WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN SMITH,
Grievant,

v. **Docket No. 2013-0145-MAPS**

DIVISION OF CORRECTIONS,
Respondent.

D E C I S I O N

John Smith, Grievant filed this grievance against his employer, the West Virginia Division of Corrections ("DOC"), Respondent on August 1, 2012, protesting a disciplinary suspension for failing to perform a recognized duty of his position, specifically neglecting to request a warrant within the thirty day period as required by applicable policy. The Statement of Grievance includes a two page single-spaced statement not fully recited herein. Grievant seeks to have the suspension overturned, the disciplinary action removed from his file and reimbursed for lost pay.

A hearing was held at level one on August 27, 2012, and the grievance was granted in part at that level on September 10, 2012. At level one Respondent reduced Grievant's suspension from a five-day suspension to a three-day suspension. Grievant appealed to level two on September 18, 2012, and a mediation session was held on November 14, 2012. Grievant appealed to level three on November 24, 2012. A level three hearing was held before the undersigned Administrative Law Judge on January 25, 2013, at the Grievance Board's Charleston office. Grievant appeared *pro se*. Respondent was represented by Cynthia R.M. Gardner, Assistant Attorney General. Both parties submitted

Proposed Findings of Fact and Conclusions of Law documents and this matter became mature for decision on February 22, 2013, on receipt of the last of these proposals.

Synopsis

Grievant was previously employed as an Enhanced Parole Officer for Respondent, responsible for providing continuous supervision for a designated caseload of probationers or parolees. Grievant was suspended for failing to request a warrant for a Parole Violator in the appropriate time-frame. Grievant contends he is being unduly sanctioned. Grievant is aware of his omission and acknowledges some degree of responsibility, but feels that the three-day suspension without pay is too severe given the totality of circumstances surrounding the occurrence, and feels that a written reprimand would best be served in this case.

Respondent established Grievant's misconduct by a preponderance of the evidence. Respondent reduced the five-day suspension originally levied. Respondent has discretion in these type of situations. Grievant failed to demonstrate that a three-day suspension is too severe a punishment, or that further mitigation is required under the circumstances. An Administrative Law Judge is not to substitute his opinion for that of the employing agency absent justifiable cause, such as improper conduct, arbitrary and capricious actions, or an abuse of discretion. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by Respondent as a Parole Officer II. At the time of the events giving rise to the instant disciplinary action, Grievant was employed as an Enhanced Parole Officer, for the Southwestern Region.[1] He has been employed by Respondent for approximately eighteen (18) years, beginning on March 1, 1995.

2. The Enhanced Parole Officer program relevant to the instant matter had been designed to supervise sex-offenders within the respective counties as well as any problem cases where the offender had several violations of their conditions of probation/parole. An Enhanced Parole Officer is charged with providing continuous supervision for a designated caseload of probationers or parolees to assist in their social and personal adjustment. Enhanced Parole Officers are responsible for all parolee sex offenders, Parole Board mandated electronic monitoring and some problematic cases not related to sex offenders or mandated monitoring.

3. At the time of the events giving rise to the instant disciplinary action, Grievant was working from the Charleston Parole Office located at 1339 Lewis Street, Charleston, WV. Grievant was supervising a caseload of approximately sixty-six (66) clients over a five (5) county area consisting of Kanawha, Putnam, Cabell, Lincoln and Logan counties.

4. Grievant's caseload of approximately sixty-six (66) clients consisted of approximately thirty-five (35) to forty (40) regular probation/parole cases which meet the criteria set down in the WV DOC Probation/Parole Manual under duties designed for the

[1] Grievant is currently working in a different position for Parole Services, he applied and was selected for another Parole Officer II position.

Enhanced Parole Officer. Also inclusive of the cases assigned to Grievant were a number of probationers/parolees that were deemed high risk and in need of intensive supervision in the designated counties.

5. On January 17, 2012, at the request of Southern District Supervisor Doug Workman, the Supervisor of the Enhanced Parole Officers, Matthew Currence, performed an audit of Grievant's parole cases.

6. District Supervisor Workman had received complaints from another parole officer that a parolee identified as Offender Copley had not been in for his scheduled meetings.

7. Supervisor Currence audited approximately twelve (12) of Grievant's cases. Offender Copley was a parolee reviewed during this audit.

8. Offender Copley was required to meet with his parole officer once every 30 days.

9. Offender Copley should have met with Grievant on or before November 3, 2011. Pursuant to the audit, Supervisor Currence discovered Offender Copley had not been seen by Grievant since October 3, 2011. (Respondent's Exhibit 4)

10. In that Offender Copley did not attend the mandatory meeting with Grievant and was in violation of his parole from the date of the scheduled meeting.

11. Upon discovery of Supervisor Currence's audit's finding, Grievant issued a warrant request and Offender Copley was arrested the following day, January 18, 2012.

12. The Parole Services Manual states, in pertinent part: "If an offender misses a scheduled appointment and it becomes likely that the offender has absconded

supervision then a violation report requesting a warrant will be prepared immediately but in no event more than 30 days after the missed appointment." (Respondent's Exhibit 3)

13. Grievant requested the warrant on January 17, 2012, 46 days after the latest date the warrant should have been requested; 75 days after it became apparent Offender Copley absconded; and 106 since he was last seen by Grievant.

14. In accordance with the 30-day policy, the latest date the warrant should have been requested was Wednesday, December 3, 2011.[2]

15. Offender Copley had been placed on electronic monitoring on or about September 1, 2011.

16. While Offender Copley was on electronic monitoring, Respondent was repeatedly notified of his absence from his home. Grievant auto-ended Offender Copley's electronic monitoring on or about November 30, 2011.

17. At the time electronic monitoring ended, Offender Copley had missed an appointment 27 days prior, and had been missing from his residence for 90 days.

18. A predetermination hearing was held on January 26, 2012, to determine Grievant's culpability. Following the predetermination hearing, it was decided that Grievant would receive a five-day suspension.

19. A Suspension Letter dated July 19, 2012, was issued to Grievant. Said correspondence among other information provided that:

> The reason for this suspension is that you violated WV Division of Corrections Policy Directive 129.00, 'Progressive Discipline,'

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[2] A warrant could have been requested prior to this date if the officer determined that the offender had absconded. The thirty day period is the latest a warrant can be requested after an offender has missed an appointment.

Section J, 1. Failure to comply with Policy Directives, Operational Procedures or Post Orders.
5. Instances of inadequate or unsatisfactory work performance.
14. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.

You are also in violation of Parole Services Manual; Supervision Section A; IV " Procedures", subsection"N", paragraph #2; page 27-28; "Absconders"; which states: "If an Offender misses a scheduled appointment and it becomes likely that the offender has absconded supervision then a violation report requesting a warrant will be prepared immediately but in no event more than 30 days after the missed appointment."

20. Grievant had conveyed concerns of inability to accomplish all the required duties of his position to Supervisor Matthew Currence.

21. Grievant was offered an assignment/transfer option which he choose to decline. The option offered to Grievant would entail dropping Kanawha County parolees, which would significantly reduce his caseload and his travel time. This option entailed a change in Grievant's direct supervisor and would have gotten him more involved in other administrative duties. Grievant did not find this option to be to his liking.

22. Grievant protested his five-day suspension as levied and presented in the Suspension Letter dated July 19, 2012.

23. Respondent held a level one hearing regarding the allegations of Grievant's misconduct. Subsequent to the information and explanation presented, Grievant's five-day suspension was reduced to a three-day suspension by Respondent at level one of the grievance process.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant is aware of his conduct[3] and acknowledges some responsibility but feels that the initial five-day suspension, and even the remaining three-day suspension without pay was too severe given the totality of circumstances surrounding the occurrence and feels that a written reprimand would best be served in this case. The record of this grievance is basically undisputed. Grievant contends, at the time of relevant events, he was supervising a caseload of approximately twenty (20) more clients than any other Enhanced Parole Officer employed by the West Virginia Division of Corrections. Grievant infers that if proper due deference is attributed to his high case load, being required to be in a different parole office each day of the week, the need to investigate submitted home

[3] Failing to request a warrant as required under the Division of Corrections, Manual of Procedures, Supervision, Section N. Resp. Ex. 3.

plans and cooperative investigations, as well as all the other expected job duties of his position, it is unjust to sanction him in the manner that Respondent has seen fit to do.

At the time of the events giving rise to this disciplinary action, "reportedly" a typical workweek for Grievant consisted of the following schedule:

> Monday – Charleston Parole Office to see the Kanawha County caseload of Probationers/Parolees.
> Tuesday – Lincoln County Courthouse located in Hamlin, WV and/or the Huntington Parole Office, Huntington, WV to see the Lincoln County caseload of Probationers/Parolees.
> Wednesday – Logan County Parole Office, to see the Logan County caseload of Probationers/Parolees.
> Thursday – Charleston Parole Office; Thursdays were not report days for any major caseload.
> Friday – Huntington Parole Office: two (2) 1½ hour sessions of sex-offender counseling as well as see Kanawha, Putnam and Cabell County sex-offenders for weekly (maximum) supervision.

See Grievant's Grievance Statement and post-hearing proposal document. Grievant participated in conversations with his supervisor Matthew Currence regarding his case load. What exactly transpired during such conversation(s) is not established. Grievant contends he asked for help from Supervisor Currence, Southern District Supervisor Doug Workman, and Deputy Commissioner of Corrections, Jim Ielapi. This is persuasive, but does not necessarily vindicate the failure to act as presented in this case. There was a significant lag in action by Grievant to a clear violation of an offender's terms of parole.

Respondent highlights that Grievant was offered a transfer of offices from the Charleston Parole Office to the Huntington Parole Office but declined. Allegedly, Grievant was fearful of a more hostile work environment from then Southwest Regional Director,

Judy Fitzgerald.[4] Respondent further highlights the potential for disaster, this type of over-site presents. The heightened degree of prospective consequences is not lost on the undersigned. Failure to properly supervise and get a warrant in the allotted time is a serious infraction and a public safety issue. (Level three Hearing Testimony). Respondent can be liable for harm by an offender to the public due to an employee's failure to supervise. Two examples were cited where officers failed to request warrants and supervise their parolees and terrible crimes occurred. There is a very real prospect of harm to the public at large if Parole Officers neglect to perform their assigned duties in a timely manner.

Grievant argued that the penalty imposed was too severe. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the

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[4] Grievant noted the West Virginia Division of Personnel Prohibited Hostile Workplace Harassment Policy in his original statement of grievance; however, did not present any argument or evidence in pursuit of a Nondiscriminatory Hostile Workplace Harassment claim at level three. Grievant presented no evidence in support of a claim of harassment and/or a hostile work environment, nor did he discuss these claims in his post-hearing written argument. Such a claim is deemed abandoned and will not be addressed.

situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge can not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra.*

Mitigation of a penalty is considered on a case-by-case basis. Respondent established that Grievant engaged in conduct that was in violation of applicable agency regulation, Division of Corrections, Manual of Procedures, Supervision, Section N, a fact Grievant does not dispute. Respondent has reconsidered its original assessment of events and reduced the five-day suspension. This is admirable and proper. The undersigned is sympathetic to Grievant's plight, and would be inclined to reduce the three-day unpaid suspension; however, it is Respondent's assessment of the seriousness of the misconduct which generates pause. Failure to properly supervise and get a warrant in a timely fashion represents a public safety issue. This is an infraction which has potentially serious

repercussions. Respondent maintains the three days of suspension is consistent with prior disciplinary actions of similar infraction.

Grievant was aware of the vast area required to travel to various offices and offenders homes for purposes of supervision, required paperwork and time lines relevant to his ability to accomplish satisfactory standards. Grievant accepted the responsibility of his position, Respondent held Grievant accountable for his failure to act. It cannot be found that Respondent acted without cause. Respondent could have been more lenient than it chose to be. However, Grievant has failed to demonstrate that Respondent's disciplinary actions of a three-day suspension was clearly excessive or an abuse of discretion.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

2. Respondent established by a preponderance of the evidence that Grievant failed to properly perform an essential duty of his position as required by applicable agency regulation. A fact Grievant does not dispute.

3. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

4. An allegation that a 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 also, Martin v. West Virginia State Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

5. Grievant failed to demonstrate that the disciplinary measure of suspension was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent. Grievant did not demonstrate that the discipline imposed was excessive.

6. Respondent established that Grievant's conduct was an infraction deemed serious in that it unduly presented an endangerment to the general public.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: June 17, 2013

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Landon R. Brown
Administrative Law Judge