit A-7 with only boxer underwear and a shirt for extended time.
>
> {Grievant} did allow female inmates to be in his reactionary gap (under six inches) for extended time without justification, giving the appearance of improper conduct on {Grievant's} behalf.
>
> {Grievant} failed to write a report documenting that the female Inmates had requested him to bring tobacco products to them.
>
> {Grievant} failed to announce male Staff on the floor as he entered a female housing unit as required by Prison Rape Elimination Act.
>
> {Grievant} allowed conversations of personal nature with female Inmates distract him from completing required duties.
>
> {Grievant} did provide false and incomplete information . . . ". R Ex 2

18. A Pod section 7 was a special management unit, which included inmates on suicide watch. Inmates on suicide watch require and/or are provided heighten attentiveness. "Potential suicide risk shall be continually monitored including verbal exchange at a minimum of every 15 minutes and infrequently" Staff Notice #123, R Ex 15

19. Grievant's recollection of events and conversation is incomplete. Grievant tends to provide an alternative interpretation of visual data and unable to recall much regarding conversations that transpired between himself and inmates. Grievant provided information to investigators at a time relevant to the event.

20. Correctional Officers are trained that they are not to engage in behavior that could be misconstrued or used to compromise their ability to perform their duties.

21. An investigation of the incident was conducted by agency personnel. When Grievant was interviewed during the investigation he did not recognize that he had done anything wrong.

22. Grievant was issued a suspension pending investigation by a letter dated June 14, 2018.

23. By letter dated September 17, 2018, Grievant's employment with the Respondent was terminated. The letter was signed by SWRJ Superintendent Timothy King and cited the following conclusions set out in the investigation:

> Your actions are in violation of the following *WV Regional Jail Authority Policy and Procedures*:
>
> <u>3010 – Code of Conduct</u>
>
> - *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.

- *32 – Employees are to be alert, to detect and prevent escapes or other incidents and/or violations of institutional regulations.*

Staff Notice #123 dated March 28, 2018

#5 states: Inmates classified as potential suicide risks may be confined to a section in A pod as long as it remains a direct supervision unit. Potential suicide risks shall be continually monitored including verbal exchanges at a minimum of every 15 minutes and infrequently.
#9 states: Only one inmate is allowed out of their cell at any given time in the dayroom area, regardless of the circumstances. If the inmate is outside of their cell you are to be within arm's reach from the inmate and if he/she is in the shower you are to be outside of the shower stall. No special management inmates are to be out of cell without supervisor's permission and are not permitted to be upstairs.

R EX 5

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for ""good cause," meaning "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). *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*).

Respondent maintains that it responsibly dismissed Grievant for multiple violations of policies related to the appropriate care, custody, and control of inmates in a special management area dedicated, in part, to suicide prevention, all in violation of the West Virginia Regional Jail Policy and Procedure #3010 — Code of Conduct and associated Staff Notices. Grievant avers that his discipline was unwarranted, unfair, and excessive. Grievant highlights he was working a temporary assignment and was terminated based

on facility specific conduct notices, which likely varies within the facility, but is not established to be known to Grievant and/or conduct under his control. Grievant maintains when properly analyzed, against the relevant policies and precedent, the facts which derive the basis for Grievant's termination does not justify the disciplinary action.

Respondent avers that Grievant's irresponsible conduct in supervising female inmates, individually and/or collectively, is good cause to conclude that Grievant is unable to effectively perform the required duties of his position without creating a substantial risk of harm to the inmate population and the facility. Respondent strongly infers to the point of unspoken truth that there is a pattern of wholly irresponsible conduct in Grievant's supervision of these female inmates, individually and/or collectively.

Respondent called three witness, namely supervisor Lieutenant Jaburs Terry, Michael Wayne, Agency Investigator and Timothy King, SWRJ Superintendent. Each witness testified to their respective role in this matter, from the initial receipt of the complaint to the investigation and ultimate dismissal of Grievant. Each witness demonstrated a demeanor which was calm and professional, and each witness showed a clear and comprehensive grasp of their duties relative to their role in the process which led to Grievant's termination. In addition to the witnesses, Respondent introduced, without objection, the report of the investigation and the facility video.[8] Much of the evidence Respondent presented at the Level Three hearing was an encapsulation review of Respondent's June 14, 2018 investigation report. R Ex 2 There was a formal grievance

[8] Each of these items were introduced into evidence pursuant to a Stipulated Protective Order due to the security sensitive nature of the information contained therein.

filed regarding Grievant by one or more of the female inmates he was assigned to supervise. Agency officials after reviewing the sworn statements, were of the opinion that all the inmates told a similar story with only minor differences. A primary purpose of the investigation was to determine whether any violations of the Prison Rape Elimination Act ("PREA") had occurred. A DVD/jump drive of June 11, 2018 is an exhibit of the instant grievance, and was an exhibit of Respondent's Investigation report. *See* finding of fact 15, 16.

Respondent maintains Grievant was relieving a female Correctional Officer from the Female Special Management Unit of SCRJ for lunch on the 11th of June 2018 and provides Grievant's conduct during that time period did not conform with WV Regional Jail Authority Policy and Procedure applicable to the circumstances. The undersigned is aware that there are agency wide policies, which are consistent with and throughout all regional jails and there are staff notices which are more individualized to a specific facility. *See* WV Regional Jail and Correctional Facility Authority, Policy and Procedure Statements, R Ex 13, 14, 16, 17; Staff Notice R Ex 15[9]

The September 19, 2018 termination letter provided to Grievant noted that the reason for Grievant's termination as:

> On June 11, 2018, while working a post at South Central Regional Jail and Correctional Facility, in Housing Unit, A Pod, Section 7, you did not perform the required checks on suicidal inmates. These checks are required to be done at least one time every fifteen minutes, and during these checks, you were to have verbally communicated with those inmates to assess their

[9] R Ex 13: Subject "Notification of Unusual Incidents"; R Ex 14: Code of Conduct; R Ex 16: *Prevention and Intervention of Inmate Sexually Abusive behavior and Staff Sexual Misconduct*; R Ex 17: Subject Internal Investigations and Staff Notice, R Ex 15: Duty Post for Special Management Unit.

> situation. Further, you were not to allow more than one inmate out of his or her cell at a time on this unit. By your own admission, you did not perform these checks in a timely fashion, placing the inmates requiring these checks in danger. Instead of performing these checks, you sat at a table in the day room; you allowed multiple inmates out of their cells at the same time; talked to inmates that you had released from their cells to order commissary; you allowed multiple inmates to freely roam around the pod, including allowing them to walk up to the unsecured pod door and peek out; you were off camera speaking to inmates; you allowed an inmate to whisper in your ear, and within an inappropriate distance from you; you allowed inmates to approach bean holes of other inmates doors and communicate through these; you allowed inmates out of cells without having appropriate attire on; and, you allowed an inmate to expose her buttocks to you without reporting the behaviors. Inmates are placed on a suicide watch so that their behaviors can be more closely monitored, to prevent them from harming themselves. By not performing these checks in an appropriate fashion, and in a timely manner, you placed each and every inmate on suicide watch in danger. This behavior cannot be tolerated of a correctional officer.

R Ex 4

Respondent highlighted identifiable policy, procedure and applicable code of conduct Grievant's actions are deemed to have violation, e.g., WV Regional Jail Authority Policy and Procedure 3010, Code of Conduct. *See* finding of fact 23. As a result of Grievant's attitude and conduct in supervising female inmates, he created a potential and actual threat, depicted in words and visual data.

Facility video unequivocally demonstrated that Grievant did not perform even the minimum fifteen minute checks on suicidal inmates during his shift in A-7 on the date in question. Facility video also unequivocally shows the female inmates released from their cells speaking freely with Grievant. At certain points, a female inmate can be seen whispering in Grievant's ear, conduct which is wholly inappropriate for a female inmate and a male officer, and which should have been immediately corrected. According to

the unrefuted testimony of Respondent's witnesses, correctional officers are required to maintain a "reactionary gap" between the officer and the inmates. Despite this safety protocol, Grievant was observed allowing inmates to encroach upon his person, even allowing a female inmate to whisper in his ear. Grievant did nothing to correct this behavior, and he did not file any reports of the violations by the inmates. Given particularly that the inmates involved were all female, Grievant's misconduct in allowing this behavior to occur without correcting the same created an appearance of impropriety and over familiarization with the female population under his care, custody, and control. Grievant failed to take any action which would have corrected the behavior in addition to failing to report its occurrence.

While Grievant attempts to argue that he was in an unfamiliar facility, he was a seasoned employee, having been employed as a correctional officer since August 10, 2015, and previously served temporary duty assignment at other jail facilities (including SCRJ). Allowing the female inmates to encroach upon his "reactionary gap" was a clear violation of Regional Jail Policy #3010 which requires Grievant to remain alert, observant, and occupied with facility business during his tour of duty and conduct himself in a manner which will reflect positively upon the Authority and its employees.

WVRJCFA prohibits and specifically forbids fraternization or sexual interaction between staff and inmates. What constitutes behavior of a sexual nature between employees and inmates is well defined. *See* R Ex 16. Grievant is and was aware of applicable rules and regulations which prohibits behavior which constitute sexual nature

between staff and inmates.[10] *See* Grievant's PREA Training Acknowledgement, R Ex 6. 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 (2008). Respondent persuasively established Grievant did not conduct his actions as a prudent correctional officer on June 11, 2018. Respondent, by a preponderance of the evidence, demonstrated just cause to discipline Grievant. Respondent demonstrated that Grievant acted contrary to standardized training and in violation of applicable code of conduct (procedure/policy) Grievant is or should have been aware of, *see* R Ex 6 -12. Respondent successfully argued Grievant's conduct was more than a little lapse in judgement. Further, not all examples of alleged procedure lapses were deemed necessary to be set out in detail in this decision.

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent maintains that Grievant's

[10] Evidence obtained during the investigation revealed that a female inmate requested to go to the Medical Unit for an evaluation of a boil on her buttocks for treatment. By Grievant's own admission in the investigation, the female inmate tried to show him the affected area on her buttocks by pulling down her boxer shorts. Grievant failed to report this behavior of the inmate, despite the serious nature of a female inmate attempting to expose her private areas to a correctional officer. The risk to the officer of a claim of a PREA violation, and the risk to the facility relative to an unreported critical incident is significant and substantial.

irresponsible conduct in supervising female inmates, individually and/or collectively, is good cause to conclude that Grievant is unable to effectively perform the required duties of his position without creating a substantial risk of harm to the inmate population and the facility. Further, Respondent highlights the liability of the agency for the conduct of its correctional officers, and the heightened responsibility to protect inmates' safety and well-being. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra*

After reviewing the numerous documents and support data submitted as evidence in this case, the undersigned cannot escape the conclusion that Respondent did not abuse its substantial discretion. Respondent by a preponderance of the evidence established the facility received communication/complaints about Grievant's behavior from a family member of an inmate under his care, an investigation was initiated wherein it was substantiated that Grievant violated a number of institutional policies placing the facility and allegedly inmates at a substantial risk. As a result of the investigation, Respondent dismissed Grievant from employment for failing to perform required security checks on suicidal inmates, allowing multiple inmates out of their cells at a time when inmates were required to be locked down, and talking to the female inmates that had been released from their cells, at an inappropriate distance from his person. Grievant allowed inmates to walk up to a secure door to the section and look out into the hallway, allowed

female inmates out of their cells without proper attire, and allowed a female inmate to expose her buttocks to him without reporting this behavior.

Respondent, by a preponderance of the evidence, established that Grievant did not perform his duties within the standard of conduct established by policy, procedure and/or training. The nature of the misconduct was significant enough for Respondent, within its scope of discretion, to reasonably conclude that termination of Grievant's employment was warranted. Proper disciplinary action is determined by the severity of a violation. Progressive disciplinary procedure does not bar termination as proper disciplinary action for an offense deemed sever or recognized as destructive. This 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.

The following conclusions of law are appropriate in this matter:

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 Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "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). *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)).

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 his 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. Respondent established by a preponderance of the evidence that Grievant engaged in multiple instances of conduct which created a substantial risk of harm to the facility and its inmates.

6. Respondent has demonstrated by a preponderance of the evidence that Grievant engaged in actions reasonably deemed misconduct.

7. Respondent established actionable charges against Grievant and that the charges were of a substantial nature. Respondent established by a preponderance of the evidence that Grievant violated WV Regional Jail Authority policy and procedure applicable to the circumstances.

8. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

9. "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).

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

11. Grievant has failed to prove that his dismissal was clearly excessive or an abuse of discretion. Further, Grievant has failed to prove that there was an inherent disproportion between his offense and the personnel action taken against him. Mitigation of this dismissal is not deemed 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* 156 C.S.R. 1 § 6.20 (2018).

Date: October 1, 2019

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Landon R. Brown
Administrative Law Judge