WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KAYLA WRATCHFORD,
Grievant,

v. **Docket No. 2020-1560-CONS**

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

DECISION

Grievant, Kayla Wratchford, was employed by Respondent, the Division of Corrections and Rehabilitation (DCR), at Huttonsville Correctional Center and Jail (HCCJ). On June 10, 2020, Grievant filed a grievance, assigned docket number 2020-1508-MAPS, alleging suspension without good cause. On June 26, 2020, Grievant filed a second grievance, assigned docket number 2020-1540-MAPS, protesting her dismissal. These grievances were properly filed directly to level three pursuant to W. Va. Code § 6C-2-4(a)(4). They were consolidated by order on August 28, 2020. For relief, Grievant seeks reinstatement and back pay.

A level three hearing was held via an online platform before the undersigned on November 10, 2020, and December 7, 2020. Grievant appeared and was represented by Paul Stroebel, Esq. Respondent was represented by Briana J. Marino, Assistant Attorney General. Each party submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Grievant was employed by the Division of Corrections and Rehabilitation (DCR) as a Correctional Counselor at the Huttonsville Correctional Center and Jail when COVID-

19 swept the nation. Grievant knew that many inmates and multiple staff had tested positive for COVID-19 and that hundreds of other inmates were awaiting their test results. Grievant was under immense stress due to the possibility of exposing her immunocompromised husband due to her daily inmate interaction with only a cloth mask manufactured from an old t-shirt to protect her. When she arrived at work on May 27, 2020, Grievant saw staff equipped with N95 masks and full gear. Lt. Currence directed that Grievant also be fitted. Superintendent Searls arrived moments later and nixed the directive, deeming a cloth mask sufficient. Grievant yelled at Superintendent Searls and left the facility grounds in a panic, even after being told to stay. DCR dismissed Grievant for various infractions related to this incident. While DCR proved that Grievant's actions violated protocol, it did not prove that this amounted to misconduct of a substantial nature affecting the interests and safety of the public or a gross disregard for professional responsibilities. In the alternative, Grievant proved mitigation is warranted. Accordingly, the grievance is GRANTED.

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, Kayla Wratchford, was employed by Respondent, the Division of Corrections and Rehabilitation (DCR), as a Correctional Counselor I, at the Huttonsville Correctional Center and Jail (HCCJ), at the time of her dismissal.

2. Grievant's duties entailed direct daily contact with inmates where she answered questions, delivered necessities, relieved Correctional Officers twice a day, and

provided a full day of security duty at least once a week. (Angie Booth and Grievant's testimony)

3. On March 14, 2020, DCR Commissioner Betsy Jividen issued a memorandum on COVID-19 protocol, which included a letter and a chart. The letter and chart mentioned N95 masks, protective gear, and surgical masks. The chart implied that staff had to use N95 masks, eye protection, gloves, and gown/coveralls for "Direct contact, including transport, to confirmed or suspected person" and a few other similar tasks. It also implied that staff had to use surgical masks for tasks such as "Direct contact with asymptomatic offender under quarantine as close contact of a confirmed case (not medical care or temp checks)." There was no mention of cloth masks or any face covering requirement for staff who have regular contact with inmates who are not confirmed or suspected of having COVID-19. (Respondent's Exhibit 5)

4. On March 16, 2020, Governor Jim Justice responded to the COVID-19 pandemic with a State of Emergency Proclamation declaring all DCR staff "essential employees." "Essential employees" are required to report to work in person.

5. On March 20, 2020, DCR issued an unnumbered Policy Directive (later numbered 337.00) to provide guidance regarding its COVID-19 response plan. DCR also issued a document titled *Huttonsville Correctional Center & Jail Procedure for Issuing, Care and Usage of Reusable Cloth Face Masks for Staff*. (Grievant's Exhibit 3)

6. Policy Directive 337.00 states, in relevant part, as follows:

> - The CDC recommends the following PPE when a person comes into contact with a person with suspected or confirmed COVID-19.
>   - Face mask or N95 respirator.

(Grievant's Exhibit 3, pages 8 – 9)

7. Policy Directive 337.00 defines face masks as “Disposable FDA-approved masks, which come in various shapes and types (e.g., flat with nose bridge and ties, duck billed, flat and pleated, pre-molded with elastic bands).” No definition of “FDA-approved masks” is provided. (Grievant’s Exhibit 3, page 9)

8. Policy Directive 337.00 contains “Centers for Disease Control Instructions for Putting on and Removing PPE.” The instructions under “MASK OR RESPIRATOR” are accompanied by a drawing of a mask which covers the nose and mouth and directions to “Secure ties or elastic bands at middle of head and neck”; “Fit flexible band to nose bridge”; “Fit snug to face and below chin”; and “Fit-check respirator”. (Grievant’s Exhibit 3, stamped DCR Discovery Response 290 – 291)

9. The document titled *Huttonsville Correctional Center & Jail Procedure for Issuing, Care and Usage of Reusable Cloth Face Masks for Staff* states, “CDC is additionally advising the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.” (Grievant’s Exhibit 3)

10. Unlike some of the other staff, Grievant never called off work, even though her husband was immunocompromised with a lung condition that placed him at high risk of harm if infected with COVID-19. (Grievant’s testimony)

11. By May 2020, all employees at HCCJ had been supplied cloth face coverings, at least some of which were made from old t-shirts. Grievant did not feel these cloth face masks were sufficient because they were not fitted and did not have a metal mold over the bridge of the nose.

12. Some employees were provided surgical or N95 masks depending on whether the duties of their position entailed extensive contact with inmates.

13. DCR employees were also permitted to acquire their own face coverings. Grievant knew this but had trouble finding any. (Grievant's testimony)

14. Emergencies arose on a regular basis at HCCJ, resulting in unscheduled interaction between staff and inmates. Thus, there was no guarantee that Grievant could avoid interacting with inmates on any given day.

15. On May 18, 2020, Commissioner Jividen sent an email to all DCR staff confirming that a staff member at HCCJ had tested positive for COVID-19. She went on to state, "The health and safety of everyone in our facilities will always be our highest priority." (Grievant's Exhibit 5)

16. On May 22, 2020, Grievant texted her immediate supervisor, Angie Booth, regarding concerns over COVID-19 at the facility, stating:

> Do they have a game plan for when everyone's been in contact with everyone? We are up to 27 inmates and 8 staff. I do not want to go back to work until I'm properly equipped with stuff to protect myself. This is proving these masks are not helping. They made Paul relieve south side today…
>
> I'm a nervous wreck but I don't want to be dragging that crap back home. I'll work as long as they make it safe for me to be there. But all the staff that's positive is proving a mask from United way isn't helping. Let me know what u find out. I don't feel like I'm being unreasonable esp with Adams medical issues. …

Ms. Booth expressed empathy with Grievant and promised to keep her updated. (Respondent's Exhibit 1)

17. HCCJ was the first correctional facility where an inmate contracted COVID-19. By May 27, 2020, 100 inmates and multiple staff at HCCJ had tested positive for

COVID-19, and 200 inmates were awaiting their results. (Testimony of Lt. Currence and Superintendent Searls)

18. Grievant was aware that many inmates and staff had tested positive and that many more were awaiting their test results. (Grievant's testimony)

19. Even though they were supplied cloth masks, most inmates either refused to wear them or to wear them properly. (Grievant's testimony)

20. After the pandemic began, Correctional Officers began regularly calling off, resulting in Grievant assuming even more duties involving inmate interaction. (Grievant's testimony)

21. On May 26, 2020, Superintendent Shelby Searls ordered staff with inmate interaction to use full protective gear and N95 masks. Grievant was assigned a security post for the day but did not receive an N95 mask or full protective gear. It is not clear if this was because she was not a uniformed officer.

22. When Grievant reported to work on May 27, 2020 at 7:00 a.m., an officer out front told her to go inside to get her N95 mask and gear. As Grievant proceeded inside, she saw staff wearing N95 masks and full protective gear. Grievant noticed that some staff in full gear were not regularly assigned to high-risk areas and felt she at least had the same amount of exposure risk to COVID-19 as they did. (Grievant's testimony)

23. Once inside, Lt. Currence directed Grievant to be fitted for an N-95 mask and protective gear for use that day because he believed that Superintendent Searls had directed all staff to be provided maximum protection. (Lt. Currence's testimony)

24. Immediately after Grievant received this directive from Lt. Currence, Superintendent Shelby Searls countermanded the order and instructed Lt. Currence not to issue an N-95 mask and gear to Grievant.

25. Superintendent Searls provided various rationales for not providing Grievant an N95 mask that day. Searls testified it was because Grievant did not have a security assignment that day. Yet, he wrote in the letter of dismissal that "only those employees in contact with inmates were going to be issued PPE…". (Superintendent Searls' testimony and Respondent's Exhibit 4)

26. Superintendent Searls did not handle roster assignments. Only shift commanders did so. (Superintendent Searls' testimony)

27. Grievant was informed that she would be needed on the high-risk Southside cell block that day and was concerned because she reasonably believed that there were many COVID-19 positive inmates there. Grievant also reasonably believed that she had more inmate contact than some uniformed officers, as inmates routinely came into her office on Dorm 7 from an open dayroom. (Grievant's testimony)

28. Grievant informed Superintendent Searls that she would be having direct contact with inmates that day and asked him if he was going to help keep her safe. Superintendent Searls smirked and said he would try. Grievant became very upset and raised her voice at Superintendent Searls. She turned and walked away before he could respond. (Grievant's testimony)

29. Grievant told Superintendent Searls and others that she was going home. No one told Grievant that she had to get permission to leave that day. (Grievant's testimony)

30. Upon exiting the building, Grievant was met outside by Captain Hinchman. Grievant was upset and crying. Captain Hinchman told Grievant to stay put outside and not to leave the premises while he went to speak with Superintendent Searls about the matter. (Captain Hinchman's testimony)

31. Grievant did not take this as an order because she was already outside the facility. Grievant then had a panic attack and left the grounds before Captain Hinchman returned. Grievant felt that circumstances surrounding COVID-19 at HCCJ and Superintendent Searls' cavalier attitude towards COVID-19 and safety protocol warranted an exception to standard protocol regarding obtaining permission before leaving. She did not receive permission to leave from anyone in her chain of command or from any staff member. (Grievant's testimony)

32. Superintendent Searls testified that he did not know on May 27, 2020, whether COVID-19 was more dangerous than the common flu. Mr. Searls maintained this ambivalence about the dangers of COVID-19 many months later during the level three hearing, despite receiving numerous briefings on COVID-19. Mr. Searls was unaware at the time of the incident that Grievant's husband was immunocompromised. Superintendent Searls agreed that DCR was responsible for the safety of its employees. (Superintendent Searls' testimony)

33. Respondent's protocol implied that an N95 mask or a surgical mask would have provided Grievant with greater protection from COVID-19 than a cloth mask.

34. Superintendent Searls testified that he had to prioritize some employees over others because HCCJ had a limited amount of N95 masks, surgical masks, and protective gear. (Superintendent Searls' testimony)

35. DCR's Report of Investigation was issued on June 3, 2020. It concluded that Grievant had abandoned her post and left the facility after beginning her shift on May 27, 2020. It also highlighted her posts on social media which excoriated the way DCR handled the protection of employees. (Grievant's Exhibit 4)

36. Grievant participated in a predetermination conference on June 17, 2020 and was informed that she was being dismissed. Superintendent Searls recommended dismissal after reading the entire Report of Investigation. The determination to dismiss was made by central office. Mr. Searls justified his recommendation of dismissal over lesser discipline using the state of emergency and the determination that Grievant had left her post and engaged in disruptive behavior that could affect others. Mr. Searls opined that abandonment of one's post would normally be sufficient grounds for dismissal. (Superintendent Searls' testimony)

37. Prior to her dismissal, Grievant had never been disciplined and had a stellar performance record.

38. Grievant's supervisor Angie Booth believed Grievant's concerns were valid and that Grievant could not avoid daily interaction with inmates because she regularly relieved Correctional Officers, worked security one day a week, and had an office on Dorm 7 where inmates freely entered. Ms. Booth was not interviewed for the investigation or prior to Grievant's dismissal. (Ms. Booth's testimony)

39. Even though she was a non-uniformed employee, Grievant was subject to the chain of command and was required to obtain permission before calling off, leaving during her shift, or leaving without proper relief.

40. In a letter of dismissal to Grievant dated June 17, 2020, Superintendent Searls provides grounds for dismissal as follows:

> On May 27, 2020, you reported to your scheduled shift at 7 a.m. Upon entering the facility, you went to the control center to be issued personal protective equipment (PPE). When you realized that you were not going to be issued an N-95 mask you became upset. When I attempted to explain to you that only those employees in contact with inmates were going to be issued PPE you became disruptive and began cursing loudly and stating something to the effect of "*fuck no, no you don't get to decide*." As you were leaving through the main entrance, you kept screaming "*no, no, no*." You then left the facility and clocked out. You did not notify me, nor anyone in your chain of command that you were leaving the facility. Had you calmed down, I would have explained to you that you were not going to be assigned to a housing unit as arrangements had been made to assign non-uniformed staff to service positions so that feeding, laundry, and commissary services could continue to function. Your display of disruptive, disrespectful, unprofessional, and unacceptable behavior will not be tolerated in any situation at this facility. Your willful abandonment of your post during an emergency/pandemic situation without any regard for the burden that you placed on the facility and your co-workers is unconscionable.

41. The letter further details the policies Grievant violated, as follows:

- West Virginia Division of Corrections and Rehabilitation Policy Directive 129.00, Paragraph F, Sections:

1. Failure to comply with Written Instructions (e.g. Policy Directives, Protocols, Commissioner's Instructions, Operational Procedures, or Post Orders).
2. Unsatisfactory attendance, excessive tardiness, or failure to follow established procedures for reporting off work, unauthorized absence, or failure to report to work as scheduled without proper notification. Note: it is considered a disciplinary action whenever an employee has their pay docked for unauthorized leave.
3. Abusing state work time – examples include unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, loafing, wasting time, or inattention to duty.

4. Disrespectful conduct, bullying, intimidation or the use of threatening, insulting, abusive, or obscene language to or about others.
5. Instances of inadequate or unsatisfactory job performance.
6. Disruptive Behavior.
12. Failure or delay in following a supervisor's instructions, Performing assigned work or otherwise complying with applicable, established written instructions.
14. Leaving a post or work site without permission or proper relief during work hours.

42. The letter concludes:

> Your unacceptable and unprofessional behavior cannot be tolerated and as Superintendent of this facility, with the overall responsibility for the safety and security of the inmates and staff, I must take appropriate action to correct such behavior. Your inability to perform your duties compromises the security of the institution …
>
> …The nature of your misconduct demonstrates a willful disregard of the employer's interests or a wanton disregard of standards of behavior which the employer has the right to expect of its employees. I believe the nature of your job abandonment and unprofessionalism is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of the West Virginia Division of Corrections and Rehabilitation / Huttonsville Correctional Center and Jail, thus warranting your dismissal.

43. The testimony did not show that Grievant cursed at Superintendent Searls.

44. Respondent did not submit into the record a copy of Policy Directive 129.00.

The only authority in the record supporting the proposition the Grievant violated this Policy Directive is the apparent paraphrasing thereof in the letter of dismissal, the Report of Investigation, and Superintendent Searls' testimony.

45. Grievant has retained the part time employment she held before her dismissal and has not obtained additional hours or other employment.

Discussion

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

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*).

Grievant was dismissed from her employment with DCR for the way she responded to the reversal by Superintendent Searls of the provision of an N95 mask and full protective gear. Respondent contends that Grievant then yelled at Superintendent Searls and left work without permission after being ordered to stay put. Respondent

claims this violated DCR protocol against leaving one's post without permission and against disruptive, disrespectful, and insubordinate behavior. Grievant counters that her behavior was excusable considering the stress she was under due to her husband's immunocompromised status and Respondent's ongoing failure to provide adequate protection against COVID-19. She asserts that her stress was further exacerbated by Superintendent Searls' cavalier attitude towards keeping her safe and that these factors and her stellar record warrant mitigation.

Grievant does not dispute that she became upset and raised her voice at Superintendent Searls in front of coworkers. This clearly qualifies as disrespectful and disruptive behavior. Grievant does not contest that disrespectful and disruptive behavior violates DCR Policy Directive 129.00. As for the use of profanity alleged in the letter of dismissal, there was no testimony presented thereon at the level three hearing. Respondent did not prove that Grievant cursed at Superintendent Searls. This goes to mitigation of the penalty.

Regarding the allegation that Grievant was insubordinate in disobeying an order, Captain Hinchman credibly testified that he told Grievant to stay put when he met her outside and to not leave the premises while he went to get answers for why she was refused an N95 mask. Grievant does not contest that the failure to follow an order violates DCR Policy Directive 129.00. Grievant argues that she did not consider it to be an order when Captain Hinchman told her to stay put because she had already exited the building. She agrees she left before he returned. This qualifies as failure to obey. Grievant further asserts she was justified in leaving because she was in a state of extreme stress due to the events that had transpired. Grievant did not present any authority for the proposition

that this excused her failure to obey.

As for the allegation that Grievant left her post without permission, Grievant does not contest that this violates DCR Policy Directive 129.00. Grievant asserts that no one told her she had to get permission when she said she was leaving. Grievant did not present any authority for the proposition that Respondent was obligated to dissuade her from leaving by telling her she needed to first obtain permission. Thus, Grievant left work without permission.

Grievant contends that she left the facility because Superintendent Searls unnecessarily put her and her family in danger by failing to provide adequate protection. She implies that the way she responded was therefore justified. This is an affirmative defense.[1] "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Whether being placed in unnecessary danger provides Grievant with a defense against obeying protocol requires further analysis.

The common infraction for all of Grievant's alleged violations is insubordination. Insubordination implies more than just failure to follow an order. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and

[1]"Affirmative defense" means "[i]n pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd, Sexton v. Marshall Univ*., 182 W. Va. 294, 387 S.E.2d 529 (1989). Employees do have a sliver of latitude to disobey a directive, rule, or regulation.[2] Grievant did not prove that she had leeway to disobey a directive, rule, or regulation.

Nevertheless, Respondent has not proven its case against Grievant. In spite of proving that Grievant committed infractions, Respondent must still show that its dismissal of Grievant was justified. As previously stated, Respondent has the burden of proving that Grievant engaged in "misconduct of a substantial nature directly affecting the rights and interest of the public" and public safety or a gross disregard for professional responsibilities. Thus, a permanent employee who is dismissed has greater protection against dismissal than against lesser forms of discipline because, with dismissal, the employer has the burden of proving that the employee engaged in misconduct affecting the public interest and safety. *Oakes* and *Graley Supra*. Superintendent Searls testified that DCR dismissed employees in the past for leaving correctional facilities without permission, implying that it is in the public interest and safety for inmates to be properly

[2]"'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ*., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd, Graham v. Bd. of Educ. of Wetzel Cty*., No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (*memorandum decision*). There appears to be some leeway in interpreting what constitutes an unlawful directive. For instance, the Grievance Board has upheld the dismissal of cadets for obeying a lawful order to participate in a Nazi salute. This implies that employees also have a duty to disobey immoral orders that are not necessarily unlawful, and thus have a defense for disobeying them. *See Smarr and Schultheiz v. DCR/BPJ/SMCCJ*, Docket No. 2020-1488-CONS (Sept. 23, 2020).

monitored. This rationale makes sense for Correctional Officers who perform a security function and for employees filling in for Correctional Officers. However, Respondent uses as justification for its not providing Grievant an N95 mask the fact that Grievant was not scheduled to perform a security function on May 27, 2020. This presents a quandary for Respondent. Does Respondent use Grievant's intermittent security role as justification for dismissing her in the public interest even though she was not going to engage in it that day or does it use the fact that she would not be having a security role that day as justification for not providing her a mask? Respondent appears to have chosen the later, thus weakening its argument for dismissal. Whether Respondent proved that Grievant's conduct affected public safety and public interests or a gross disregard for professional responsibilities requires further analysis.

In reviewing the claims made by each party that are relevant to this issue and that of mitigation, there are a handful that are in dispute. Searls provided various rationales for not providing Grievant an N95 mask. He testified that he nixed the provision of an N95 mask to Grievant because she was not assigned to a security role that day. Yet, he states in the letter of dismissal that Grievant did not receive an N95 mask that day because "only those employees in contact with inmates were going to be issued PPE…". Grievant contends that her conduct was justified in light of her husband's immunocompromised status because she knew she would be interacting with inmates that day and told Searls as much. There appears to be confusion as to whether Superintendent Searls knew that Grievant would be interacting with inmates and as to the methodology Searls used to determine who should receive N95 masks.

The credibility of Grievant and Superintendent Searls are at issue. Searls' credibility goes to both his testimony and his motive in recommending dismissal. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id*., *Burchell v. Bd. of Trustees*, *Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997). Not every factor is necessarily relevant to every credibility determination. In this situation, the relevant factors include demeanor, motive, opportunity to perceive, attitude toward the action, the consistency of prior statements, and plausibility.

While Grievant had motive to misrepresent, as would any party to an action, she exhibited a calm and candid demeanor that seemed removed from the emotions of May 27, 2020. Grievant's testimony remained consistent and came from personal

knowledge. Her attitude towards the action was appropriate. Grievant plausibly testified that she interacted with inmates daily because her office was on Dorm 7 and inmates freely came into her office from the dayroom. She also plausibly stated that all non-uniformed staff were called on to fill in for Correctional Officers during their breaks or if they called off, and that she filled in for them daily. She plausibly testified that she had more contact with inmates than some uniform staff due to her daily interaction with inmates, including simple tasks such as providing them soap and other necessities. Grievant also testified that she was aware at the time of the incident that many inmates had tested positive for COVID-19. The plausibility of this testimony is seen by Grievant's texts with her supervisor just weeks prior to the incident where she expressed concern over the positive tests while reciting the number of positive inmates and staff.

Superintendent Searls also had motive to misrepresent. Grievant had humiliated him in public by screaming at him and had called HCCJ out on social media for its failure to have a coherent plan to protect its employees from COVID-19. Grievant's social media posts were thoroughly delineated in the Report of Investigation. Searls testified that he read the entire report before recommending that Grievant be dismissed. It was apparent that Searls had issues with consistency and clear communication as seen in the fact that he and his staff were not on the same page after he issued a directive on May 26, 2020, regarding who should receive N95 masks and protective gear. The incident with Grievant was in part a consequence of his failure to either adequately or consistently communicate his directives. Searls testified that Grievant never told him she would be working security

duty that day. Grievant testified that she told Searls she would be interacting with inmates and followed this by asking him if he was going to keep her safe, to which he smirked and responded that he would try. These four facts in succession flow seamlessly and sum up in a nutshell the crux of emotion that led to the events at issue in the grievance.

Superintendent Searls provided various rationales for not providing Grievant an N95 mask. Superintendent Searls testified it was because Grievant did not have a security assignment that day. Yet, he wrote in the letter of dismissal that "only those employees in contact with inmates were going to be issued PPE…". He further testified that Grievant did not let him explain his thought process in concluding Grievant did not need a N95 mask and protective gear. Searls delineated this in his letter of dismissal, stating, "Had you calmed down, I would have explained to you that you were not going to be assigned to a housing unit as arrangements had been made to assign non-uniform staff to service positions so that feeding, laundry, and commissary services could continue to function." However, this seems to conflict with Searls' testimony that he did not handle roster assignments as well as his testimony that Grievant never set him straight as to where she would be working that day.

It defies plausibility that Searls' explanation to Grievant would have made a difference if his decision to not provide her an N95 mask and gear was in fact based on her failure to tell him she was interacting with inmates that day. It also seems unlikely, given Grievant's forthrightness that day, that she would have held back from telling him that she would be interacting with inmates. Searls' credibility is also

compromised by his testimony that he did not know at the time of the incident, or even months later when he testified at level three, whether COVID-19 was any more dangerous than the flu. If Searls was ambivalent about COVID-19 being similar to the flu, it follows that he would have had no more concern for staff contracting COVID-19 than the flu. It also gives credence to Grievant's testimony that Searls smirked when she asked him if he would keep her and her family safe. The rationale given by Searls for recommending Grievant's dismissal is tainted by its own inconsistencies and the effects thereof on his credibility.

The parties might have avoided the incident that followed had they tempered their emotions and talked out their concerns. Grievant was understandably stressed given that Respondent allowed her reasonable perception of inadequate protection from COVID-19 to drag on for months. Grievant justifiably feared for the safety of her immunocompromised husband. Even so, Grievant should have interacted less emotionally with Superintendent Searls and he should have been more understanding of her fears given that every employee potentially could have non-apparent circumstances that play into their workplace concerns and temperament. With that in mind, Searls could have displayed a less cavalier attitude toward Grievant's concerns and been more empathic. Had he avoided smirking or telling Grievant he would try to keep her safe, there is a good chance Grievant would not have reacted the way she did. Ultimately, Grievant is responsible for her own behavior.

Nevertheless, Respondent had the burden of proving that Grievant committed "misconduct of a substantial nature directly affecting the rights and interest of the

public" and public safety or that her conduct amounted to a gross disregard of professional responsibilities to justify her dismissal. Respondent did not meet its burden. While one incident may not affect the public interest and safety, or indicate a gross disregard for professional responsibilities, the same act of misconduct repeated multiple times may be sufficient to justify dismissal. It is important to note that up until the incident on May 27, 2020, Grievant had a stellar record devoid of disciplinary incidents. Respondent could have more justifiably imposed any lesser punishment and the undersigned would have been hard pressed to second guess it. Instead, Respondent chose to impose the ultimate penalty. Superintendent Searls testified that DCR has dismissed employees for abandoning their post, implying that this act puts the public interest and safety at risk. Dismissal for this infraction seems to be more prevalent in the correctional setting because of the security concerns associated with abandoning a post. This concern seems more apt for staff on security duty. Searls testified that Grievant was not on security duty that day and even implied that she was not going to be interacting with inmates. Thus, Respondent failed to prove that dismissal for this first offense was justified.

Even if Respondent had proven that Grievant's misconduct directly affected the public safety and interest or was a gross disregard of professional responsibilities, Grievant made a strong case for mitigation of her dismissal. "[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).

Dismissal of employees for abandoning a post, even when they have stellar records, seems more justifiable in security settings because of the effects on the

public interest and safety resulting from the security concerns associated therewith. However, Grievant was a counselor, not a Correctional Officer. Nevertheless, Grievant performed security duties at times, even though these were not her primary duties. Ironically, Superintendent Searls determined that Grievant would not be performing security duties on the day of the incident. Thus, this rationale for dismissal does not apply to Grievent. Respondent never altered its position that Grievant would not have been on security detail on May 27, 2020. Respondent's allusion to the contrary is therefore insincere and not credible. This is indicative of the arbitrary and capricious nature of Grievant's dismissal.

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).

Grievant implies that she did not know she would face dismissal in failing to get permission to leave because no one told her she needed to that day. While this

claim as to lack of knowledge at first glance appears to defy credulity, it makes sense from the perspective that she was not a uniformed employee who could expect to be dismissed for abandoning their security post. Of additional relevance is Grievant's stellar record, her justifiable stress caused by possibly exposing her immunocompromised husband to COVID-19, the shoddy protection provided and the cavalier attitude exhibited by Superintendent Searls, the questionable motives for dismissal, Grievant's fearlessness in not calling off like many other staff did to avoid exposure, and Respondent's failure to prove that Grievant cursed at Superintendent Searls. Grievant proved by a preponderance of evidence that her dismissal warrants mitigation.

In summary, Respondent failed to prove by a preponderance of evidence that it was justified in dismissing Grievant. The penalty of dismissal necessitates "misconduct of a substantial nature directly affecting the rights and interest of the public" and public safety or a gross disregard for professional responsibilities. While Respondent proved that Grievant committed misconduct, it did not prove that her conduct in yelling at Superintendent Searls and leaving the facility affected the public interest and safety. Grievant had a stellar record and was not a uniformed officer or posted on security duty that day. Even if Respondent had proven that Grievant's conduct affected the interest and safety of the public, Grievant proved that her dismissal warranted mitigation. Grievant was under immense stress out of concern not for herself, but for her immunocompromised husband, as she regularly interacted with inmates in a facility where many were COVID-19 positive. Grievant chose not to call off like many of her coworkers and had a stellar record with no disciplinary

incidents. While Respondent has dismissed Correctional Officers for abandoning their security post, it did not provide a coherent reason for dismissing Grievant when her infractions would otherwise warrant lesser discipline.

The following Conclusions of Law support the decision reached.

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 was 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, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, 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 did not prove by a preponderance of evidence that Grievant engaged in misconduct of a substantial nature directly affecting the rights, interest, and safety of the public or that her conduct was a gross disregard of professional responsibilities.

4. "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).

5. Even if Respondent had proven that Grievant's actions affected the interest and safety of the public or was a gross disregard of professional responsibilities, Grievant proved by a preponderance of evidence that mitigation of her dismissal is warranted.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to reinstate Grievant and to provide her back pay from the date of her dismissal to the date she is reinstated, plus interest at the statutory rate; to restore all benefits, including seniority; and to remove all references to the dismissal from Grievant's personnel records maintained by Respondent.

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: February 25, 2021

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Joshua S. Fraenkel
Administrative Law Judge