

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN P. GRAGG,
Grievant,

v.

Docket No. 2019-1194-MAPS

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

DECISION

John P. Gragg, Grievant, filed a grievance at level one against his employer, Respondent, West Virginia Division of Corrections and Rehabilitation, Bureau of Prisons and Jails, Parkersburg Correctional Center and Jail ("DC&R") dated March 4, 2019, alleging the following:

Wrongful termination for actions out of my control. No policies/procedure in place at the time of the incident. No formal training related to position of regional transport position. No OP in place/signed off on at WCHC. Email dated 1/4/19 after the incident on 1/2/19 stating transport personnel not responsible for count.

There were/are no Safeguards/failsafes present at WCHC upon recent acquisition by DOC of the Wood County Holding Center and facility.

There are not video cameras installed, no signage in place to indicate an inmate is in the interview rooms. No safety protocols.

Officers that were present at WCHC during the incident received two-week suspension. Officers who were not present, were terminated.

As relief, Grievant seeks:

Immediate reinstatement with backpay/benefits etc. Re-assignment to regional transport position. Personnel file corrected. Any and all documentation (electronic/papers)

related to this incident to be destroyed/expunged. No employee retaliation. Reinstated, no break in service or benefits or promotion.

A level one conference was held on March 19, 2019. By letter dated April 3, 2019, DC&R Commissioner, Betsy Jividen, adopted the recommendation of the hearing examiner and denied the grievance. Grievant's appeal to level two was dated April 11, 2019. A mediation was conducted on July 12, 2019. Thereafter, Grievant made a timely appeal to level three.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on November 5, 2019. Grievant personally appeared and was represented by Elaine Harris and Jack Ferrell, CWA, AFL-CIO. Respondent was represented by Briana J. Marino, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusion of Law on December 23, 2019.

Synopsis

Grievant was employed by Respondent as a Correctional Officer II. Respondent asserts that Grievant violated policy while performing his duties as a Temporary Transportation Officer for the North Central Regional Jail, and that such contributed to the escape of an inmate. Respondent dismissed Grievant from employment. Grievant denies Respondent's claims and asserts that any violation of policy or practice he committed did not contribute to the inmate escape. Grievant further asserts that Respondent engaged in discrimination and favoritism as he was dismissed from employment when others involved were not. Respondent proved its claims by a preponderance of the evidence. Grievant failed to prove his claims of discrimination and favoritism by a preponderance of

the evidence. Grievant also failed to prove that mitigation of his discipline was appropriate.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, John Gragg, was employed by Respondent, West Virginia Division of Corrections and Rehabilitation, as a Correctional Officer II ("CO 2") at the Parkersburg Correctional Center and Jail. Grievant had been working in corrections for fifteen years. At all times relevant herein, Grievant was temporarily assigned to work at the North Central Regional Jail and Correctional Facility ("NCRJ") as a Transportation Officer. He had been working in that assignment since September 8, 2018. In this position, Grievant was responsible for transporting inmates between NCRJ and the Wood County Holding Center ("WCHC") in Parkersburg, West Virginia.

2. Through courses at the West Virginia Corrections Academy¹ and in regular in-service training, Grievant was trained in proper techniques for inmate identification, movement and transport of inmates, as well as inmate escapes. Safe and secure transport of inmates to and from correctional facilities is an established job responsibility of a CO 2.

3. The West Virginia Division of Corrections and Rehabilitation was created by statute on July 1, 2018. Within the WVDC&R are the Bureau of Prisons and Jails, the Bureau of Community Corrections, and the Bureau of Juvenile Services. WVDC&R

¹ All correctional officers must complete training at the Academy within their first year of employment.

replaced the Division of Corrections, Regional Jail and Correctional Facility Authority, and Division of Juvenile Services.

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

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

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

7. Corporal Gary McDonald, Correctional Officer Amber Willis, and Correctional Officer Zachary Bibbee were the three employees on duty at WCHC during the day shift of January 2, 2019. Corporal McDonald was the shift commander on January 2, 2019. He was the highest-ranking officer and was in charge of WCHC operations.

8. As a Transportation Officer, Grievant worked with a partner, CO 2 Shane Foutty. In this position, Grievant and Officer Foutty transported inmates for things including, but not limited to, court appearances and medical appointments. As court proceedings and appointments vary in length, it was common for Grievant and Officer Foutty to finish their transports as late as 7:00 p.m. to 9:00 p.m.

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

10. Inmate A.D. was among those transported from the NCRJ. When custody was transferred to the WCHC staff, Grievant and Foutty also gave all documents related to the inmates to them as well. Once WCHC took custody of the seven inmates WCHC became responsible for all the inmates' care, as well as their comings and goings, and movement within the facility.

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

12. When the meeting was over, the deputy left the interview room and shut the door. Inmate A.D. remained in the interview room. After exiting the interview room, the deputy made contact with Officer Bibbee and told him that he was finished with the inmate. Officer Willis followed the deputy out of the booking area and unlocked the door for him to exit. Neither Officer Willis nor Officer Bibbee returned to the interview room to retrieve inmate A.D. and return him to the secure area.

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

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

15. Grievant took the paperwork from Officer Willis, and without reading or reviewing the same, he signed each page where indicated. He did not look at the documentation given to him by Officer Willis to verify that he had all the proper inmates that needed to be transported.

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

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

18. Grievant and Officer Foutty, assisted by Officer Bibbee, loaded the inmates into the vehicle and transported them back to NCRJ. Officer Foutty and Grievant left WCHC at or about 5:20 p.m. Grievant did not take any steps to properly identify the inmates as they were being loaded because he believed Officers Foutty and Bibbee had already done the identity checks.² Even though Grievant had signed a transfer of custody form for inmate A.D. indicating that he was being taken back to NCRJ, inmate A.D. was not in the vehicle. Inmate A.D. was still in the interview room at WCHC.

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

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

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

² When asked why he did not check the paperwork given to him by Officer Willis or the identity of the inmates to the paperwork as they were being loaded, he replied, "Blue should trust blue." However, the redundancy of multiple checks is built into the transport system to catch occasional mistakes made by a fellow officer.

22. While locked in the interview room, inmate A.D. began using a piece of metal like a light switch cover to cut the drywall on the back wall of the room to escape. Then, using his hands, inmate A.D. made a hole in the wall. Forcefully kicking the wall, inmate A.D. made a hole in the wall large enough to fit his body through. He crawled through the hole, and eventually ran through the lobby of the building before going out a side fire door, which did not alarm, and fled on foot from the building. It is estimated by investigators that inmate A.D.'s escape from WCHC occurred at about 6:38 p.m. A little more than an hour after Grievant and Officer Foutty left to transport the prisoners back to NCRJ.

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

24. At the time WCHC staff called Superintendent Westfall, no one knew who, if anyone, had escaped from WCHC, or when. Superintendent Westfall ordered investigation into the possible inmate escape in the early morning hours of January 3, 2019. Superintendent Westfall assigned Investigators Shawn Carson and Darin Cool to conduct the same.

25. On the morning of January 3, 2019, Grievant and Officer Foutty returned to WCHC to retrieve some inmate property that had not been given to them the evening before. When they arrived, Superintendent Westfall was there, as well as Officer Brogdon. Officer Brogdon told them that it was not one of their inmates from the day before because their count was good at NCRJ.

26. By the morning of January 3, 2019, the staff at NCRJ had conducted at least four inmate counts and had not found that inmate A.D. was missing. During the inmate count the officers are supposed to use an inmate sheet to determine that every inmate assigned to the facility is in his assigned cell.

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

28. Grievant and Officer Foutty returned to NCRJ after leaving WCHC. Grievant and Officer Foutty went to the pod where the inmates they transported the day before were housed. Grievant asked the inmates where A.D. was, and they all told him that A.D. had been released on home confinement. Grievant then suspected that inmate A.D. was missing. Grievant contacted facility administration, and asked for a standing count of NCRJ, which confirmed that inmate A.D. was missing. Grievant immediately called Officer Brogdon at WCHC and told him it was A.D. who was missing.³

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

Effective immediately, upon receiving the regional jail court docket, our staff will immediately print off an OIS picture sheet of the inmates that we are receiving to go to court for the scheduled day. When we are sending inmates back to the regional jail the inmate photo and name **has** to match before the inmate transport leaves the Wood County Holding Center.

³ A.D. was apprehended around 10:45 a.m. on January 3, 2019. Had Grievant not followed up and asked for a standing count, it would have been much longer before A.D. was identified as the missing inmate. Knowing the escapee's identity and his known associates, greatly enhanced the ability to track him quickly.

This process of verifying the inmates going back to the regional jail will **not** be conducted by the transport officer, it has to be done by the staff at the Holding Center. (Emphasis included in original).

30. At the time of the escape there was no formal inmate count procedure implemented at the WCHC

31. WVDCCR Policy Directive 300, "Short-Term Holding Facilities," at section A. *General Release Procedures*, the following procedures are set out:

6. Prior to releasing *or transferring* any inmate for any reason from any facility, the inmate shall be positively identified using file photos, OIS System Photo, face-to-face recognition, wristband identification, and if necessary, fingerprints, or any other means necessary to assure that positive identification is made and that the inmate being released has been legally authorized to be released by the court of proper jurisdiction and no other charges or detainers exist in the inmate's file or in OIS. . .

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

Prior to the implementation of any specific rule for transport to and from WCHC, this policy applied to all the correctional officers involved in the transfer of inmates, including the Grievant as a transport officer.

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

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

34. The investigators interviewed all the staff involved, as well as, inmate A.D. during their investigation. The investigators concluded that “[t]he Policy Violations by Correctional Staff at the Wood County Holding Center directly resulted in the escape of Inmate [A.D.]” The investigators concluded that Grievant, Officer Foutty, Officer Willis, Officer Bibbee, and Corporal McDonald each committed various policy violations.

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

36. Grievant attended the predetermination conference with Superintendent Westfall on February 22, 2019, at which time they discussed Grievant’s actions and conduct on January 2, 2019. Grievant was informed that his dismissal was being considered and he was given the opportunity to argue against his dismissal. Grievant admitted that he had made a mistake by not following proper procedure in identifying the inmates. He noted that this was his first time he had been in trouble at work and that he felt he was not given sufficient instruction when he commenced the temporary transport assignment.

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

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

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

The investigation determined you were assigned on 02 January 2019 to transport Inmate A.D. to North Central Regional Jail & Correctional Facility and then return back to NCJ&F on the same date. You had not completed an incident report at the time of the escape of inmate A.D. According to log entries you were responsible for transporting seven inmates to NCRJ&CF at 1720hrs on 02 January 2019. By your own admission, you failed to positively identify the inmates [to] be transported at 1720hrs on this date. You stated you only counted the number of inmates you were supposed to be transporting. You failed to follow Policy Directive 300 Short-Term Holding Facilities by not positively identifying the inmate.

By your own admission you stated that you signed the Inmate Release from Custody form, verifying you had custody of inmate A.D. without positively identifying any of the inmates who departed at 1720hrs to be transported to NCRJ&CF. Your actions on this date assisted in facilitating the escape of Inmate A.D. due to the Holding Center log entries showing the transport of Inmate A.D. . . . however this inmate was still located in the interview room.

Your actions place you in violation of Policy Directive 129.00 Progressive Discipline Section J as Follows:

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

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

6. Prior to releasing or transferring any inmate for any reason from any facility, the inmate shall be positively identified using file photos, OIS System Photo, face-to-face recognition, wristband identification, and if necessary, fingerprints, or any other means necessary to assure that positive identification is made and that the inmate being released has been legally authorized to be released by the court of proper jurisdiction and no other charges or detainers exist in the inmate's file or in OIS.

- **5. Instances of inadequate or unsatisfactory job performance.**
- **32. Falsifying any records whether through misstatement, exaggeration, or concealment of facts.**
- **42. Gross negligence on the job which results in the escape, death or injury of an inmate or any other person.⁴**

3*. Respondent dismissed Grievant, Officer Foutty, and Officer Willis from employment stemming from the escape of inmate A.D. Respondent suspended Corporal McDonald and Officer Bibbee for two weeks without pay.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. 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). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more

⁴ Respondent Exhibit 4.

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, a party has not met its burden. *Id.*

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

Respondent asserts that it properly dismissed Grievant from employment for violating policy by failing to positively identify inmates before transport. Respondent also alleges that Grievant signed forms confirming that he had taken inmate A.D. into custody when he in fact had not. Respondent argues that these actions “assisted in facilitating the escape of Inmate A.D.”

Grievant does not believe his actions specifically facilitated the escape inmate of A.D. Grievant admitted that he did not properly identify the inmates who were to be transported and he did not properly confirm that all the inmates that he signed for as being in his custody were actually present. Grievant points out that he had no prior disciplinary

or counseling issues. He also asserts that while he had received general training regarding the transfer of inmates, he received no instruction regarding the specific responsibility of a transport officer and there was no specific procedure designating who was responsible for identifying inmates for transfer at the WCHC. Further, it was Grievant's suggestion that a standing roll call be conducted at NCRJ that confirmed that inmate A.D. had escaped. Given these circumstances and his willingness to own up to his mistake, he believes that dismissal was too severe. Grievant also argues that it was discriminatory for Respondent to fire him when other involved officers received only a two-week suspension.

Much of the evidence is undisputed. On the morning of January 2, 2019, Grievant and Officer Foutty transported inmates, including inmate A.D., to WCHC from NCRJ for court appearances and transferred custody of them to WCHC when they arrived at the facility. There were three officers on duty at WCHC that day, Corporal McDonald, Officer Willis, and Officer Bibbee. Corporal McDonald was in charge. These three officers work twelve-hour shifts at the WCHC. Grievant and Officer Foutty then left WCHC and transported another inmate to a medical appointment in the Wood County area.

During the afternoon of January 2, 2019, while Officer Foutty and Grievant were not at the WCHC, Officer Bibbee transported inmate A.D. from the secure area inside WCHC to an interview room at the request of a sheriff's deputy. Inmate A.D. and the deputy met in the interview room for an unknown amount of time. When the meeting was over, the deputy exited the interview room and closed the door. The deputy saw Officer Bibbee and told him that he was done meeting with inmate A.D. Officer Willis followed the deputy out of the booking area so that she could unlock the door to let him exit. Inmate

A.D. was left in the interview room and not returned to the secure area. The interview room was locked from the outside and the light had been turned off with inmate A.D. still inside. Grievant had no responsibility for inmate A.D. being left in the interview room.

Grievant and Officer Foutty returned to WCHC at or around 5:00 p.m. to transport inmates back to NCRJ. All of those being held at WCHC were to be transferred to the NCRJ. Grievant went to WCHC control to get the transfer paperwork for the inmates from Officer Willis. She handed Grievant a stack of paperwork, supposedly one piece of paper for each inmate being transferred, for his signature. Officer Willis told Grievant "here is your seven." Grievant replied, "don't you mean eight?" Officer Willis again said "seven." Grievant signed each sheet where required without reviewing them. One of the papers indicated that inmate A.D. was returned to the custody of the transport officers. Grievant argues that he rightfully trusted Officer Willis to properly do the paperwork. However, the redundancy in the procedure of each officer checking the paperwork and identifications is designed to catch occasional mistakes that may lead to serious security issues.

While Grievant was dealing with Officer Willis in control, Officer Foutty went to the secure area within WCHC and began "pulling" inmates from the cells and preparing them for transport. Corporal McDonald and Officer Bibbee assisted him. At that time none of those officers had a list of inmates to be pulled and there was nothing displayed on the "count board." They pulled all the inmates for transfer to NCRJ, except inmate A.D. At no time did Officer Bibbee, Corporal McDonald, or Officer Foutty positively identify the inmates by checking their ID bracelets, photographs, or calling their names, while preparing them for transport.

Grievant met Officer Foutty, Corporal McDonald, Officer Bibbee, and the seven inmates to be transported at the vehicle. Grievant did not positively identify the seven inmates prior to transport. The seven inmates were loaded into the transport vehicle and taken back to NCRJ. NCRJ then took custody of the seven inmates from Officer Gragg and Grievant. NCRJ staff marked all seven present and accounted for at NCRJ. Therefore, NCRJ staff also did not positively identify the inmates when they took custody of the inmates.

During the entire transfer process inmate A.D. remained locked in the WCHC interview room until about 6:38 p.m. when he was recorded on video as escaping the interview room by a hole he had knocked in the wall. Inmate A.D. escaped from the facility, through the WCHC main lobby and out a disarmed fire door on the side of the building. He then left the immediate area on foot.

Investigators reviewing the incident found that all five of the officers involved violated numerous policies. In fact, the investigators found that they each had violated all the same policies in various ways, except Corporal McDonald was not found to have violated policy by failing to draft an incident report about the escape. Otherwise, the five officers were found to have violated the same policies. Of the five, Grievant, Officer Foutty, and Officer Willis were dismissed from employment. Corporal McDonald and Officer Bibbee were suspended from their jobs without pay for two weeks. Superintendent Westfall decided what discipline to recommend for each employee involved, and the same was approved by Assistant Commissioner Thomas, and eventually, Commissioner Betsy Jividen.

Superintendent Westfall stated that transfer is probably the most vulnerable time for prisoner escape. Grievant had been a transport officer for a few years and knew his responsibilities regarding that procedure. Superintendent Westfall found that Grievant knew his duty to check the paperwork and positively identify all inmates coming into his custody and control for transport. His view was for whatever reason, Grievant and Officer Foutty made the decision to not follow those procedures. Had they done so it would have been discovered that inmate A.D. was not among the inmates to be transferred thus preventing the mistake. He recommended dismissal of Grievant because of the serious risk to the public in an escape situation. Superintendent Westfall took Grievant's long successful service into account in making his decision, but he could not excuse Grievant for choosing to not follow specific security procedures which are in place to protect the most vulnerable times for prisoner escape and the risk such escapes pose to the public at large.

At issue is whether Superintendent Westfall's recommendation was arbitrary and capricious. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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]." *Blake v. Kanawha County Bd. of Educ.*,

Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Superintendent Westfall considered the actions of Grievant in the context of existing policies and the risk involved in prisoner escapes. Under the circumstances Respondent proved by a preponderance of the evidence that discipline was appropriate, and dismissal was not unreasonable.

Next Grievant argues that it was discrimination for him to be dismissed for his role in the escape while two other officers only received a two-week suspension. For purposes of the grievance procedure, discrimination is defined as "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). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

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

Grievant did not prove that the difference in treatment was related to the actual job responsibilities of the other two officers. The investigators concluded that Grievant,

Corporal McDonald and Officer Bibbee violated the same policies,⁵ but not exactly in the same way. Superintendent Westfall recommended a lesser penalty for Corporal McDonald and Officer Bibbee because their involvement in the incident was very different from Grievant's.

Grievant was the transportation officer. Like Officer Foutty, all his duties relate to assembling and properly completing the paperwork transferring custody of the inmates, properly identifying the inmates to be transferred and providing safe and secure transportation. Likewise, as the control officer, Officer Willis was specifically charged with performing and checking all paperwork related to the transfer of custody of all inmates to be transferred.

Corporal McDonald and Officer Bibbee had no direct responsibility for transfer of the inmates such as checking all the custody paperwork and positively identifying the inmates for transfer. Their role in the incident was assisting the transportation officers in preparing the inmates for transfer. Because they had much less direct responsibility for the transfer it was not discrimination to give them a lesser penalty based upon their "actual job responsibilities of the employees" involved.⁶ Consequently, Grievant did not prove discrimination because he was not similarly situated with Corporal McDonald and Officer Bibbee and the difference in penalties was based upon the actual job responsibilities of the employees involved.

⁵ With the exception that Corporal McDonald did file an incident report and the other officers did not.

⁶ Corporal McDonald and Officer Bibbee were certainly not without fault. They observed that no positive identification was being made and should have intervened.

Finally, Grievant argues that dismissal was too severe given his long successful employment and the fact that he immediately took responsibility for his mistake. "The argument that discipline is 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." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Respondent has proved that Grievant's failure to positively identify the inmates before the transport and his failure to properly check the transfer documents in violation of policy contributed to an inmate's escape from WCHC. Given the seriousness of the consequences of his actions, termination of Grievant's employment was not unreasonable. Superintendent Westfall testified that Grievant had otherwise been a good employee and had no disciplinary history. However, given that an inmate escape resulted, at least in part, from his misconduct, the penalty of dismissal is not clearly excessive, an abuse of agency discretion, or is inherent disproportionate to the proven misconduct. Grievant failed to prove that he is entitled to mitigation of his discipline. Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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. 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, a party has not met its burden. *Id*

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

3. Respondent proved by a preponderance of the evidence that Grievant’s conduct amounted to a very serious violation of agency policy and procedures which led to public risk; thus, the discipline was justified.

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

5. Under the circumstances Respondent proved by a preponderance of the evidence that discipline was appropriate, and dismissal was neither unreasonable nor arbitrary and capricious.

6. For purposes of the grievance procedure, discrimination is defined as "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).

7. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) That the different treatment is not related to the actual job responsibilities of the employees; and,

(c) That the difference in treatment was not agreed to in writing by the employee.

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

8. Grievant did not prove by a preponderance of the evidence that the difference in treatment was not related to the actual job responsibilities of the other two officers. Therefore, the difference in the penalties imposed did not constitute discrimination.

9. "The argument that discipline is 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." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

10. Grievant did not prove by a preponderance of the evidence that the penalty of dismissal is clearly excessive, an abuse of agency discretion, or is inherent disproportionate to the proven misconduct. Mitigation of the penalty is not appropriate.

Accordingly, the 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: February 7, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE