THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORAH LOUISE BOLEN,
Grievant,

v. **Docket No. 2012-0343-MAPS**

DIVISION OF CORRECTIONS/
ST. MARY'S CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant, Deborah Louise Bolen, is employed by Respondent, Division of Corrections at St. Mary's Correctional Center. On September 27, 2011, Grievant filed this grievance against Respondent stating, "Decision to demote for listed reasons. . . was arbitrary and capricious. Discipline imposed was too harsh and severe and does not follow West Virginia Division of Personnel Administrative Rule Section 12.5." For relief, Grievant seeks "[t]o be reinstated to the rank of Correctional Officer IV, including back pay. To be made whole in every way. To have a reasonable discipline imposed. To be reinstated to previous assignment.

Following the November 14, 2011 level one conference, a level one decision was rendered on December 7, 2011, denying the grievance. Grievant appealed to level two on December 20, 2011. Grievant perfected the appeal to level three of the grievance process on May 1, 2012. Level three hearings were held on March 5, 2013 and March 15, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Jack Ferrell, Communication Workers of America, Respondent was represented by counsel, John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on April 30, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was demoted for unprofessional treatment of an inmate, falsifying a report, and gross negligence resulting in the injury of an inmate. Respondent proved by a preponderance of the evidence that, despite her specialized training as a crisis negotiator, Grievant antagonized a helpless inmate, escalating a situation that led to his significant injury, and then filed a false incident report and lied to cover it up. Demotion as a penalty was not arbitrary and capricious, in violation of rule or policy, and was not excessive. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a correctional officer at the St. Mary's Correctional Center ("St. Mary's), a prison housing adult male felons. Grievant was previously a Correctional Officer IV ("COIV"), which is a supervisory position at the rank of Sergeant, and was demoted to Correctional Officer II ("COII"), a non-supervisory position, due to the disciplinary action currently grieved. Before the grieved incident, Grievant was also a member of the Crisis Negotiations Team, and had been trained to de-escalate crisis situations.

2. On June 17, 2011, Grievant, along with four other officers, was involved in an incident involving inmate B.B[1].

[1] To protect his identity, the inmate involved in the alleged incident will only be referred to by his initials.

3. At approximately 7:15 p.m., B.B., a resident of Building 75, was caught in possession of tobacco while out on the recreation yard. Corporal[2] Donald Smith ordered B.B. to return to Building 75, and to remain on his bunk for the rest of the night. That instruction was a form of punishment that Cpl. Smith was not authorized to give.

4. B.B. did comply with the order initially, but later left his bunk to go to the restroom and out into the day room. Another officer reported this behavior to Cpl. Smith, who then came back to speak with B.B. B.B. believed the order was unfair, especially since it was known that B.B. placed a telephone call to his children every evening. B.B. refused to obey the order, but was not otherwise threatening or disruptive.

5. At no time was B.B. being aggressive, or even excessively defiant. B.B. is not a physically intimidating man, being approximately 5'8'' and 140 lbs.

6. Cpl. Smith discussed the situation with Sergeant Shultz, who was the shift commander for Building 75. It was decided that further intervention was required with B.B., and that they would need an additional officer to total three. Sgt. Shultz decided they should request permission for Grievant, who was the shift commander of Building 76, to come to Building 75 to assist.

7. As Sgt. Shultz had no one to back up her command, which would leave the control room empty for Building 75, it was improper for her to leave her command to participate.

8. Cpl. Smith called Site Commander Lieutenant Higgins, the officer in charge of the entire facility, to request permission for Grievant's assistance. Lt. Higgins

[2] All of the officers involved in the action were demoted, but will be referred to in these findings of fact by their rank at the time of the incident.

agreed and further instructed them to wait for him and COII Webster. As the site commander, it was improper for Lt. Higgins to involve himself directly in the situation.

9. After Lt. Higgins, Grievant, and COII Webster arrived, Cpl. Smith and Grievant retrieved B.B. from the shower and took him out to the hallway. There are no cameras in the hallway, and it is out of sight of the rest of the building.

10. Cpl. Smith then placed B.B. on the wall. B.B. was leaned against the wall, with his cheek to the wall, his arms on the wall with the palms facing away from the wall, and his feet more than shoulder width apart. B.B. was surrounded by all five officers and COII Webster was brandishing pepper spray in B.B.'s face. B.B. was not threatening or aggressive, but he refused to answer questions. Cpl. Smith then began to cuff B.B. While Cpl. Smith attempted to cuff B.B., Grievant and other officers began to taunt B.B. Grievant lead the taunting, and made insulting comments about B.B. being frightened and that Grievant's niece's balls were bigger than B.B.'s. These comments escalated the situation. B.B. was intimidated and shaking.

11. Cpl. Smith then took B.B. smoothly to the floor and placed him in handcuffs. Grievant assisted with placing B.B. in handcuffs. B.B. was not injured during this first takedown. Leg irons were called for and Sgt. Shultz left to retrieve leg irons.

12. Cpl. Smith then placed B.B. back on the wall without waiting for the leg irons, and with B.B.'s hands cuffed behind his back. Cpl. Smith continued to speak with B.B. and encourage him to cooperate.

13. Cpl. Smith then began to pat B.B. down again. During this pat down, COII Webster sprayed B.B. in the face with pepper spray, and then went to the other side of

B.B.'s face and sprayed him again. Cpl. Smith was caught in the overspray and disengaged. Lt. Higgins then grabbed B.B. and threw him to the floor.

14. B.B. was dazed and bleeding. Lt. Higgins and COII Webster picked B.B. up off the floor and then Cpl. Smith and COII Webster escorted B.B. to medical. B.B. required assistance walking as he was stumbling and disoriented.

15. During this incident, B.B. received a one and one half inch cut under his chin requiring fourteen stiches. The wound bled profusely, leaving a dinner-plate-sized pool of blood on the floor and a trail of blood down the hall. When B.B. was examined by the prison nurse, he was dazed, bleeding, complaining of pain to his shoulder and jaw, and the nurse suspected he had a concussion. In addition to the cut on his chin, he also had abrasions on the cheek of each side of his face.

16. B.B.'s facial injuries are not consistent with only being thrown to the floor. If he received the cut under his chin due to impact with the floor when thrown, then he could not have received abrasions to his cheeks in the impact with the floor. However, no further behavior was admitted to by the officers involved and B.B. has no memory of the incident after being thrown.

17. Lt. Higgins, Grievant, and Cpl. Smith got together after the incident and decided that Lt. Higgins and Sgt. Shultz would be left out of the incident reports and that the reports would state that Cpl. Smith did the takedown. In addition, Cpl. Smith decided to write B.B. up for assault and Lt. Higgins instructed Cpl. Smith to also write B.B. up for creating a disturbance. It takes two violations, with the requirement that one be a serious violation, in order for an inmate to be transferred to another facility.

18. Despite B.B.'s condition and the nurse's request that B.B. be transported to the emergency room, he was left in the prison clinic for four and one half hours before being transported to the emergency room for treatment. B.B.'s treatment was delayed because the officers involved in the incident were deciding what to put in the false reports and writing up charges on B.B. so that he would be immediately transferred to another facility. B.B. was immediately transported to Mt. Olive once he was released from the emergency room.

19. Grievant, Cpl. Smith, and COII Webster all filed false incident reports. Lt. Higgins and Sgt. Shultz did not file reports. Grievant's incident report failed to state that Lt. Higgins and Sgt. Shultz were present, that there were two takedowns, that Lt. Higgins performed the second takedown, or that B.B. was injured.

20. No investigation was launched regarding the incident until a complaint was made to the Commissioner's office by the mother of another inmate.

21. A Use of Force Committee was convened on June 22, 2011, to review the incident. A disciplinary investigation also commenced, and Grievant was suspended without pay beginning July 21, 2011, pending the outcome of the investigation.

22. During her initial interview in the disciplinary investigation, Grievant lied to the investigator by continuing to claim that Lt. Higgins and Sgt. Shultz were not there and that Cpl. Smith was the only one to put B.B. on the floor. When the investigator indicated he thought Grievant was lying, she chose to change her story. She denied making provoking comments to B.B., but admitted to the presence of Lt. Higgins and Sgt. Shultz. She stated that it was Lt. Higgins who performed the second takedown, but that it was proper and that she had no idea how B.B. could have been injured.

23. The Use of Force Committee concluded that the use of force in the initial take down and handcuffing of B.B. was necessary and appropriate to control B.B and was in compliance with policy. However, the Committee concluded that the second takedown and use of pepper spray was unnecessary, excessive, and not justified as B.B. had already been placed in handcuffs and was compliant.

24. The disciplinary investigation concluded that Grievant had falsified her report, lied to the investigator, and had escalated the situation by taunting B.B.

25. On September 7, 2011, a predetermination conference was conducted in which Grievant was informed of the results of the investigation and that disciplinary action was being considered. Grievant stated she did not recall making an antagonizing statement to B.B., and that she did not intend for B.B. to be injured.

26. Division of Corrections ("DOC") Policy Directive 129.00 governs progressive discipline. The level of discipline is to be determined by the severity of the violation. Demotion is available for cause and "may be the final attempt at corrective action, prior to dismissal." Dismissal may be imposed for "a singular offense of such severity that dismissal is warranted." The policy includes a list of fifty illustrative offenses that would warrant discipline.

27. DOC Police Directive 312.03 governs incident reports. The policy requires that each person witnessing a use of force must file separate and independent incident reports. DOC Policy Directive 312.00 mandates that all incidences involving the use of force must be recorded "to establish the identities of the staff, inmate(s), or others involved and to describe the nature of the incident."

28. By letter dated September 13, 2011, Grievant was demoted from CO IV to CO II and removed from the Crisis Negotiations Team. Respondent found the Grievant had violated Policy Directive 129.00 in three ways. Antagonizing B.B. by stating, “My niece has bigger balls than you” constituted “unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy” under Paragraph 28. Grievant’s intentional omission of Lt. Higgins from the incident report and falsification of the events by reporting only one takedown constituted “Falsifying any records whether through misstatement, exaggeration, or concealment of facts” under Paragraph 32. Grievant’s action and lack of action directly resulting in the injuries sustained by B.B constituted “Gross negligence on the job which result in the escape, death or injury of an inmate” under Paragraph 42.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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.*

Grievant asserts Respondent’s decision to demote her was arbitrary and capricious, violated West Virginia Division of Personnel Administrative Rule Section 12.5, and was too severe. Grievant admits she turned in an incomplete incident report,

but that the punishment for filing “a report written the wrong way or being incomplete” should not have been demotion. Respondent argues that Grievant’s conduct was much more serious. Respondent asserts that Grievant was guilty of unprofessional treatment of an inmate, falsification of her report, and gross negligence resulting in the injury of an inmate. Importantly, Grievant leaves out that she was also disciplined for her behavior during the incident. Further, although she admits to filing an “incomplete” report, that is different from falsifying a report, which is what Respondent asserts she did. Therefore, there is a dispute surrounding the facts of this case.

Accordingly, the undersigned must make credibility determinations. 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).

Firstly, the medical record does not support the story of the officers involved once Sgt. Shultz left the hallway. The report of the nurse shows that B.B. had a cut under his chin, a swollen lip, pain in both shoulders, and abrasions on the cheeks of both sides of his face. None of the interviews or testimony explains how B.B. could have received this combination of injuries. One throw or fall to the floor could not have caused both

the cut and abrasions to both cheeks. One throw or fall to the floor is the most any officer has admitted to happening, so it is apparent they are still lying about what happened. Grievant, specifically, still denies that either happened. She states that she saw the second takedown by Lt. Higgins and that B.B. was "placed" on the floor properly. Further, this incident is suspicious from the beginning. B.B. should not have been ordered to remain on his bunk all night, he should not have been taken to where there were no cameras or witnesses to be questioned, and he certainly should not have been questioned by five officers while one brandished pepper spray in his face the entire time.

Credibility determinations in this case are particularly difficult in that there was an initial admitted cover-up of the incident. The stories of all of the officers changed over time. Further, only the statement of B.B. is available for his side of the incident, and he remembers nothing after he was thrown to the floor. While the credibility of all involved is questionable, even witnesses who were not credible did not lie about everything. Therefore, a reconstruction of the incident can only be accomplished by taking parts of the assertions of all involved and fitting that into the whole of what most likely occurred during this incident.

It is undisputed that B.B. was in possession of contraband cigarettes in the yard and was instructed by Cpl. Smith to go back in the building and remain on his bunk. B.B. initially complied, but then began to move around the housing unit. When Cpl. Smith confronted B.B. about his failure to follow his order, B.B. non-aggressively refused to comply. Cpl. Smith returned later and he and Grievant escorted B.B. out into the hallway where there were no cameras, and leaned him against the wall with his

cheek, shoulders, arms, and back of hands pressed to the wall and feet more than shoulder width apart. B.B. mostly remained silent and would not answer questions. At this point, the stories on the incident begin to differ.

B.B. asserts that Grievant began provoking him with insulting and vulgar language, calling him a "pussy," daring him to come off the wall, and making fun of him for being frightened. Grievant states she does not recall provoking B.B. in any way and Lt. Higgens states he does not recall hearing any provoking language. Sgt. Shultz, Cpl. Smith, and COII Webster all stated they remember Grievant telling B.B. that her niece or daughter "has bigger balls" than B.B. All but Grievant agreed that B.B. was not talking back, and that he mostly remained silent when asked questions. In one interview, Grievant asserts that B.B. was "snarky." B.B. asserts when Cpl. Smith calmed down and tried to reason the situation out with B.B., B.B. was going to agree to comply with the order to remain on his bunk, but that when Grievant continued to provoke him, he just "shut down." B.B. asserts that he did not move and was not in any way aggressive. The statements of the officers regarding how B.B. supposedly moved were not consistent and continued to change throughout the interviews and testimony. The officers all agree that B.B. was properly taken down to the floor, handcuffed, and then stood back up by Cpl. Smith. B.B. does not state that he was taken down and handcuffed at this time.

While B.B. was on the wall, for what the officers state was the second time, there is also disagreement between them about how B.B. supposedly moved. COII Webster states that B.B. moved "very aggressive," and originally stated that Cpl. Smith was uncuffing B.B. and B.B. moved his arm. He later changed his story to say that he just

came off the wall. Lt. Higgins claims that B.B. turned his whole body off the wall. At different times, Cpl. Smith states B.B. jerked, or came off the wall. At the time, B.B. was handcuffed and leaned against the wall. B.B. states that he did not move, and was simply remaining silent when Cpl. Smith stepped back and COII Webster pepper sprayed him. All agree that B.B. was then sprayed in the face with pepper spray on one side and then the other. B.B. states that he then felt someone grab him by the shoulders and throw him to the floor, and has no memory of the rest of the incident until he came to himself while in medical. Lt. Higgins states that B.B. was falling and he grabbed him under the arms to control the fall. Grievant states that Lt. Higgins did a proper takedown of B.B. and that he was placed on the floor smoothly. Cpl. Webster continued to state that it was actually Cpl. Smith who grabbed B.B. Cpl. Smith states that he could not see due to being sprayed with pepper spray, but in a second interview supposedly stated that Lt. Higgins had confessed to him that Lt. Higgins tripped B.B. and threw him to the floor.

Grievant was not credible. Grievant was caught falsifying her report and lying in her interview, and now admits to that untruthfulness. However, her admission of untruthfulness came only when it was apparent the investigator was not buying her story. Grievant admitted to her untruthfulness, not out of any sense of remorse or conscience, but only because she got caught. Most troublesome are two statements Grievant made at the level three hearing which reveal her attitude towards the incident, investigation, and the grievance proceeding. Grievant justified her actions by stating she “was protecting her lieutenant” and that she would “never” believe the word of an inmate over that of an officer. Grievant obviously has bias and interest and has shown

a willingness to lie in support of her bias and interest. Grievant's demeanor, especially during cross examination, was arrogant and smug. Even though the puddle of blood and medical record clearly show the seriousness of the injury to B.B., Grievant still discounts that the incident was that serious. Grievant still claims she has no idea how the injuries occurred and refuses to take any real responsibility for what happened.

Sgt. Shultz was credible. Although she did not file an incident report, once she was interviewed, her account of the incident remained consistent. In her level three testimony, her answers were thorough and her demeanor was appropriate. She appeared to be genuinely disturbed and remorseful for her part in the incident. She relayed the facts of the incident as serious, and did not try to downplay what had happened.

COII Webster was not credible. There was no opportunity to assess his demeanor as he testified by phone, and his testimony was very limited. However, in his interview he continued to lie about B.B. not being in handcuffs when he was sprayed and stood by his report even though it was false. He also continued to state it was Cpl. Smith who grabbed B.B. the second time, even though Lt. Higgins had admitted he himself was the one who had contact with B.B. the second time. COII Webster demonstrated a willingness to lie to both keep himself and his lieutenant out of trouble.

Lt. Higgins was not credible. He involved himself in an action where he was supposed to remain detached. He failed to write an incident report, and his claim that he just forgot is implausible. He demonstrated a willingness to participate in unethical behavior in order to keep himself out of trouble. He continues to state he recalls no antagonism of B.B. even though Shultz, Webster, Smith, and B.B. all stated that there

were comments. Although he did admit that he was the one who had contact with the inmate the second time, he termed that as a fall. This story is inconsistent with that of B.B., Grievant, and the later statement of Cpl. Smith.

Cpl. Smith is mostly credible. Cpl. Smith filed a false report, but immediately admitted to this in his initial interview. In addition, his demeanor in the level three hearing was calm, direct, and appropriate. He admitted to the seriousness of the incident and appeared remorseful. His initial interview and testimony were consistent, and his account is supported somewhat by the accounts of both B.B. and Sgt. Shultz.

Also to be considered is the statement of B.B. collected during the course of the investigation. Such statement is hearsay, but relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

B.B.'s statement was credible. Despite the severity of what happened to him, his statement was matter-of-fact and not sensationalized. He admits to his own bad behavior and his version of events fits in with other verifiable facts. He could have made up additional behavior by the officers to account for all his injuries, but he did not. He admitted that he remembers nothing after being thrown to the floor. Although the statement is not signed by B.B., it is sworn to be transcribed by a recording of B.B. and was taken in the normal course of the investigation.

A review of all the evidence shows that Grievant participated in the removal of B.B. to a location where there would be no recording or witnesses. She antagonized B.B., who was helpless, non-aggressive, and intimidated. Despite her specialized training as a crisis negotiator, she escalated a situation that resulted in an improper use of force causing significant injury to B.B. Thereafter, she falsified her report to cover up the incident and lied to the investigator, changing her story only when it was apparent the investigator knew she was lying. She shows absolutely no true remorse for her behavior. Respondent has proven the charges against Grievant.

Therefore, analysis then turns to the imposition of punishment for the conduct which Respondent proved by a preponderance of the evidence. Grievant argues demotion was in violation of administrative rule and policy, arbitrary and capricious, and too severe. The administrative rules require the imposition of "like penalties for like offenses." W. VA. CODE ST. R. § 143-1-12.5 (2012). Demotion with prejudice is available when "due to the inability of an employee to perform the duties of a position or for improper conduct." W. VA. CODE ST. R. § 143-1-11.4 (2012). "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). An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

Demotion was not in violation of rule or policy or too severe. Demotion is available for both inability to perform duties and improper conduct. Grievant's improper conduct was severe, and her lack of judgment and dishonesty made her incapable of further acting in a supervisory capacity. Respondent would have been justified under its progressive discipline policy to terminate Grievant, a punishment originally recommended to the Commissioner by the investigators and officials of St. Mary's and Central Office. The Commissioner already mitigated the punishment of termination that Grievant would have received, and that everyone involved in the discipline, with the exception of the Commissioner, believed was warranted. Demotion for the conduct of which Grievant was guilty was certainly not excessive. Despite her specialized training as a crisis negotiator, Grievant antagonized a helpless inmate, escalating a situation

that led to his significant injury, and then filed a false incident report and lied to cover it up.

The decision to demote was not arbitrary and capricious. Although Grievant argues that she and Lt. Higgins received the same penalty, which she asserts makes the discipline arbitrary and capricious; that is not factually accurate. Each was demoted, but Lt. Higgins was demoted an additional level of position and rank. He was demoted from COV, with the rank of Lieutenant, to an unranked COII. The other ranked officers were likewise demoted down to COII, a position with no supervisory authority. The amount of demotion chosen was to relieve Grievant of supervisory authority, which she obviously could no longer perform due to her demonstrated lack of judgment and trustworthiness. If Grievant were not to be terminated, as the policy would allow, it was reasonable for Respondent to choose a level of discipline that would remove Grievant of supervisory authority.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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. Respondent proved by a preponderance of the evidence that, despite her specialized training as a crisis negotiator, Grievant antagonized a helpless inmate, escalating a situation that led to his significant injury, and then filed a false incident report and lied to cover it up.

3. The administrative rules require the imposition of "like penalties for like offenses." W. VA. CODE ST. R. § 143-1-12.5 (2012). Demotion with prejudice is available when "due to the inability of an employee to perform the duties of a position or for improper conduct." W. VA. CODE ST. R. § 143-1-11.4 (2012).

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).

5. An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. Grievant failed to prove that demotion was improper discipline or otherwise warranting mitigation. Demotion was not in violation of rule or policy. Demotion was not excessive considering the seriousness of Grievant's improper conduct. Demotion was not arbitrary and capricious, in that Grievant's superior officer was punished more severely, and demotion accomplished removing from her the supervisory authority she was no longer qualified to wield given her lack of judgment and trustworthiness.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: September 30, 2013

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Billie Thacker Catlett
Administrative Law Judge