WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ZACHERY RICHARD BASSHAM,
Grievant,

v. **Docket No. 2020-1447-MAPS**

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

D E C I S I O N

Zachery Richard Bassham, Grievant, filed this grievance against his employer, Division of Corrections and Rehabilitation/Bureau of Prisons and Jails/Southwestern Regional Jail and Correctional Facility, Respondent, protesting the termination of his employment. Grievant filed an expedited grievance alleging that he was wrongfully dismissed for his alleged refusal to report for a temporary duty assignment.[1] The grievance, as filed on April 21, 2020, seeks reinstatement to Grievant's former employment position and back pay for all workdays missed because of his termination.

A level three hearing was held before the undersigned Administrative Law Judge on August 12, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and by counsel, Nathan D. Brown, Esq., Ferrell & Brown, 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

[1] 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.

fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about September 25, 2020, on receipt of the last of these proposals.

Synopsis

Grievant was employed as a Correctional Officer 3 with Respondent at Southwestern Regional Jail (SWRJ), and, as such, was subject to a requirement to serve temporary duty assignments in any of the state's regional jails at any time as deemed necessary for the appropriate care, custody, and control of the state's inmate population. Respondent dismissed Grievant for his failure to report to work for a shift at the South Central Regional Jail (SCRJ). Grievant alleges that he was wrongfully terminated.

At or near the time period relevant to this matter, some non-essential workers in the state were permitted or encouraged to work remotely; nevertheless the state's prison and jail employees were, and are still, considered essential workers who must report for duty in person as they are directly responsible for the care, custody, and control of the incarcerated population. Whether or not positive COVID-19 cases were diagnosed among inmate or staff populations does not alter the necessity of correctional officers and staff to report for duty to protect the public welfare. In short, the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct directly and adversely affecting the rights and interests of the public.

The nature of Grievant's conduct is significant enough for Respondent, within its scope of discretion, to reasonably conclude that termination of Grievant's employment was warranted. Grievant has not persuasively provided adequate rebuttal to overturn or

significantly mitigate the disciplinary actions of Respondent. Respondent established good cause to dismiss Grievant from employment. 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. At the time relevant to this grievance matter, Grievant was employed by Division of Corrections and Rehabilitation as a permanent employee in the classified service, as a Correctional Officer 3 assigned to the Southwestern Regional Jail (SWRJ).

2. Grievant had been employed with Respondent for approximately seventeen (17) years, and in review of the records submitted, Grievant seemed to have met the reasonable expectations of his employer during that period.

3. Beginning in or around February 2020, an unprecedented disease known as COVID-19 began to grip the nation. At the time relevant to the events giving rise to this grievance, the United States and the State of West Virginia was beginning to experience the influences of this phenomenon.

4. In March 2020, the virus was in its infancy and little was known about the virus or its effects on people. The Governor of the State of West Virginia began issuing almost daily directives to West Virginians and various State agencies.

5. As part of Respondent's business practices, prior to and during this pandemic, Respondent would temporarily assign its employees from an employee's reporting jail to a subsequent jail to provide relief for staffing issues at the second facility. This practice, while not necessarily ideal, is implemented among and between regional

jails to cover, staffing quotas and short term employment concerns. This type of temporary assignment was a familiar business practice known to Grievant. Grievant has accepted numerous temporary assignments during his employment without issue.

6. On or around March 13, 2020, Grievant was temporarily reassigned from Southwestern Regional Jail to North Central Regional Jail to cover staffing needs at that facility. Grievant reported without issue; however, on the morning of March 14, 2020, Grievant began to experience flu like symptoms and reported for medical treatment at the local Med-Express. At Med-Express, Grievant underwent a series of tests. The documents presented at the hearing reveal that Grievant tested negative for Flu A, Flu B, and the Strep Rapid Test. Grievant was diagnosed with an "unspecified" viral infection.[2] As a result of his illness, Grievant was taken off work until March 18, 2020.

7. Effective March 20, 2020, Respondent implemented a COVID-19 Response Plan, Policy Directive 337. R Ex 3

8. On March 23, 2020, Grievant reported to Southwestern Regional Jail (SWRJ) in the ordinary course of business to work his regularly scheduled shift.

9. At that time, prior to gaining entry into the SWRJ, employees were screened for symptoms of infection with the COVID-19 disease or the SARS-COV-2 virus, which included a temperature check and a list of questions regarding whether or not an individual is feeling sick or exhibiting symptoms of COVID-19. Any employee answering in the affirmative to any of the questions was denied entry into the facility.

[2] This information and the circumstance there of, as highlight, by Grievant was not overlooked by this fact finder.

10. Grievant was screened on March 23, 2020. Documentation of the encounter does not exist, and as such, no written evidence of the encounter was produced at the hearing. Some of the particulars of Grievant's screening process is challenged by Grievant, but Grievant did not indicate he was feeling ill in response to the verbal inquiries of the screening nurse nor did he have a temperature.[3]

11. Grievant was granted entry into the facility on March 23, 2020.

12. Once the Grievant reached his work area, he joined his co-workers in "roll call" to get a briefing on the upcoming work duties. At this juncture, Grievant was summonsed to a meeting with Lt. Chauncey Maynard and Captain Jimmy Vance and was advised he [Grievant] needed to report to South Central Regional Jail (SCRJ) that day for work.

13. Prior to the morning muster briefing, Grievant did not advise his commanding officer(s) that he was ill and needed to go home. Grievant had not previously refused a temporary duty assignment and had worked at SCRJ and other facilities many times before.

14. In response to the order to report to SCRJ, Grievant immediately stated that he had heard a rumor that an inmate at SCRJ had been diagnosed as positive for COVID-19 and indicated an unwillingness to serve at that facility but not an unwillingness to perform his duties at SWRJ.

[3] *See* R Ex 3, Policy Directive 337; COVID-19 Response Plan, effective March 20, 2020. p7 Employee Screening. Also *see* L-3 testimony of Chauncey Maynard.

15. Grievant acknowledges and does not dispute he had real concerns about reporting to a facility where COVID-19 was rumored to be present.[4]

16. SWRJ personnel contacted the DCR Central Office regarding the allegations or rumors of COVID. SWRJ personnel were advised by senior DCR personnel that temporary duty assignment was mandatory.[5]

17. Grievant was again informed he was to work a temporary duty assignment at SCRJ.[6]

18. Grievant was reluctant to go to SCRJ and asked to call his wife to discuss the temporary duty assignment. On this telephone call, in the presence of his commanding officers at SWRJ, Grievant told his wife he did not want to work a shift at SCRJ, and that he was thinking about quitting rather than working a shift at SCRJ.

19. Prior to Grievant calling his wife, Grievant did not report to his supervisors that he was suffering from any illness. Immediately after speaking with his wife, Grievant still did not report that any illness was the cause for his reluctance to report to his temporary duty assignment at SCRJ. Only after Grievant heard an officer inform his supervisors that another officer could not work at SCRJ due to illness did Grievant then advise his commanding officers that he too was too ill to work a shift at SCRJ.

---

[4] Grievant testified that given his medical illness, his wife's upcoming medical procedure, and the rumored issue of COVID-19 at South Central Regional Jail, he was legitimately scared about the impact it would have on his and his wife's health.

[5] Although the rumors about COVID being present at South Central Regional Jail were later dispelled, it is not established Grievant knew on March 23, 2020, the rumors were false. Grievant testified that he was never informed that COVID-19 was not present at SCRJ.

[6] Respondent is of the opinion whether or not positive COVID-19 cases were diagnosed among inmate or staff populations does not alter the necessity of correctional officers and staff to report for duty.

20. In addition to Grievant, at least two other correctional officers who indicated an unwillingness to report to their temporary duty assignment were also dismissed.

21. Superintendent Timothy King informed Captain Vance that Grievant could either accept the temporary reassignment or be terminated. The record is not clear whether this determination was relayed to Grievant.

22. Grievant indicated he was unwilling to go work at SCRJ, and he was informed he could work at SCRJ or it would be considered a resignation by his commanding officers.[7]

23. SWRJ personnel were not sure as to the proper course of action.

24. Once a correctional officer shift starts, that officer cannot abandon his or her shift without permission of a supervisor. Grievant was told he would not be prevented from leaving if he said he was indeed sick. At no time was Grievant excused by his superiors from his ordered temporary duty assignment.

25. Respondent's witnesses acknowledge that Grievant was informed he would not be prohibited from leaving, if he [Grievant] provided he was ill. But it was also clear that none of Respondent's witnesses believed Grievant suffered from an illness preventing him from performing his duties, and that Grievant's claim of illness was in fact a pretext for his concerns of being exposed to COVID-19 at the SCRJ.

26. Temporary duty assignments are crucial for providing adequate staffing at the regional jails, and any officer refusing such an assignment creates a hardship for the

[7] Grievant admits he was informed at some time during relevant events he could either report to SCRJ or resign. *See* Grievant L3 testimony.

facility and the other officers, as well as jeopardizing the safety of officers, inmates, and public safety due to the potential for inadequate staffing levels at the State's jail facilities.

27. Grievant ultimately left the facility without serving his assigned duties, and other officer(s) were then required to serve the temporary duty at SCRJ which had been assigned to Grievant.

28. Subsequent to leaving the facility, Grievant provided a physician's note excusing him from his duties on March 23, 2020, but only after he had reported for his regular shift, successfully passed the screening for entry into the SWRJ, and elected not to work his temporary duty assignment at SCRJ.

29. On March 23, 2020, Grievant was advised his employment was suspended pending an investigation.

30. Grievant's medical documentation, secured subsequent to leaving the facility on March 23, 2020, was precured pursuant to a remote communication not a physical examination.[8]

31. On April 8, 2020, Respondent held a predetermination hearing to determine if Grievant would be terminated from his employment for his failure to report to South Central Regional Jail on March 23, 2020. Superintendent Timothy King, Major Hansford Slater, Lisa Vance (Human Resources), and Grievant were present.

[8] Grievant's Exhibit 4 does not provide a medical diagnosis or provide any medical explanation regarding Grievant's health. The form document states "Zachary Bassham was seen in our office on 3/23/20 and may return to work/school on 3/25/20." Thank you, Rafael Rodighiero, DMSc. Pursuant to Grievant's testimony he secured this via telecommunication. This was understood to mean phone conversation not in person examination. The one and only sentence of the document does not provide persuasive medical verification of Grievant's physical state (illness).

32. Lieutenant Maynard and Captain Vance, two persons with direct knowledge of what happened the morning of March 23, 2020, were not invited to attend the meeting. Superintendent King relied on incident reports completed by Lieutenant Maynard and Captain Vance in accessing the situation and Respondent's ultimate determination regarding Grievant's employment.[9]

33. Grievant's only previous written disciplinary actions occurred on September 14, 2016, and December 9, 2018. Both instances revolved around excessive use of force. Grievant's history of employment with Respondent is peppered with periods of separation. Superintendent King had known Grievant for several years and believed Grievant to be a good employee without any significant employment issues.

34. Superintendent King determined that termination of Grievant's employment was appropriate disciplinary action for Grievant's conduct on March 23, 2020.

35. Superintendent King testified at the level three grievance hearing. Superintendent King is of the opinion that the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct.

36. Respondent is of the position that the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct which directly and adversely affected the rights and interests of the facility, the Division of Corrections and Rehabilitation, and the public.

[9] Respondent failed to introduce into evidence the incident reports. Lieutenant Maynard and Captain Vance testified at the level three hearing, subject to cross examination.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

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 dismissed Grievant for his refusal to report to work a shift at the South Central Regional Jail (SCRJ) on March 23, 2020. Grievant alleges that he was wrongfully terminated. Grievant seeks reinstatement to his former employment position with back pay for all workdays missed because of his termination. Respondent and Grievant do not agree on the reason for this failure to report. Grievant avers that he did not refuse his temporary assignment to SCRJ. Rather, he asserts he was too sick to work.[10] Respondent counters that while Grievant claims he did not refuse to work the shift due to illness, the totality of the circumstances indicate that his claims of illness were a pretext for his refusal to work in a facility where he believed an inmate may have been positive for COVID-19.

At the time relevant to the events giving rise to this grievance Respondent had implemented a Covid-19 Response Plan, Policy Directive 337. R Ex 3 Respondent is of the position that the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct. Grievant was not the only correctional officer's employment which was terminated for refusal or election not to perform a temporary assignment duty in March 2020.

An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29,

[10] In addition, it is also recognized that Grievant likewise tends to underscore that he had a family member with a medical issue, which may have been a factor in his determination not to report for his temporary assigned duty.

1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses, who testified and provided information in the course of this grievance. The testimony of all witnesses herein was provided direct attention and assessed with the identified factors in consideration.

Respondent called four witnesses, Lt. Chauncey Maynard, Captain Jimmy Vance, Superintendent Timothy King, and Chief of Institutional Operations Lance Yardley. Each witness testified to their respective role in this matter, from the initial indication of Grievant's reluctance to work at SCRJ through his exiting the facility after asserting illness as justification for his election not to report for his temporary assignment on March 23, 2020. 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.

Not every factor is relevant to every credibility determination. In the circumstances of this grievance matter, it seems relevant factors include motive, demeanor, bias, opportunity or capacity to perceive and communicate, the consistency of prior statements and plausibility. There was little to no indication that Respondent's witnesses were being untruthful. The demeanor of these witnesses was indicative of witnesses providing relevant facts and continuity of circumstance. Their individual testimony was plausible and provided insight regarding time, place and temperament of the situation. Credibility assessments herein were made from direct observations as well as review of the record.

Grievant testified on his own behalf with regard to several facts, factors and identifiable disputes of contention. The demeanor of Grievant demonstrated appropriate respect and cooperation with the instant grievance process. Grievant indicated he had heard a rumor of an infected inmate at SCRJ and went so far as to tell his wife to document the conversation in case he became infected with COVID-19 as a result of working at SCRJ. This excuse is in stark contrast to Grievant also inferring that he himself may have actually been infected with some unspecified virus, including suggestions that his infection was COVID-19, and that he should not work *due to his own infection*. In other words, Grievant argues that he was concerned about contracting the COVID-19 virus at SCRJ for fear of spreading it to his wife and also asserts that he was potentially infected but came to work anyway in direct contravention of an order not to report to work if you are ill. It is understood that Grievant was concerned about potential health issues but this does not relieve him of the obligation to effectively do his job, as

lawfully directed. Grievant's testimony that he was too sick to work on March 23, 2020 was not persuasive.

Superintendent King was in attendance at the level three hearing, his demeanor was appropriate for the occasion. The Superintendent's level three testimony was enlightening and thought provoking. It did not go unnoticed by the undersigned that Superintendent King failed to demonstratively establish that he knew all of the pertinent facts impacting the events of March 23, and provided less than thorough statements regarding the factors considered when terminating Grievant's employment. Nevertheless, Superintendent King did demonstrate comprehension of the issues being balanced and analyzed in the circumstance of this grievance. Superintendent King was a credible witness and his testimony was reliable with regard to Respondent's opinion that if Respondent tolerated its essential employees' unwillingness or refusal to perform the duties of a correctional officer as needed during a declared State of Emergency, substantial harm to both public safety and the agency would undoubtedly result. Grievant's decision not to perform his temporary duty assignment was a substantial event.

Whether or not positive COVID-19 cases were diagnosed among inmate or staff populations does not alter the necessity of correctional officers and staff to report for duty to protect. Officers and other jail and prison staff must be present at their facilities to effectuate 24 hour a day coverage to care for an ever-changing inmate population, to detect and prevent escapes, and ensure the safety and security of the other officers, employees, health care staff, and inmates. In short, the refusal or unwillingness of a

correctional officer to perform his or her essential duties is substantial misconduct directly and adversely affecting the rights and interests of the public.

Prior to Grievant calling his wife, Grievant did not report to his supervisors that he was suffering from any illness. Immediately after speaking with his wife, Grievant still did not report that any illness was the cause for his reluctance to report to his temporary duty assignment at SCRJ. Only after Grievant heard an officer inform his supervisors that another officer could not work at SCRJ due to illness did Grievant then advise his commanding officers that he too was too ill to work a shift at SCRJ. Respondent's witnesses testified without exception their disbelief that Grievant suffered from an illness preventing him from performing his duties, and that Grievant's claim of illness was in fact a pretext. In assessing the trustworthiness of the information provided by witnesses, the undersigned was mindful of third party interest, consistency of statements and the plausibility of the witness's information. Respondent persuasively established that Grievant's claim of illness was a pretext. It is understood that Grievant was concerned about COVID-19, but this does not relieve him of the obligation to effectively do his job, as lawfully directed.

The undersigned, trier of fact, does not find that Respondent's actions were arbitrary or clearly wrong. The "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. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

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. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). The circumstance of this matter was not discounted or taken lightly. COVID-19 is a novel virus, and in March 2020 the virus was very much in its infancy just beginning to affect the operations in the State of West Virginia. It is more than likely, than not, that on March 23, 2020, Grievant believed that COVID-19 was present at South Central Regional Jail. Grievant had been an employee with nearly seventeen years of experience with Respondent, he was aware of his duty. Grievant was of the opinion he had competing responsibilities on March 23, 2020. Grievant made a conscious decision not to accept the temporary assignment duty. This fact finder is reluctant to state Grievant was necessarily ill-advised for making the decision, he made, but his decision as executed has consequences. Respondent effectively highlights, the refusal or unwillingness of a correctional officer to perform his or her essential duties is substantial misconduct directly and adversely affecting the rights and interests of the public. This is recognized as a dischargeable offense.

Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot 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.* Mitigation of a penalty is considered on a case-by-case basis. "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).

Respondent had less restrictive means to punish Grievant but elected to terminate his employment, as well as the other officers who failed do perform their assigned duties. Testimony of record indicate Respondent consistently disciplined the correctional officers who elected (refused) to perform their temporary assignment on March 23, 2020. The record does not definitively address whether Respondent has steadily maintained this disciplinary position throughout the subsequent months of the pandemic. Nevertheless, in review of the instant grievance, the undersigned tier of fact, cannot escape the conclusion that Respondent has not abused its substantial discretion. Respondent by a preponderance of the evidence established Grievant's fear of exposure to COVID-19 in the SCRJ facility was not proper justification for his refusal to work in that facility, and

Grievant's claim of an illness preventing his work was belied by the fact that he actually reported for work at SWRJ and only claimed illness as a last resort to avoid assignment to a facility at which he refused to enter. Grievant's failure to perform an essential duty was a serious matter with serious consequences. On March 23, 2020, Grievant reported to work as scheduled with no complaints of illness despite the screening processes in place. His temperature was checked upon his reporting to work and was found to be within normal limits as set by DCR and the Center for Disease Control. Moreover, Grievant did not display or indicate any symptoms of illness nor did he report to the nurse screening employees for illness at the entrance to the facility that he was feeling ill. Grievant participated in conversations with other officers, and attended the staff muster meeting prior to shift, exhibiting no signs of illness nor reporting to his superior officer that he was ill. Only upon being notified that he was being ordered to take up a temporary assignment at SCRJ did Grievant complain and reported being ill. Grievant did not report to his temporary duty assignment at SCRJ after receiving clear instructions from a commanding officer. Respondent persuasively established that Grievant's claim of illness was a pretext. Respondent established it had good cause to dismiss Grievant from employment when, as a correctional officer charged with the care, custody, and control of inmates, he elected to not perform his essential duties.

The nature of Grievant's conduct 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 offence deemed sever or recognized as destructive. This ALJ does not 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. Respondent proved by a preponderance of the evidence that Grievant failed to report for an essential duty without proper cause during a declared state of emergency, and that this failure to report directly and adversely affected the rights and interests of the facility, the Division of Corrections and Rehabilitation, and the public.

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 to prove by a preponderance of the evidence that the disciplinary action taken is justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *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. "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).

6. “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).

7. “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).

8. 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.

9. Respondent proved by a preponderance of the evidence that Grievant's failure to perform his temporary assignment duty on March 23, 2020 was proper or "good cause" for disciplinary action during a declared state of emergency, and that this failure to report directly and adversely affected the rights and interests of the facility, the Division of Corrections and Rehabilitation, and the public.

10. Respondent proved by a preponderance of the evidence that Grievant's failure to perform his temporary assignment duty on March 23, 2020 was misconduct of a substantial nature.

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: November 6, 2020

_____

Landon R. Brown
Administrative Law Judge