THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW SCOTT COMFORT,

Grievant,

v. **DOCKET NO. 2013-1459-CONS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/WESTERN REGIONAL JAIL,

Respondent.

DECISION

Matthew Scott Comfort ("Grievant") filed a grievance directly at Level Three on November 27, 2012, challenging the decision of the Regional Jail and Correctional Facility Authority ("Respondent" or "Authority") to indefinitely suspend him without pay from his position as a Correctional Officer II at the Western Regional Jail. That grievance was assigned Docket Number 2013-0823-MAPS, and duly scheduled for a Level Three hearing on February 19, 2013. At that hearing, it was determined that Grievant's indefinite suspension had subsequently been reduced to an unpaid suspension of fifteen days, and Grievant had been made whole for any lost work time and benefits resulting from the time he was on unpaid suspension in excess of fifteen days.

Grievant was prepared to challenge the entire suspension process at the February 19 hearing, including the reasons for his fifteen-day suspension without pay. However, Respondent objected to litigating the ultimate fifteen-day suspension,

asserting that it constituted a separate event from the indefinite suspension which had been taken while possible misconduct by Grievant was under investigation, and was therefore outside the scope of the grievance filed in November. This dispute was resolved when the Grievant agreed to file a separate grievance addressing his fifteen-day suspension, and Respondent agreed to waive the time limit for filing such grievance.[1] Accordingly, the Level Three hearing was adjourned, and the parties agreed to resume the hearing on March 1, 2013.

Consistent with the agreement reached between the parties on February 25, 2013, Grievant filed a second grievance at Level Three of the grievance procedure challenging his fifteen-day suspension. This grievance was assigned Docket Number 2013-1459-MAPS. On February 26, 2013, the undersigned Administrative Law Judge issued an Order consolidating these two related grievances as Docket Number 2013-1459-CONS. Thereafter, a Level Three hearing in this consolidated matter was held on March 1, 2013, in the Grievance Board's office in Charleston, West Virginia. Grievant appeared *pro se*, and Respondent appeared through its General Counsel, Travis Ellison, Esquire. Grievant made an oral argument at the conclusion of the hearing. This matter became mature for decision on April 10, 2013, upon expiration of the deadline for Respondent to file Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended from his position as a Correctional Officer II at the Western Regional Jail by his employer, Respondent Regional Jail and Correctional

[1] Grievant believed that the grievance he filed challenging his indefinite suspension included the fifteen-day suspension he ultimately received because the two events were inextricably intertwined.

Facility Authority, on November 16, 2012, for a renewable period of at least fifteen days, based upon allegations that Grievant had used excessive force in his interactions with inmates in his care and custody. This suspension was renewed on December 1, 2012. Thereafter, on December 10, 2012, Mike Clark, Administrator of the Western Regional Jail, decided to convert the indefinite suspension into a fifteen-day suspension, based upon a determination that Grievant participated in an incident involving use of excessive force on October 29, 2012, by holding an inmate while another Correctional Officer beat the inmate, and for failing to timely submit an accurate incident report describing that event, in accordance with established policy.

During a Level Three evidentiary hearing on March 1, 2013, Respondent presented no testimony from any witnesses who were present during the alleged events, only unsworn, hand-written statements from various correctional personnel who were interviewed in the course of an internal investigation, nearly all of whom were themselves implicated in either using excessive force or failing to report such an incident as required, and other hearsay evidence from Respondent's administrators. Respondent failed to establish the disciplinary charges against Grievant by a preponderance of the credible evidence of record, and thus, Grievant's challenge to his fifteen-day suspension will be granted. Grievant's allegations that the original investigative suspension without pay was either substantively or procedurally flawed, and therefore improper, were likewise not supported by competent evidence, and will be denied.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by Respondent, Regional Jail and Correctional Facility Authority ("RJA") as a Correctional Officer II in the Western Regional Jail.

2. On October 31, 2012, Investigator Keith Davis[2] was assigned to investigate an allegation of possible use of force on inmate ED. *See* R Ex 1.

3. On October 27, 2012, inmate ED was allegedly belligerent with Correctional Officer ("CO") Joshua Guy when CO Guy came to process ED for release. There was an altercation involving several CO's and ED was restrained and returned to his cell. In addition, ED's bond was revoked by a Magistrate. There was no allegation that Grievant was involved in the events surrounding this incident.

4. On October 28, 2012, inmate ED was taken to Medical complaining of chest pains, telling the nurse that he was feeling sick and sweating. ED was not cooperative when asked to lie down on the examining table. ED was allegedly assaulted while in Medical. There was no allegation that Grievant was involved in the events surrounding this incident.

5. Early in the morning of October 29, 2012, inmate ED was again taken to Medical for treatment, where he was examined and cleared by Nurse Amanda Shaw. Grievant was one of the CO's who escorted ED to and from Medical. While ED was in Medical, he was allegedly assaulted by CO's Robert Harley and Michael Franklin while

[2] As of the March 1, 2013 hearing, Investigator Davis was no longer employed by RJA.

Grievant held him. In addition, ED was allegedly assaulted by CO Chris McCann while being escorted back to his cell by CO's Harley, Franklin and Grievant.

6. Sometime later on the morning of October 29, 2012, ED was again taken to Medical by unspecified CO's and examined by a Doctor Wong and an unidentified nurse. The medical personnel noticed a bruise on ED's stomach that could have been caused by a sandal strike. Additional tests indicated that ED had a collapsed lung, and he was transported to a hospital for further treatment.

7. Grievant was initially suspended from his employment without pay by letter from Mike Clark, Administrator of the Western Regional Jail, dated November 16, 2012. This suspension was for a renewable period of fifteen calendar days, pending the outcome of an investigation into allegations that Grievant used excessive force against inmates in his care and custody. *See* R Ex 16.

8. Grievant's initial suspension for fifteen calendar days was extended for another fifteen calendar days in correspondence from Mr. Clark to Grievant dated December 1, 2012. R Ex 15.

9. On December 10, 2012, Mr. Clark issued a decision letter in this matter which stated the following:

> The purpose of this letter is to inform you of my decision to suspend you without pay for fifteen (15) working days as a Correctional Officer II with the Western Regional Jail. This personnel action is being taken in accordance with the West Virginia Regional Authority policy # 3008 – Authority for Negative Personnel Action. This is also in accordance with Section 12.3 of the Administrative Rule of the West Virginia Division of Personnel. You were placed in a Suspension Pending the Outcome of an Investigation status on November 16, 2012. Your days of suspension without pay are November 17, 18, 19, 20, RDO (21, 22) 23, 24, 25, 26, 27, RDO (28, 29) 30, December 1, 2, 3, 4, RDO (5th, 6th) and 7th. This represents time served in a Suspension Pending the Outcome of an

Investigation status[.] You will be paid for the 8th, 9th and 10th of December. You are expected to return to duty on Tuesday, December 11, for your regular scheduled shift.

* * *

So there is no misunderstanding my reasons for taking this personnel action, the following is a brief description of the information that has been made known to me which led to my decision.

There was a Use of Force incident at the Western Regional Jail on October 27, 2012 in which several correctional officers were involved. Our Investigation concludes that on October 29, 2012 you were posted as the Core Rover Officer on the midnight shift. A call came from the A Unit Tower for a two (2) Officer escort to medical. The Inmate was complaining of chest pains. You and another Correctional Officer escorted the Inmate to medical at approximately 0452 hours. Evidence indicates that you did assist in maintaining custody of the inmate while another Correctional Officer beat the Inmate. You did not initially write any incident work as required by Policy.

Your actions place you in violation of Policy and Procedure Statement 3010, Item 3, which states “The use of excessive force shall not be tolerated. The use of force, except in compliance with, Regional Jail Authority policy, shall result in disciplinary action.

Your actions place you in violation [of] Policy and Procedure Statement 3010, item 14, which states “Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of the law, rules, and/or regulations by either an employee or inmate.”

You are also in violation of Section 11.25 of the State of West Virginia's Jail Standards which states "Incident reports. Written Policies and procedures shall require prompt oral and written reporting of all incidents that result in physical harm to, or which threaten the safety of, any person in the facility, or which threaten the security of the facility."

Policy and Procedure Statement 3031 states in pertinent part, "shall be used in all regional jails to provide for written documentation and reporting of unusual incidents, violations of rules of conduct, use of force, requests for maintenance, and all other circumstances which would necessitate a written record. In all instances, the Incident Report shall be completed and distributed as required by the specific situation or policy statement

governing the recording and reporting of the subject matter contained in the report, or as directed by the Administrator or designee."

Your actions place you in violation of Policy and Procedure Statement 3010, Code of Conduct, item 16, which states "All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the authority and its employees.

You are in violation of Policy and Procedure 3010, No. 18, which states "All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow an inaccurate or incorrect material or information to be submitted as valid. All employees are required to provide relevant, truthful, and complete information when required by a supervisor or investigator."

You are in violation of Policy and Procedure 3010, No. 19, which states "All employees shall conduct themselves, whether on duty or not, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service."

Additionally, your actions place you in violation of Policy and Procedure 3010, No. 29, which states "Employees are not to discipline or threaten to discipline inmates. The established "due process" disciplinary procedures shall be followed."

And finally, your actions place you in violation of Policy and Procedure 3010, No. 33, which states "At all times employees shall maintain a professional demeanor and are to be respectful, polite, and courteous and refrain from using abusive or obscene language in their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility."

The State of West Virginia and its Agencies have reason to expect their employees to observe a standard of conduct, which will not reflect discredit upon the abilities and integrity of their employees, or create suspicion with reference to their employee's capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you do not meet a reasonable standard of conduct as an employee of the West Virginia Regional Jail and Correctional Facility Authority, thus warranting this suspension. **In addition to this disciplinary suspension, you will be required to**

> **attend certain courses at the Academy for the purpose of re-training you on proper techniques and recording of incident issues.**

R Ex 19 (emphasis in original).

10. None of the Correctional Officers or medical personnel who participated in the events discussed above in Findings of Fact Numbers 5 and 6 were called to testify at the Level Three hearing, nor was any reason given for why they were not available to testify in person.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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*.

The evidence supporting the charges against Grievant consists entirely of hearsay statements. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). 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 declarant's 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 declarant's 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. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

Respondent called two witnesses to testify in person: (1) Austin Burke, Chief of Internal Affairs for the Western Regional Jail; and (2) Wayne Armstrong, the Authority's Director of Human Resources. Neither of these witnesses had any direct personal knowledge of the events for which Grievant was disciplined.[3] Through Mr. Burke, Respondent presented a report of investigation (R Ex 1) prepared by Missy Hicks, an Internal Affairs Investigator.

Ms. Hicks' report was based on interviews that had been conducted with four Correctional Officers. Ms. Hicks had no first-hand knowledge of the events for which Grievant was disciplined. Ms. Hicks did not interview Grievant. Respondent provided no reason why this report was being presented through Mr. Burke rather than Ms. Hicks. Mr. Burke was not employed by the Authority in November 2012 when Grievant

[3] Mr. Burke was not employed by RJA until January 1, 2013, after Grievant had been suspended.

was suspended indefinitely, pending an investigation, nor later in December 2012 when the decision was made to convert this indefinite suspension into a fifteen-day suspension. In addition, Ms. Hicks' report was not completed and submitted to Mr. Burke until February 27, 2013, over two months after the decision was made to suspend Grievant for fifteen days. Thus, this document had not been created until after Grievant filed a grievance challenging his suspension. Accordingly, Respondent could not have relied on the information contained in this report in deciding to suspend Grievant for fifteen days, because this document did not exist at the time that decision was made. Therefore, this hearsay document is determined to be irrelevant to these proceedings, and will not be considered. Further, this hearsay document appears to have been prepared specifically in contemplation of these grievance proceedings and, therefore, is considered unreliable. Thus, even if it were considered relevant, it would be accorded no evidentiary weight.

Respondent also presented the unsworn, hand-written statements of several Correctional Officers who were interviewed by either Lieutenant Karl Aldridge, the Chief Correctional Officer of the Western Regional Jail, or Mike Clark, Administrator of the Western Regional Jail. (R Exs 4, 7, 8, 9, 10, 11, 12, 13, & 14.) Respondent did not call any of these officers as witnesses at the Level Three hearing, nor did Lt. Aldridge or Mr. Clark appear as witnesses to explain the circumstances of these interviews. Further, Respondent offered no reason why these witnesses were not available to testify in person[4] where they would be subject to cross-examination by Grievant. Each

[4] Mr. Armstrong testified that Mr. Clark is no longer employed by RJA. However, the mere fact that a witness is no longer employed by the agency does not explain why they are not being called as a witness.

of these officers was exposed to some risk of punishment for either participating in the excessive use of force against the inmate, ED, or failing to properly report one or more of these alleged incidents. The report of investigation indicates that Amanda Shaw, a nurse, was present during the incident in which Grievant was allegedly involved. However, no statement from Ms. Shaw was offered. Indeed, there was no indication that she was even interviewed in the course of the investigation. Ms. Shaw was not called as a witness at the hearing.

There were two unsworn, hand-written statements (R Exs 4 & 8) made by Officer Tim Pridemore. The first statement, dated November 8, 2012 (R Ex 8), only addresses events that took place on October 28, 2012, and Grievant is not mentioned in the document. The second statement is dated November 16, 2012, and provides a version of the events that transpired on October 28, 2012, which contradicts the earlier statement from this witness. Grievant's involvement in an incident on the following day, October 29, is referenced in terms of a verbal statement which Officer McCann related to Officer Guisinger who told Officer Pridemore who wrote it down in his statement. This statement is not just hearsay, it is triple hearsay. Such statements represent little more than rank gossip and are inherently suspect as unreliable. Therefore, Officer Pridemore's second statement (R Ex 4) will be given no weight. Officer Pridemore's first statement (R Ex 8) is not relevant and sheds no light on whether the charges against Grievant are true or false.

An unsworn, hand-written statement by Officer R. Guisinger (R Ex 10) dated November 16, 2012, related a rumor that he heard, upon returning to work after being

off for two weeks, involving Officers Pridemore and Shaw using excessive force while taking an inmate to Medical. Officer Guisinger further related that he was told by Officer McCann that Grievant and Officer Harley took the same inmate to medical the following night. This statement likewise fails to shed much light on what happened. Although it is only double hearsay, it suffers from the same lack of reliability as Officer Pridemore's triple hearsay statement, and will be accorded no weight.

Officer Desiree Siberia provided an unsworn, hand-written statement (R Ex 13) in which she stated that Officers Comfort, Harley, Franklin and Shaw escorted the inmate, ED, into Medical. She stayed outside of Medical, patrolling the area until she heard yelling and returned to Medical. Officer McCann also arrived on the scene and she again left Medical. She later observed Officers Comfort, Harley, Shaw and Franklin escort the inmate back to his cell. Officer Siberia's statement provided little information relevant to the charges, other than the fact that these events transpired on Monday, October 29, 2012.

Officer Michael Franklin provided an unsworn, hand-written statement (R Ex 14) dated November 20, 2012, in which he described an event that took place on October 28, 2012. He described how Grievant and Officer Harley brought inmate ED to Medical. Officer Franklin proceeded to state that Officer Harley subsequently struck the inmate's chest while in the exam room. Officer Franklin also described how he delivered two strikes to the inmate's upper bicep while he was exiting Medical and Officer McCann delivered a strike to the inmate's shoulder. Thereafter, Officer Franklin delivered two more strikes to the inmate's outer thigh. The statement contains no further references

to what Grievant was doing after the inmate was delivered to Medical, or if Grievant was even present. Once again, because there was no opportunity to clarify a hearsay statement, the evidentiary value of this statement was negligible.

Officer Brent Shaw provided an unsworn, hand-written statement dated November 8, 2012 (R Ex 7), describing certain interaction with the inmate, ED, on October 28, 2012. Grievant is not mentioned anywhere in this statement. Therefore, the statement is not relevant to the issues presented, and will not be considered.

Officer Chris McCann provided an unsworn, hand-written statement dated November 19, 2012 (R Ex 11) describing events that took place "on the date of approximately October 27th." In the statement, Officer McCann explains how he arrived at Medical and found Officers Siberia and Shaw in the hallway while Officers Comfort, Harley and Franklin were in Medical with the inmate, ED. Officer McCann states that he "saw Officer Comfort holding the inmate's left arm as if trying to escort him out of a situation." He further stated that he "saw C/O [Correctional Officer] Harley hit the inmate multiple times in the back with closed hands." Officer McCann also observed that Officers Franklin, Comfort and Harley escorted the inmate out of Medical and back to his cell.

Respondent also introduced an unsworn, hand-written statement from Officer Robert Harley, III, dated November 15, 2012 (R Ex 9), in which he stated that he and Grievant simply escorted the inmate, ED, to Medical on October 29, 2012, where the inmate was cleared by staff after complaining of chest pains and receiving an EKG. Officer Harley and Grievant then escorted the inmate back to his cell.

Respondent introduced a second unsworn, hand-written statement from Officer Robert Harley, III, dated November 20, 2012 (R Ex 12), in which he relates a substantially different version of events that took place on "Monday, October 28, 2012." He describes how he and Grievant escorted the inmate, ED, to Medical where, after the inmate was cleared for chest pains, Correctional Officer Shaw "began to cuss and strike the inmate. C/O [Correctional Officer] Shaw also hit the inmate in the back and slapped him in the face." R Ex 12. Given that October 28, 2012 was a Sunday, this statement only adds to the confusion created by attempting to establish these charges through hearsay statements that cannot be clarified by the proponent, and further serves to illustrate how unreliable this form of evidence can be.

In addition, because the more recent statement (R Ex 12) does not even acknowledge the existence of the earlier statement (R Ex 9), it is not apparent whether the second statement was intended to correct and supersede the first statement, or if it was simply intended to describe a completely separate set of events. On November 5, Officer Harley described events that took place on "Monday, October 29," but by November 20, Monday had become October 28. This hearsay evidence fails to provide a reliable account of the events in which Grievant was allegedly involved.

In summary, Respondent's Exhibits 4, 7, 8, 9, 10, 11, 12, 13, & 14 were not prepared in affidavit form and are not sworn statements. No reason was given at the Level Three hearing why the proponents of these statements were not available nor was any other reason proffered for their not being called to testify in person. Taken as a whole, these statements contain both contradictory and inconsistent factual

assertions and some include both double and triple hearsay. There was corroborating evidence presented that ED was an inmate in the Western Regional Jail at the time of these events and that ED did suffer some form of injury. However, none of this corroborating evidence is specific as to Grievant's role in these events. These written statements are simply too unreliable to provide preponderant evidence of Grievant's misconduct as alleged. *See Cale*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

Respondent also presented two photographs of the inmate involved in this series of incidents. (R Ex 5) These photographs were taken on October 29, 2012, based upon the inmate's complaints, and routinely preserved in the business records of the Authority. One of the photos shows a large, pronounced welt on the inmate's stomach, consistent with an injury that would have been made by striking him with a flat sandal. Correctional Officer Tim Pridemore provided an unsworn, hand-written statement to Lt. Aldridge on November 16, 2012 (R Ex 4) in which he stated that Officer Shaw struck the inmate with a "shoe," because he would not lie down on the table for an EKG test, when ED was taken to Medical complaining of chest pains. This statement was inconsistent with an earlier statement dated November 8, 2012 (R Ex 8) in which Officer Pridemore made no mention of anyone striking the inmate during a visit to Medical on October 28, 2012.

Notwithstanding these inconsistencies in the witnesses' statements, this photographic evidence is corroborative of one of the alleged incidents involving use of excessive force by Correctional Officers at the Western Regional Jail. However, there

was no allegation that Grievant was present during or participated in this event. It was simply alleged that Officers Pridemore and Harley passed Grievant at his duty post while escorting the inmate from his cell to Medical and back. There was no evidence that Grievant was involved in this alleged use of excessive force against the inmate on October 28, nor that he had knowledge of such use of force which he was obligated to disclose in a timely incident report.

It was alleged that Grievant held this same inmate during a subsequent trip to Medical on or about October 29, 2012, while another Correctional Officer, Robert Harley, struck the inmate. It was further alleged that a medical doctor diagnosed the inmate as having a collapsed lung as a result of these assaults. However, there were no medical records of the inmate introduced to corroborate this aspect of the allegations, and the treating physician was not called as a witness. Moreover, there is nothing visible in the photos (R Ex 5) which shows any marks consistent with such serious injuries.

Respondent also introduced an unsworn, hand-written statement which Grievant provided to Lt. Aldridge on November 15, 2012. (R Ex 2) Although hearsay, this statement is admissible as an admission against interest by Grievant, and may be considered to the extent it either incriminates Grievant or corroborates other hearsay evidence. *See Plantz v. W. Va. Dep't of Health & Human Res.*, Docket No. 2012-0756-DHHR (Mar. 13, 2013). In that statement, Grievant describes escorting ED to Medical along with Officer Harley when the inmate complained of chest pains. The statement describes a routine visit to Medical where the inmate was cleared by staff to return to

his cell. There is nothing in this narrative which would have generated any obligation for Grievant to prepare an incident report under the Authority's rules and regulations.

It was asserted by Respondent that this statement was untruthful because Grievant recalled these events as having occurred on "Sunday/Monday 20/21 October 2012 at an unknown time" (R Ex 2), and Authority records indicate that ED was jailed at 7:05 PM on October 27, 2012, and released on October 29, 2012, at 2:00 PM. (*See* R Ex 3) Assuming that this escort to Medical was an uneventful episode during Grievant's shift, it is unreasonable to expect that he would remember the exact date when it happened. Grievant indicated in the statement that he was not sure if this escort took place on Sunday night or Monday morning. This anomaly does not constitute an intentional and material violation of Respondent's rules and regulations requiring Correctional Officers to provide accurate and truthful information when providing statements during investigations or reporting incidents. (*See* R Exs 18 & 20) Accordingly, Respondent has not met its burden of proof. *See Cale*, *supra*; *Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 14, 2008).

Grievant also complained in his original grievance that he had been improperly suspended without pay while an investigation into allegations of excessive use of force was being conducted. Grievant was suspended pursuant to authority in Section 12.3 of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 (2012). This provision explicitly authorizes state agencies to suspend employees without pay pending an investigation into a work-related offense. There was no persuasive evidence presented to indicate that Respondent abused its discretion to suspend

Grievant while an internal investigation into serious allegations involving use of excessive force against an inmate was conducted. Therefore, this aspect of this consolidated grievance must be 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, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res*., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

3. 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 declarant's 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 declarant's

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. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

4. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See Simpson*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

5. The charges against Grievant are supported wholly by unreliable and contradictory hearsay statements. Respondent did not prove the charges against Grievant.

Accordingly, the grievance challenging Grievant's fifteen-day suspension is hereby **GRANTED**. Respondent, Regional Jail and Correctional Facility Authority, is hereby **ORDERED** to make Grievant whole for any loss of pay and benefits he suffered during this fifteen-day suspension, and any reference to this suspension shall be removed and stricken from his personnel records. However, the grievance challenging Grievant's indefinite suspension without pay, pending an investigation into allegations of the use of excessive force against an inmate, is hereby **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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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LEWIS G. BREWER
Administrative Law Judge

Date: April 18, 2013