THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHAWN WILLIAM RAMSEY,
Grievant,

v. **Docket No. 2022-0400-DHS**

DEPARTMENT OF HOMELAND SECURITY/ BUREAU OF PRISONS AND JAILS/MOUNT OLIVE CORRECTIONAL COMPLEX AND JAIL,
Respondent.

DECISION

Grievant, Shawn William Ramsey, filed an expedited level three grievance against his employer, Respondent, West Virginia Department of Homeland Security, Bureau of Prisons and Jails, Mt. Olive Correctional Complex and Jail (MOCCJ) dated November 11, 2021, stating as follows:

> [u]nfairly terminated for a use of force that I backed out in. During the investigation I watched the video where it appeared that I had struck the inmate. I stated that I did not recall striking the inmate and that I think I need help for possible anger issues that I was not aware of at that time. After stating that I Need (sic) help, none was offered, I went home and proceeded to tell my wife. She called our PCP and I was set up with a Counselor. I have been in counseling since and also been referred to a Therapist as well. I have also been diagnosed with PTSD and been put on medication for this.

As relief sought, Grievant asks to be "[r]einstated at previous rank, pay and my choice of post for the rest of my career. All my annual leave returned. If not, to be transferred to the WV DOT, Oak Hill detachment at the pay rate as I had as a Correctional Officer IV and for all annual leave reinstated and annual leave and sick to follow in career change."

A level three hearing was held via Zoom video conferencing on March 14, 2022, before the undersigned administrative law judge who appeared from the Grievance

Board's Charleston, West Virginia, office. Grievant appeared in person and via Zoom, *pro se*. Respondent appeared via Zoom by counsel, Jodie Tyler, Esquire, Assistant Attorney General, and represented by Donnie Ames, Superintendent of MOCCJ. This ALJ, Grievant, and Respondent appeared from separate locations. It is noted that Ms. Tyler, Superintendent Ames, and possibly their witnesses, initially appeared in person at the Grievance Board's office on the morning of the hearing. Grievance Board staff informed this ALJ of the same, and this ALJ granted Ms. Tyler, Superintendent Ames, and those with them time to travel to Respondent's Charleston location so that they could appear by Zoom for the hearing. The hearing proceeded by Zoom once the parties were logged in at the respective locations. This matter became mature for decision on April 11, 2022, upon the receipt of the last of the parties' post-hearing submissions.[1]

Synopsis

Grievant was employed by Respondent as a Correctional Officer IV. Respondent dismissed Grievant from employment for excessive use of force on an inmate, failing to report the use of force, and attempting a cover-up of the same, all of which violate numerous West Virginia Division of Corrections and Rehabilitation (WVDCR) policies and procedures. Grievant denies Respondent's claims. Respondent proved its claims by a preponderance of the evidence and was justified in dismissing Grievant from employment. Therefore, this grievance is DENIED.

[1] In his post-hearing submissions, Grievant appears to raise alleged facts and/or claims that he did not raise during the level three hearing, or before. Any claims or evidence raised after the record of his grievance was closed on March 14, 2022, will not be considered in deciding this grievance.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a Correctional Officer IV, holding the rank of Sergeant, at MOCCJ. Grievant had been employed by Respondent for approximately twenty-two years.

2. Donald Ames is the Superintendent of MOCCJ. John Frame is its Associate Superintendent of Security. John Young is employed at MOCCJ as an Investigator I.

3. On or about August 19, 2021, an inmate's attorney telephoned Superintendent Ames and informed him his client, Inmate A, had been assaulted while he was in the infirmary at the facility during the prior weekend.[2]

4. After receiving the call from the attorney, Superintendent Ames called Associate Superintendent Frame and asked if he was aware of any use of force incident involving Inmate A that occurred on August 14, 2021. Associate Superintendent Frame

[2] The inmate will be identified as Inmate A throughout this Decision. It is noted that the exhibits Respondent presented at the level three hearing had not been redacted to conceal the identities of inmates and other personal identifying information. This ALJ began redacting the documents during the proceeding and reserved the right to further redact them if other personal identifying information was discovered while reviewing the evidence. It is the responsibility of the parties to redact such documents before presenting them at the hearing. However, as counsel for Respondent was new to her position, and as this was a Zoom proceeding, this ALJ made an exception this one time. It is further noted that in reviewing the exhibits, a second inmate is mentioned in the investigation report. This ALJ has redacted the second inmate's name and any personal identifying information found in the exhibits, and refers to him as Inmate B. If there is no "B" by a redaction, that means the redaction refers to Inmate A.

advised him that he was not aware of any such use of force and that no reports of the same had been filed.

5. As stated in a written memo dated August 19, 2021, Associate Superintendent Frame requested John Young to investigate the August 14, 2021, incident. It is noted that in addition to the written memo, Associate Superintendent Frame spoke to Investigator Young in person on August 21, 2021.[3]

6. On August 23, 2021, as part of his investigation, Investigator Young accessed the facility's surveillance system, and reviewed video recordings from the cameras located in the infirmary from August 14, 2021, between 11:07 p.m. and 11:37 p.m. These recordings captured the entire use of force incident that occurred on August 14, 2021, involving Grievant, Inmate A, and four other correctional officers.

7. The August 14, 2021, recording shows that while Inmate A was seated in a chair outside his cell with his arms/wrists restrained behind his back, Grievant pushed Inmate A back in his chair twice, once with significant force, and thereafter struck Inmate A in or about the face two times. Later in this video, Lieutenant Ward can be seen striking Inmate A three times.[4]

8. The video recording shows that Inmate A was not trying to fight, strike, or otherwise physically resist being restrained and removed from his cell. Inmate A was only verbally objecting to another inmate, Inmate B, being placed in the cell with him.[5]

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[3] *See*, Respondent's Exhibit 1, August 19, 2021, Investigation Memo; testimony of John Young.

[4] *See*, testimony of John Young; Respondent's Exhibit 4, "Report of Investigation," dated August 31, 2021; Respondent's Exhibit 2, August 14, 2021, Video Recording.

[5] *See*, testimony of John Young; testimony of Shawn Ramsey; Respondent's Exhibit 2, Video Recording; testimony of Kaitlin Montgomery.

9. After reviewing the recording from August 14, 2021, Investigator Young began interviewing witnesses. From August 24, 2021, to August 26, 2021, Investigator Young interviewed Inmate A, Correctional Officer I Samuel Kelly, Grievant, Lieutenant Ward, Correction Officer II Kaitlin Montgomery, and Corporal Ralph Champion about the events of August 14, 2021.

10. Initially, during his interview with Investigator Young, Grievant denied striking Inmate A. Thereafter, Investigator Young gave Grievant the opportunity to review the video recording of the incident. After seeing the video, Grievant stated that he did not recall striking Inmate A but acknowledged that he did so.[6] At some point during the interview, Investigator Young informed Grievant that he was not to speak to anyone about his interview or the investigation.

11. Grievant did not write a report of the use of force incident, as is required by policy, and he instructed subordinate officers not to write reports about the incident. He also instructed them not to speak to anyone about it.

12. Despite being told not to discuss his interview or the investigation with anyone, following his interview, Grievant called Lieutenant Ward and informed him that Investigator Young had a video recording of the August 14, 2021, incident.

13. On or about August 31, 2021, Investigator Young completed his investigation report wherein he concludes that the allegations of [Grievant's] excessive use of force toward Inmate A were substantiated. Investigator Young submitted his report to WVDCR administration.

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[6] *See*, testimony of John Young; testimony of Shawn Ramsey; Respondent's Exhibit 4, Investigation Report.

14. By letter dated October 20, 2021, Superintendent Ames informed Grievant that a predetermination conference would be held on October 29, 2021, and that such was being held "to provide [Grievant] with the opportunity to respond to the tentative conclusion that you should be issued discipline up to and including dismissal as a Correctional Officer IV with the Mount Olive Correctional Complex and Jail for an allegation of a use of force what was not reported. . . ." This letter further advised Grievant that he was accused of multiple violations of WVDCR Policy Directives 129.00 and 303.[7]

15. Grievant's predetermination conference with Superintendent Ames was held on October 29, 2021, as scheduled. Superintendent Ames informed Grievant at the start of the predetermination conference that he was considering terminating Grievant's employment for striking Inmate A, failure to report the incident, and for instructing his subordinates to file no reports about the same. Superintendent Ames granted Grievant the opportunity to respond. It is unknown if anyone other than Grievant and Superintendent Ames attended this meeting.

16. During the predetermination conference, Grievant asserted that he remembered Inmate A being verbal and would not stop, but that he did not remember striking Inmate A. Grievant claimed that he had been directed by someone "higher up" to file no report about the incident.[8] Grievant also informed Superintendent Ames that he started treatment for his anger issues and PTSD.

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[7] *See*, Respondent's Exhibit 5, Letter dated October 20, 2021.

[8] *See*, Respondent's Exhibit 9, October 29, 2021, letter; testimony of Donald Ames; testimony of Grievant. Grievant did not identify the higher-up person whom he alleged directed him to not write a report.

17. By letter dated October 29, 2021, Superintendent Ames informed Grievant that his employment was terminated for "excessive use of force, failure to file a report, and telling subordinates not to file or report this use of force incident," all in violation of WVDCR Policy Directives 129.00 and 303. Additionally, Superintendent Ames noted in this dismissal letter that Grievant failed to take Inmate A for medical treatment after being struck by both Grievant and Lieutenant Ward, which is also a violation of WVDCR policies and procedures.[9]

18. Neither party called Associate Superintendent Frame to testify at the level three hearing.

19. Neither party called Inmate A, Inmate B, Lieutenant John Ward, Associate Superintendent of Programs, John Bess, CO I Samuel Kelly, or Corporal Ralph Champion to testify at the level three hearing.[10]

20. It is unknown whether Respondent imposed any discipline on the other correctional officers who participated in, or witnessed, the August 14, 2021, incident.

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17,

[9] *See*, Respondent's Exhibit 9, October 29, 2021, letter.
[10] Respondent introduced a disk containing the audio recordings of the interviews Mr. Young conducted during his investigation. This disk is Respondent's Exhibit 3.

1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that it properly dismissed Grievant from employment for excessive use of force on Inmate A, failing to file a report of the incident, attempting to cover-up the incident by instructing his subordinate officers not to file reports of the incident or speak to anyone about it. Grievant's response to the allegations against him is somewhat confusing. Grievant argues that the surveillance camera video Respondent presented does not show him slapping Inmate A. Grievant asserts that the video shows him "talking with his hands," and that it does not show him slapping Inmate A. Further, Grievant claims that he has no memory of hitting Inmate A, and that he blacked out during the incident because of his anger issues and PTSD.[11] In his post-hearing submissions, Grievant states that he does not think he "laid" his hands on Inmate A at all. However, Grievant testified that he remembers Inmate A being "verbally aggressive" and that Inmate A attempted to stand up two times while he was restrained and seated in the chair.

Grievant further claims that he was coerced into admitting some of the allegations against him during his interview with Investigator Young. As for whether Grievant denies instructing his subordinate officers not to report the incident, it is unclear. Grievant appears to both admit and deny doing the same. Grievant testified that watching the video recording with Investigator Young prompted him to seek help for his anger issues, which he did. However, Grievant appears to somehow fault Respondent for his dismissal because Grievant asked Investigator Young and

[11] *See*, Statement of Grievance; testimony of Shawn Ramsey.

Superintendent Ames for help with his anger issues during the investigation, but Respondent provided him no help. Lastly, even though he was instructed to speak to no one about the incident after his interview with Investigator Young, Grievant admits that he called Lieutenant Ward, who had not yet been interviewed, and tipped him off about Respondent having a video of the incident.

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*).

WVDCR Policy Directive 129.00, "Code of Conduct and Progressive Discipline," states, in part, as follows:

> II. The Division expects its employees to:
>
> A. Conduct themselves in such a manner that their activities both on and off duty will not discredit either themselves, other employees, of the Division. . .
>
> IV. The basic principle underlying disciplinary procedures is that the Division must demonstrate cause for disciplining a classified employee.

F. The following list of violations is intended to be an illustrative but not all-inclusive code of conduct covering all employees regardless of their employment status with the Division. Accordingly, a violation or other misconduct although not listed below, but found by management to undermine the effectiveness of the Division's activities or the employee's performance should be treated consistent with the provision of this policy.

1. Failure to comply with Written Instructions (e.g. Policy Directives, Protocols, Commissioner's Instructions, Operational Procedures, or Post Orders . . .

5. Instances of inadequate or unsatisfactory job performance. . .

8. Refusal to cooperate in or interference with any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in any inquiring or investigation. . .

12. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written instructions. . .

31. Using unnecessary or excessive force, or physical abuse of any person. . .

48. Failure to file a written report by the end of the duty shift concerning any incident, violation of law, rules and/or regulations, or information relative to the safety and security of the agency or any of its locations, its employees, persons under agency custody or supervision, or the public. . . .

WVDCR Policy Directive 303, "Control/Restraints," states, in part, as follows:

I. GENERAL

A. It is the policy of the West Virginia Division of Corrections and Rehabilitation to use the least amount of force reasonably necessary when resolving situations involving confrontation or aggression. . .

J. Staff shall only employ that level of control required to overcome the level of resistance encountered by using the force continuum. . .

O. The staff person using force and the subject against whom was used will receive immediate medical attention, as appropriate. . .

P. In all situations where any force was used, individual written reports shall be submitted by anyone involved in any way or any witnesses by the end of their shift, unless serious injury prevents that. . .

IV. USE OF RESTRAINTS

B. Any use of restraints, except for transportation purposes and routine use in segregation units will be documented and submitted to the Shift Commander and then forwarded to the Chief Correctional Officer. . . .[12]

The surveillance camera central to this grievance is located in the hallway that runs in front of Inmate A's cell. The video is fairly clear, but the lighting is poor in the area where the incident occurred. Therefore, discerning fine details is difficult. Also, there is no audio on this recording. The camera is positioned opposite a security desk which is down the hallway (closer to the camera) from Inmate A's cell. The camera is pointed straight down the hallway that runs from the desk, past the cell of Inmate A, and all the way down to a blue security door at the opposite end of the hallway. The camera

[12] *See*, Respondent's Exhibit 8, Policy Directive 303. It is noted that the language quoted from this exhibit differs slightly from that in Respondent's Exhibit 6, October 29, 2021, dismissal letter. These differences do not change the meaning of any provisions of the policy.

is positioned to capture activity in front of and at a security desk, and any activity between the security desk and the secure door at the opposite end of the hallway. Given the camera's location, the August 14, 2021, incident was recorded from the side, or in profile; therefore, Inmate A can first be seen walking across the hallway to a chair with Grievant and CO II Montgomery on either side of him, then he is seated in the chair. Grievant's back is to the camera in much of the recording, and it blocks Inmate A's head from view. Given the dim light in the infirmary and the positions of Grievant, Inmate A, and CO II Montgomery, a credibility assessment should be done. This ALJ considered the testimony of all the witnesses called to testify at the level three hearing in making this decision. However, credibility determinations are being limited to only those witnesses whose testimony is most relevant to deciding the outcome of this grievance.

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).

Grievant testified at the level three hearing. As he is seeking reinstatement to his position, such could be a motive to be untruthful. Grievant admits to having changed his account of the August 14, 2021, incident more than once since the investigation began. During his interview with Investigator Young, Grievant initially denied striking Inmate A. After reviewing the video with Investigator Young, Grievant admitted to striking Inmate A, but asserted that he could not remember doing it. Grievant now argues that his admissions to Investigator Young were coerced and that the video does not show him striking Inmate A. Grievant still asserts that he blacked-out because of his anger issues and it lasted only for those few moments during which he is accused of striking Inmate A two times.

Grievant is not credible. Grievant's claim that he blacked-out during only the moments when he is accused of striking Inmate A is not plausible. Further, Grievant has demonstrated a tendency to be untruthful. In addition to changing his story, he tried to cover-up his use of force on Inmate A by not reporting it as required policy, and by directing his subordinate officers not to file reports. Grievant also witnessed Lieutenant Ward striking the restrained inmate three times, and Grievant did not try to stop him, and Grievant did not report that either.

CO II Montgomery testified at the level three hearing. He was an eyewitness to the entire incident involving Inmate A on August 14, 2021. CO II Montgomery was Grievant's subordinate at the time of the incident. CO II Montgomery demonstrated the

appropriate demeanor and answered the questions asked of him. Investigator Young's report states that CO II Montgomery initially denied witnessing Grievant and Lieutenant Ward strike Inmate A, even after the video was played for him. However, neither party asked CO II Montgomery about this during the level three hearing. The investigation report also states that CO II Montgomery recanted his initial statements to Investigator Young the next day, and stated that Grievant pushed Inmate A twice, then slapped Inmate A twice with an open hand. CO II Montgomery's testimony at level three is consistent with the statements he made to Investigator Young at his second interview. CO II Montgomery further testified that he had been directed to file no report about the incident, but he could not remember whether it was Lieutenant Ward or Grievant who gave him that direction. CO II Montgomery appeared credible during his testimony at the level three hearing. CO II Montgomery's history of changing his account of the events is very troubling, but it supports the allegation that Grievant told his subordinates to file no reports about the incident or speak to anyone about it.

The video footage establishes that Grievant, along with another correctional officer, CO II Montgomery, escorted Inmate A, whose arms/wrists were restrained behind his back, out of his cell to a chair in the hallway across from the same. This is how Inmate A and Grievant come into the view of the infirmary's surveillance camera. Grievant's back is toward the camera during much of the video. At times, Grievant's body blocks Inmate A's face and upper body from view, but it is clear that Inmate A is there seated. Inmate A's leg and foot can be seen clearly during most of the video. While there is no sound on the video, given Grievant's mannerism and movements, it appears that he was speaking with Inmate A, and "talking with his hands" at times, as

Grievant has claimed. Additionally, at other times, Grievant's body movements and hand gestures appear more dramatic, which suggests that he was agitated. Also, Grievant can be seen pushing Inmate A, who was still restrained and seated, back in his chair twice, once using significant force. This is consistent with Grievant's testimony during which he stated that he remembered Inmate A being "verbally aggressive" and trying to stand up twice. At no time in this video can Inmate A be seen physically resisting, or in any way physically fighting or attempting to harm Grievant or any other officer.

After pushing Inmate A back in his chair the second time, the video recording shows that Grievant struck Inmate A twice on or about his face. However, given the camera angle and Grievant' position, this viewer cannot see the two blows land on Inmate A. Nonetheless, a viewer can recognize where Inmate A's head is located because earlier in the video, Inmate A was seen walking to the chair and sitting down before the incident occurred. Further, Grievant's movements while striking Inmate A are different from the times Grievant appears to be talking with his hands. When Grievant struck Inmate A, his movements were quick and were directed in toward Inmate A, and his right hand and arm go out of view for a moment.

The issue now becomes, whether Respondent's actions in dismissing Grievant from employment were arbitrary and capricious. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did

not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health & 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health & 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).

"[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472

(1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982). Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

Given the evidence presented, this ALJ cannot conclude that Respondent's decision to terminate Grievant's employment was unreasonable, or arbitrary and capricious. Grievant intentionally struck a restrained inmate who was doing nothing other than being loud and irritating. Grievant was a long-time employee and he was a supervisor. Grievant was expected to enforce Respondent's policy and rules and he did not. Instead, Grievant knowingly violated policy and procedures, and he ordered subordinates to do the same. Accordingly, Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct in violation of WVDCR Policy Directives 129.00 and 303, and that Grievant's dismissal was justified. For the reasons set forth herein, this grievance is DENIED.

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. Dep't of Health & Human Res.*, Docket No. 92-

HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the 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. 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 & 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 & 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).

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 her judgment for that of [the employer]." *Trimboli v. Dep't of Health & 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. "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

6. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives

of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

7. Respondent proved by a preponderance of the evidence that Grievant violated WVDCR Policy Directives 129.00 and 303 by using excessive force on an inmate, by attempting to conceal the same by failing to file a required report about his use of force, and by ordering subordinates to file no reports, thereby justifying Respondent's decision to terminate Grievant's employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: May 24, 2022.

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Carrie H. LeFevre
Administrative Law Judge