THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WAYNE D. BANKS,

Grievant,

v. **Docket No. 2019-1354-MAPS**

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

Respondent.

DECISION

Grievant, Wayne D. Banks, filed a level one grievance against his employer, Respondent, Division of Corrections and Rehabilitation, Bureau of Prisons and Jails, Southern Regional Jail and Correctional Facility ("DCR") dated April 1, 2019, stating as follows:

> I Corporal Wayne Banks had an initial suspension hearing on March 6, 2019, during this time Administrator Michael Francis made several statements regarding other people also examining the release paperwork. Mr. Francis stated that he had additional officers and staff review the release of inmate, [name redacted], half of staff also agreed that this paperwork was covering all of the charges and that they would agree with his release. The Monroe County courthouse was contacted and according to Mr. Francis also agreed that the order was not very clear and the release to the state of Virginia was understandable. The facts of the release are as follow[:]
>
> - Inmate [name redacted] was released from Southern Regional Jail on November 18, 2018
>
> - This inmate was directly released to the Giles County Virginia Sheriffs Department, Sgt. Jason Tickle was the receiving officer for this inmate.
>
> - Inmate was brought back into our custody after this paperwork had been cleared up.

> The court order will be attached, and it states ***"The above-styled criminal case is hereby DISMISSED WITHOUT PREJUDICE"*** the order contains two different case numbers that pertain to his commitment. The order is written in the style that both court orders appeared to be dismissed per Circuit Judge Robert Irons, therefore the release of this inmate to the State of Virginia should be considered legitimate and legally binding. The order should also be examined and the fact that we are expected to accept orders that are electronically signed such as the one that follows, this makes it appear that the judge may not have even signed this order personally.
>
> Thank you for your time and consideration regarding my response to this suspension and hopefully you can examine this court order and see the inconsistencies that are contained within it. (Emphasis in original).

As relief sought, Grievant states "Suspension time given back. Personnel record cleared."

A level one hearing was conducted on April 17, 2019. The grievance was denied by decision issued on April 17, 2019. Grievant perfected his appeal to level two on April 30, 2019. A level two mediation was conducted on August 30, 2019. Grievant appealed to level three on September 13, 2019. A level three hearing was held on January 15, 2020, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Briana J. Marino, Esquire, Assistant Attorney General. This matter became mature for decision upon the receipt of the Grievant's post-hearing proposal on March 4, 2020. The Respondent did not avail itself of the opportunity to submit proposed Findings of Fact and Conclusions of Law.

Synopsis

At the times relevant herein, Grievant was employed by Respondent as the Booking Supervisor. While Grievant was serving as shift supervisor, he reviewed a Dismissal Order issued by the Circuit Court and approved the release of an inmate for extradition to Virginia. Three months later, Respondent reviewed the Order and determined that that the inmate was released in error. Grievant was suspended without pay from employment for twenty-four hours for approving the release. Grievant argued that he did nothing wrong and the Dismissal Order was confusing. Grievant also raised claims of discrimination and favoritism in that no one else involved with the release was disciplined. 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 is employed by Respondent, Division of Corrections and Rehabilitation, as a Correctional Officer with the rank of Corporal at the Southern Regional Jail and Correctional Facility. Grievant had been employed by Respondent for about thirteen years.

2. At the time of the incident at issue in this grievance, Grievant served as the booking supervisor and was the shift supervisor on the date in question. However, at the

time of the level three hearing in this matter, Grievant was serving in the position of transportation supervisor and had been so for about three or four months.

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

4. At the times relevant herein, Michael Francis was the Superintendent of Southern Regional Jail. Major Larry Warden was three ranks above Grievant, and he was part of management at SRJ. However, it is unknown who Grievant's direct supervisor was at the time of the incident in questions.

5. On or about November 16, 2018, Southern Regional Jail received an Order issued by the Circuit Court of Monroe County, West Virginia, entitled "Dismissal Order" in the case of inmate T.S. in Case No. 32-2018-F-31. This Order bears the handwritten notation "11/16/18 SS" in the margin of this one-page Dismissal Order.[1] This Order was signed electronically by Circuit Court Judge Robert Irons. At that time, electronically signed Orders were a new phenomenon. This Order states, in pertinent part, as follows:

> On this date came the State of West Virginia, by and through Monroe County Prosecuting Attorney . . . and moved the Court to dismiss the above-styled criminal action. In support of the State's motion, counsel advised the Court that the State of West Virginia had agreed to dismiss the present criminal action as part of a plea agreement entered in Monroe County Criminal Action No. CC-32-2015-F-52. . . it is here by **ORDERED** and **ADJUDGED**:

[1] *See*, Respondent's Exhibit 3, Dismissal Order.

1. The State of West Virginia's motion to dismiss is **GRANTED**. The above-styled criminal case is hereby **DISMISSED WITHOUT PREJUDICE** . . . .[2]

6. At the time of the events at issue herein, Officer Logan Ward was subordinate to Grievant. Also subordinate to Grievant were booking clerks, Shana O'Quinn and Sherry Shrewsbury. Grievant had served as the Booking Supervisor for two or three years.

7. At the times at issue, it was SRJ's regular practice to maintain offender files for each inmate housed there. Inmate records including court orders, custody documents, and comment sheets were contained in these offender files.

8. Comment sheets are fill-in-the-blank forms on which employees would handwrite inmates' names, dates of birth, inmate numbers, institution name, dates on which the inmates were checked-in, actions taken in the inmates' cases, calls made or received, and the dates of which, for inmates in their custody.

9. Two comment sheets from inmate T.S.'s offender file were introduced as evidence at the level three hearing. At the top of each page, the following statement is written: "***[A]LL FILES MUST BE REVIEWED, CORRECTED AND SIGNED OFF BY A SUPERVISOR BEFORE THE INMATE CAN BE HOUSED."*** (Emphasis, capitalization, and smaller font size included in original).[3]

10. The first of the two comment sheets introduced at level three indicates that Grievant signed the document as supervisor on April 14, 2018.

11. All the entries in the comment section are handwritten by employees at SRJ, and several different handwritings appear on the two sheets. The first entry on the lined

[2] *See*, Respondent's Exhibit 3, Dismissal Order.
[3] *See*, Respondent's Exhibit 3, comment sheets.

comments section of the document is dated May 11, 2018, and states only "No Detox." It is unknown who wrote this comment as there are no initials by said comment. Most of the other fourteen dated entries on the comment sheets bear the initials of their drafters. Most of the entries are initialed "SS" or "SO," and they have distinctive handwriting styles. Based upon the evidence presented, "SS" stands for Sherry Shrewsbury, and "SO" stands for Shana O'Quinn.

12. The comment sheets contain two entries bearing a person's initials that are largely illegible, but appears to begin with an "M." Based upon the evidence presented at level three, it is believed that those are the initials of an employee named Darren Morgan who was employed by Respondent as the Director of Inmate Services at the time. Based upon the information presented, it appears Mr. Morgan is no longer employed by Respondent. Mr. Morgan was not called as a witness by either party, and no party requested a subpoena to compel him to testify at the level three hearing.[4]

13. From on or about May 11, 2018, through November 26, 2018, "SS," "SO," and "M" noted various actions taken with respect to the inmate's criminal charges, sentencing, contacts with Giles County, Virginia, orders received, and criminal action numbers pending in the Circuit Court of Monroe County, West Virginia.

14. There are three entries in the Comments section dated November 16, 2018. The first is initialed "SS," the second, "M," and the third is not initialed, but is in the same handwriting as that initialed "SS." They state as follows:

> 11/16/18 Received waiver. Still has locals. SS
>
> 11-16-18 [Inmate's Last Name] is DOC sentenced in Monroe County for 2 to 25 years (15-F-52). He

[4] *See*, testimony of Grievant Wayne Banks, level three hearing; testimony of Michael Francis, level one hearing transcript, pg. 8.

has a signed waiver from Raleigh County Circuit Court. He has an indictment in Monroe 18-F-31. He has finished a probation saction (sic) in Raleigh but still owes time on Probation. (16-F-237-K) called Monroe and 18-F-31 was dismissed and they will send dismissal. M

11/16/18 Dismiss 18-F-31 and 15-F-52.
Phone Giles Cty Va 540-921-[redacted]
Spoke to Steve fax 540-921-[redacted]
Fax waiver

15. Sometime after the receipt of the November 16, 2018, Dismissal Order, CO Ward reviewed the order and the inmate's offender file, then brought the same to the attention of Grievant. CO Ward told Grievant something to the effect of "I think he needs released."

16. Based upon the handwritten notation of "11/16/18 SS" on the Dismissal Order and the comments handwritten by SS on the comment sheets, it appears that Ms. Shrewsbury took action on that date to prepare for the release of the inmate to Virginia. Further, the comment sheet entries do not reflect that she called the Monroe County Circuit Court, the county prosecutor, or anyone else, to verify that this order dismissed both criminal cases before taking action to prepare for his release.

17. Upon receipt of the file and Dismissal Order from CO Ward, Grievant reviewed the same. The inmate's offender file was thick as he was a repeat offender. Looking that the Dismissal Order, contents of the file, along with the entries on the Comment Sheets, Grievant concluded that the Dismissal Order dismissed all the charges against the inmate and that his release to Virginia was appropriate. It is noted that Grievant testified that he relied on Ms. Shrewsbury's last entry dated November 16, 2018, and that he must have missed the entry from Mr. Morgan dated November 16, 2018.

18. In response to the Dismissal Order issued by the Circuit Court of Monroe County, West Virginia, on or about November 16, 2018, three days later, on November 19, 2018, Grievant, as Shift Supervisor, signed a "WV Regional Jail & Correctional Facility Authority Inmate Release From Custody" form releasing an inmate from Southern Regional Jail to the custody of Sgt. Jason Tickle of the Giles County, Virginia, Sheriff's Department. Also signing this release form was another of Respondent's employees, Logan Ward, who is identified as the "Releasing Officer" thereon.

19. On November 18, 2018, the inmate was released from SRJ pursuant to the signed inmate release form to the custody of Giles County Virginia Sheriff's Department Sgt. Jason Tickle, and transported to Giles County, Virginia. In Giles County, Virginia, the inmate was incarcerated on charges pending there.

20. On November 26, 2018, one last entry was made in the inmate's SRJ offender file which is only a telephone phone number: 540-643-[redacted]. This entry is not initialed. The entry does not state what this number is, or whether it was called. There is no explanation whatsoever in the comment for this number, or its significance, or even why it is noted at all as the inmate was no longer at SRJ. While this comment is not initialed, it is noted that it appears to be most similar to the handwriting of Ms. Shrewsbury.

21. Nearly three months after the release of inmate, on or about February 11, 2019, an unknown person or persons investigated the November 18, 2018, release of the inmate from SRJ, and concluded that his release was "erroneous," and the inmate should not have been release to Giles County, Virginia, because all of the West Virginia criminal charges against the inmate had not been dismissed by the November 16, 2018, Dismissal Order. It is unknown why the release was being reviewed at that time. Thereafter,

somehow, the matter was brought to the attention of Superintendent Michael Francis and Major Larry Warden at SRJ.[5]

22. It is unknown who investigated the November 18, 2018, release, why it was investigated, who brought it to the attention of Superintendent Francis and Major Warden, and who determined it was an erroneous release.[6] The record is silent to these issues.

23. Jonathan Huffman, DCR Assistant Director of Records and Interstate Compacts, who was called as a witness by Respondent at level three, did not investigate the release of inmate T.S. He was only asked to review the records of the release for this grievance. Assistant Director Huffman was not asked whether he knew who investigated this release.[7]

24. After the issue with the November 18, 2018, "erroneous" release was brought to his attention, Superintendent Francis reviewed the order, along with Darren Morgan, and Major Larry Warden. Superintendent Francis also had several other staff members review the order for their opinions as to its clarity. The issue was whether the order could have been viewed as warranting the release of the inmate.[8]

25. Superintendent Francis testified at the level one hearing. He did not testify at the level three hearing. However, based upon his statements at level one, he found that the order was not confusing and that the inmate was released improperly to Virginia before serving his sentence in West Virginia.

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[5] *See*, Respondent's Exhibit 4, March 27, 2019, suspension letter; level three hearing testimony of Mjr. Larry Warden.
[6] *See*, level three hearing testimony of Jonathan Huffman; testimony of Mjr. Larry Warden; testimony of Grievant Wayne Banks.
[7] *See*, testimony of Jonathan Huffman, level three hearing.
[8] *See*, testimony of Michael Francis, level one hearing transcript, pg. 8; testimony of Mjr. Larry Warden, level three hearing; testimony of Grievant Wayne Banks, level three hearing.

26. When Superintendent Francis presented the issue of the release and the November 16, 2018, Order, Major Warden went into his office and reviewed the order alone, slowly and ultimately determined that the dismissal order did not dismiss all the charges pending against the inmate. There was one still remaining. However, Major Warden agreed during his testimony at the level three hearing that he believed the order was confusing.

27. Of the people who reviewed the Order at the request of Superintendent Francis, about 50% thought the order was confusing about whether release of the inmate was required pursuant to the order, and 50%, did not.[9]

28. On March 6, 2019, Superintendent Francis, Major Larry Warden, and Charlotte Underwood, Human Resources Manager held a predetermination meeting with Grievant to discuss the November 19, 2018, release of the inmate.[10]

29. By letter dated March 27, 2019, Superintendent Francis informed Grievant that he was being suspended without pay for 24 hours, or two shifts, for "unacceptable performance." Specifically, Superintendent Francis stated as follows:

> [m]ore specifically, the reason(s) for this personnel action is/are as follows:
>
> On November 19, 2018, you misinterpreted a Court order as dismissing two separate changes on an inmate from Southern Regional Jail's custody, the inmate was extradited to Virginia. This erroneous release wasn't discovered until February 11, 2019. Although the inmate was returned to West Virginia to finish serving his sentence, your failure to adhere to the required standard of awareness is inexcusable and resulted in the erroneous release of the inmate creating a possible risk to the general public. . .

[9] *See*, testimony of Michael Francis, level one hearing transcript, pg. 8; testimony of Mjr. Larry Warden, level three hearing; testimony of Grievant Wayne Banks, level three hearing.

[10] *See*, Respondent's Exhibit 4, March 27, 2019, suspension letter.

Superintendent went on to state that Grievant violated West Virginia Regional Jail Policy and Procedure 19001 "Inmate Release Procedures," "Procedure A: General Release Procedures, 11, 14, and 21.[11]

30. In the March 27, 2019, letter, Superintendent Francis also informed Grievant that his suspension would begin on April 2, 2019, at 7:00 a.m. and end on Wednesday, April 3, 2019 at 5:00 p.m. Grievant was to return to work on Sunday, April 7, 2019, at the time of his regularly scheduled shift.[12]

31. Grievant served his 24-hour suspension without pay as ordered by the March 27, 2019, letter from Superintendent Francis, and returned to work pursuant to the same.

32. Grievant had no history of discipline before his suspension in March 2019.[13]

33. Before the incident at issue in this grievance, Grievant had never been involved in a "bad release" or an "erroneous release" during his employment with Respondent.

34. Major Warden and Grievant agreed at the level three hearing that they each could not remember a time when there had been a bad, or erroneous, release where all the employees involved in the same, those signing off on the release paperwork and those involved in the decision making, were not all disciplined.

35. Neither party called Michael Francis to testify at the level three hearing. It is noted that Grievant requested a subpoena for him, and the same was issued; however,

[11] *See*, Respondent's Exhibit 4, March 27, 2019, suspension letter.
[12] *See*, Respondent's Exhibit 4, March 27, 2019, suspension letter.
[13] *See*, Respondent's Exhibit 4, March 27, 2019, suspension letter; testimony of Grievant, level three hearing.

Grievant did not serve Mr. Francis with the subpoena because he assumed Mr. Francis would be at the level three hearing. Mr. Francis was not present at the level three hearing and was reportedly unavailable as he was attending a meeting at the time.[14]

36. Neither party called Sherry Shrewsbury or Shana O'Quinn to testify at the level one hearing or the level three hearing.

37. Neither party called Darren Morgan or Logan Ward to testify at the level one hearing or the level three hearing.

38. There was no evidence presented to suggest that either Logan Ward or Sherry Shrewsbury were disciplined for their actions in "erroneous release." Major Warden testified that he did not know whether they received any discipline for their involvement in the release of the inmate on November 18, 2019.

39. No policy requiring the disciplining of all employees involved in an erroneous, or bad, release was presented as evidence in this matter.

40. On an unknown date after February 11, 2019, the inmate was returned to West Virginia to serve his sentence on the remaining criminal charge here.

Discussion

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

[14] This ALJ informed Grievant that she would entertain a motion to continue or for a second day of hearing if he wanted to call Mr. Francis in his case-in-chief. However, Grievant did not wish to do so.

R. § 156-1-3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Respondent asserts that it properly suspended Grievant for twenty-four hours, or two shifts, without pay for his actions in mistakenly releasing an inmate from SRJ for extradition to Virginia when the inmate still had a sentence to serve in West Virginia. Grievant asserts that he did nothing wrong, and that at the time he reviewed the Dismissal Order, he thought he had made the right decision in concluding that it dismissed all the charges pending against the inmate. He also argues that if the Dismissal Order did not dismiss both criminal action numbers, the order was unclear, or bad, and his release of the inmate to Virginia should not be considered erroneous, and he should not have been disciplined. It is noted that Grievant admitted at the level three hearing that he made a mistake, but defended his actions asserting that the order was unclear.

As stated in its suspension letter dated March 27, 2019, Respondent charged Grievant with "unacceptable performance" in violation of "West Virginia Regional Jail Authority Policy and Procedures, 19001— "Inmate Release Procedures," "Policy" and "Procedure A: General Release Procedures," provisions 11, 14, and 21. Such states as follows:

> 19001—Inmate Release Procedures
>
> Policy—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 regional jails shall follow standard procedures to ensure proper computation of release dates, documentation of release, collection and retention of regional jail property, return of inmate's lawful personal property, and collection and storage of records related to the inmate's incarceration and release . . .

PROCEDURE A: General Release Procedures . . .

11. Prior to releasing or transferring any inmate for any reason from any Authority facility, the inmate shall be positively identified using file photos, TAG System Photo, Inmate Property Release Form with 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. . .

14. Before any inmate is authorized to be released from any regional jail, there shall be a court ordered release in the possession of the releasing officer and the supervising officer. This court ordered release must be read thoroughly to comprehend all instructions. All instructions shall be followed as directed by court order. The name of the inmate being released must be the same as the inmate that is being released. All case numbers and charges on the release must correspond with the case numbers and charges on the committing documents. Careful attention to the name of the inmate to be released is imperative to ensure that the proper inmate is being legally released from custody. It is imperative that only the inmate authorized by the court order is released and that no outstanding charges or detainers exist. Extreme caution shall be used in assuring the proper inmate is legally released. . .

21. Failure to faithfully follow each of these requirements, resulting in the improper release of an inmate, will be considered sufficient to conclude that there has been a refusal to obey a lawful order or directive and failure to use a proper level of care, An employee who is insubordinate and or negligent will be disciplined up to and including dismissal. Any employee who fails to faithfully comply with the proper release procedures, or

> whose negligence of duty results in an improper release of an inmate shall be subject to disciplinary action up to and including dismissal from employment.
>
> The public must have assurance that a person legally confined to a jail shall be kept therein until released by the official court of jurisdiction. Public safety must be protected. Releasing an inmate without a proper court ordered release is misconduct of a substantial nature directly affecting the rights and interest of the public. . . .[15]

A review of the Dismissal Order issued by the Circuit Court of Monroe County reveals that the Court issued it in Case No. CC-32-2018-F-31, and it states, in part, "counsel advised the Court that the State of West Virginia has agreed to dismiss the present criminal action as part of a plea agreement entered in Monroe County Criminal Action No. CC-32-2015-F-52." Thereafter, in paragraph one of the Order section of the Dismissal Order, the Court states, in part, "[t]he State of West Virginia's motion to dismiss is **GRANTED**. The above-styled criminal case is hereby **DISMISSED WITHOUT PREJUDICE**."[16]

Grievant testified that the Dismissal Order is confusing because the two case numbers are situated above "the above-styled criminal case" language in its order section. In support of this, he points to Superintendent Francis's statements at level one about showing the order to other staff members and about half of them thought that the Dismissal Order dismissed both cases thereby warranting the inmate's release. Grievant also testified that in making his decision, he reviewed the file and comment sheet, and that he relied on the comments made by Ms. Shrewsbury on November 16, 2018. Based

[15] *See*, Respondent's Exhibit 2, "WV Regional Jail and Correctional Facility Authority, Policy and Procedure Statement, Document Number: 19001."
[16] *See*, Respondent's Exhibit 3, Dismissal Order, emphasis in original.

upon her entries, he assumed that she did her job correctly and called for guidance on the order. However, there are no notations in the comments sheets to suggest that Ms. Shrewsbury called anyone for guidance on the order.

A review of the Dismissal Order read in its entirety, and not simply paragraph one of the order section, demonstrates that the Dismissal Order does not dismiss both criminal actions. Only the case number referenced in *the style of the case*, which is CC-32-2018-F-31, is being dismissed. Even if that language were confusing, logic dictates that as one case was being dismissed as part of *a plea agreement* in another, a second criminal action in which there was a plea agreement, would still be active. Also, if Grievant reviewed the comment sheets in making his decision on whether to release the inmate, Mr. Morgan's very detailed entry on the comment sheets dated November 16, 2018, makes it clear that the inmate was sentenced to serve two to twenty-five years in one case, and that only the other case, CC-32-2018-F-31, was being dismissed. Grievant testified that he must have missed Mr. Morgan's November 16, 2018, comment when reviewing the offender file before signing off on the release.

Based upon the evidence presented, Respondent has proved that Grievant improperly released the inmate and that such constitutes violations of Policy 19001, Procedure A, paragraphs 11, 14, and 21. While Respondent did not include Policy 19001, Procedure A, paragraph 15 in its suspension letter, such lists the responsibilities of the shift supervisor, like Grievant, with respect to the release of inmates, and states as follows:

> 15. Two officers must approve a release in order to check and counter check the authorization of an inmate release. The initial officer shall take all steps necessary to positively identify the inmate using file

> photos, TAG System Photo, Inmate Property Release Form with Photo, face-to-face recognition, wristband identification, and if necessary, fingerprints, or any other means necessary to assure that positive identification is made and the proper inmate is being released, and shall further ensure that no outstanding charges or detainers exist, The initial officer shall affix his/her signature to all release documents. By affixing his/her signature to the release documents, the initial officer is affirming that the proper inmate is being released and that no other charges or detainers exist that would cause the inmate to remain incarcerated.
>
> The shift supervisor shall then take all steps necessary to positively identify the inmate using file photos, TAG System Photo, Inmate Property Release Form with Photo, face-to-face recognition, wristband identification, and if necessary, fingerprints, or any other means necessary to assure that positive identification is made and the proper inmate is being released, **and shall further ensure that no outstanding charges or detainers exist.** The shift supervisor shall affix his/her signature to all release documents. **By affixing his/her signature to the release documents, the shift supervisor is affirming that the proper inmate is being released and that no other charges or detainers exist that would cause the inmate to remain incarcerated. The shift supervisor is the final check and balance, prior to an inmate's release, to ensure the inmate being released has been positively identified as the person to be released, and shall be responsible for that accountability**. (Emphasis added).[17]

While Officer Ward and Ms. Shrewsbury may have made mistakes as well, this provision makes clear that the shift supervisor, Grievant, was to ensure that there were no outstanding charges or detainers before he approved the release of the inmate, and that as shift supervisor, he was responsible. Grievant failed in this duty because of his error.

[17] *See*, Respondent's Exhibit 2, "WV Regional Jail and Correctional Facility Authority, Policy and Procedure Statement, Document Number: 19001."

The issue now becomes, whether Respondent's actions in suspending Grievant without pay for 24 hours 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). Given that Grievant improperly approved the release and extradition of an inmate who was sentenced to serve a two to twenty-five-year sentence in West Virginia, this ALJ cannot conclude that Respondent's decision to suspend Grievant for 24 hours without pay was unreasonable, or arbitrary and capricious.

While Grievant does not use the words "discrimination" or "favoritism" in his grievance, he argues that he was the only employee involved with the release who was disciplined which was contrary to SRJ standard procedure. 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). Grievant presented no written policies or procedures regarding discipline or discipline for an erroneous release. Respondent presented no disciplinary policies, either.

For such non-disciplinary claims, the Grievant bears the burden of proving the elements of his claims by a preponderance of the evidence. Grievant compares himself to CO Logan Ward and Ms. Shrewsbury, the booking clerk. Both were his subordinates at the time in question. Neither was a shift supervisor. Therefore, CO Ward and Ms.

Shrewsbury are not similarly situated. Grievant maintains that in the past when there has been an erroneous release, everyone involved in the release, and those who have signed off on the same, have been disciplined. Grievant contends that CO Logan Ward, who also signed off on the release, and Booking Clerk Sherry Shrewsbury, who made the incorrect notations regarding the dismissal of charges on the comment sheets were not disciplined in anyway despite their involvement. There was no concrete evidence presented as to whether CO Ward or Ms. Shrewsbury were disciplined. They were not called as witnesses, and when asked if they were disciplined, Major Warden answered that he did not know. Further, Grievant presented no policies on discipline. As such, this ALJ has no way to determine whether Respondent violated any policy by not disciplining CO Ward or Ms. Shrewsbury, if they were not so disciplined. "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 seems to argue that as the Dismissal Order was confusing, or poorly written, he had no disciplinary history, and CO Ward and Ms. Shrewsbury were not disciplined, he should have received a lesser discipline than suspension, if any. "[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).

Grievant was suspended without pay for twenty-four hours, or two shifts, for his actions in improperly releasing an inmate from SRJ for extradition to Virginia in violation of policy and court order. The inmate was not released into the public and he was

eventually returned to West Virginia to serve his sentence. However, he was released contrary to a court order, and such was a risk to public safety. Grievant has not demonstrated that his suspension is so clearly disproportionate to his offense that it indicates an abuse of discretion. Accordingly, Grievant failed to prove that he is entitled to mitigation of his discipline.

For the reasons set forth herein, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. 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).

3. "'[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).

4. 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).

5. "'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).

6. "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)).

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. Respondent proved by a preponderance of the evidence that Grievant engaged in unacceptable performance by authorizing the improper release of an inmate from SRJ for extradition to Virginia, before the inmate had served his sentence in West Virginia, in violation of a court order and certain provisions of West Virginia Regional Jail and Correctional Facility Authority, Policy 19001.

10. 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: April 17, 2020.

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Carrie H. LeFevre
Administrative Law Judge