**JOHN R. LOGSDON, JR.**

**v. Docket No. 94-HHR-1078**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND**
**HUMAN RESOURCES/EASTERN REGIONAL JUVENILE**
**DETENTION CENTER**

**DECISION**

Grievant, John R. Logsdon, Jr., employed by the West Virginia Department of Health and Human Resources (DHHR or Respondent) as a Youth Service Worker I at the Eastern Regional Juvenile Detention Center (Center), filed an expedited grievance at level four on November 22, 1994, as a result of his dismissal. An evidentiary hearing was conducted beginning January 17, 1995. Proposed findings of fact and conclusions of law were submitted by both parties on or before February 23, 1995, at which time the record was closed.

Sue Sergi, Commissioner of the Bureau of Children and Families, advised Grievant of his dismissal by letter dated November 2, 1994. That document stated in pertinent part:

This is to inform you that we have concluded the investigation, which began on May 25, 1994, of the incident which occurred on July 30, 1993 at the EasternRegional Juvenile Detention Center during which four juveniles in your care and custody became ill. Based on the findings of this investigation, it is my decision to dismiss you from your position as a Youth Service Worker I with the West Virginia Department of Health and Human Resources effective November 17, 1994. . . .

On May 24, 1994, you were indicted by a Berkeley county Grand Jury for battery against residents of the Eastern Regional Juvenile Detention Center on July 30, 1993. Since there has been no final disposition of this charge, it does not serve as basis for this personnel action. Although you have denied the event of July 30, 1993, the Agency's administrative investigation has established by a preponderance of the evidence that you, along with co-workers, caused four juveniles in your care, custody and control to ingest laxatives placed in their food which caused the juveniles to become ill.

On November 1, 1994, a discussion was held with you and Tom Moreland, Director, Eastern Regional Juvenile Detention Center, regarding the nature of these charges. Mr. Moreland shared with you that you were being considered for this disciplinary action. Your response was 'I did not do it'. [sic] After reviewing your response and the findings of the investigation, I have determined that your dismissal is warranted.

Commissioner Sergi continued to specifically address the evidence upon which her decision had been made:

On July 30, 1993, John Mills, Edward Gearhart, Mona Kelly, Patience Keefer and you were on duty on the 3:00 p.m. to 11:00 p.m. shift at the Eastern Regional Juvenile Detention Center. Resident Lester P. had been out of the facility for a court appearance that day but had returned to the facility at 6:30 p.m. A snack was served by John Mills and you at6:45 p.m. The snack was chocolate milk shakes served from a blender pitcher into 10 oz. cups. In the past, these shakes were served in the cartons in which they were purchased. According to Edward Gearhart, prior to the milk shakes being served, someone brought up the idea that the milk shakes should be "doctored" to give the residents diarrhea as they would then be too busy going to the toilet to cause staff any more problems. He said the main discussion was between John Mills and you. Mr. Gearhart stated that you got two spoons, and he observed you crushing two or three ex-lax pills to be used in the milk shakes. Mr. Mills and you prepared the milk shakes. Mr. Gearhart observed Mr. Mills and you using the blender and extra chocolate to make the milk shakes that night. According to Rhandy Matthews, he observed Patience Keefer and John Mills serving the snack that evening when he visited the facility. In fact, John Mills told Mr. Matthews that evening that they had ex-laxed the kids. Mr. Matthews also observed the milk shakes being made in the blender. The Daily Log indicates that on July 31, 1993, five log entries were made in regard to laundry being done. In addition, one entry states, "Chastity stated something was wrong with the food on July 30, 1993," that made her upset (stomach cramps). Another log entry on July 31, 1993 states, "Due to a resident's accident, and soiled underwear, Matthews is washing clothes with bleach." Another log entry on July 31, 1993 states, "Lester told to remove his soiled underwear and place them in washer. He denied having them in his room." These recordings all indicate that there were cases of diarrhea on July 31, 1993, and residents suspected something in their food on July 30, 1993 caused it. Residents Ashley B., Chastity M., Terry S., and Gary F.

provided statements that they became ill after consuming the milk shakes and some of them indicated the shakes were gritty. Resident Wendy G. provided a statement that she did not drink the milk shakesand was not sick, although the other residents were experiencing diarrhea. According to Mr. Gearhart, the general population of Eastern Regional Juvenile Detention Center complained about not feeling good, and they didn't act well that evening (July 30, 1993).

An incident report, as well as the physical restraint form and Daily Behavior Report, validates the altercation with Lester P. concerning his soiled underwear. A review of Chastity M.'s Medication Record shows that on July 31, 1993 at 2:30 p.m. she received two tablets of Pepto Bismol and at 6:00 she received two tablets of anti-acid. Both medications are indication of stomach problems on July 31, 1993. Eastern Regional Juvenile Detention Center records indicate that a blender was purchased at Walmart in Martinsburg on July 22, 1993. Eastern Regional Juvenile Detention Center records indicate that tee-shirts, shorts and briefs were purchased at Walmart on August 3, 1993 for the residents. Although similar purchases are made throughout the year, this purchase does coincide with the time frame involved concerning the residents' need for underwear due to diarrhea problems. Mr. Gearhart told Police Officer Spessert that he observed you and John Mills place the powdered ex-lax in the milk shakes. Mr. Matthews stated that the allegations from the residents continued for several days. Rebecca Wolford stated that several employees expressed fear after the incident, because they believed they might lose their jobs. She stated it was common knowledge among staff that the incident had occurred.

Commissioner Sergi determined that such conduct was a violation of public trust, Department Policy 2108, and the standards of child protective services. Based upon these findings Commissioner Sergi concluded the actions warrantedthe termination of Grievant's employment.

Following Grievant's indictment in the Berkeley County Circuit Court on May 24, 1994, DHHR conducted an investigation of the matter. James L. Crowder, Director of Investigations and Fraud Management completed his report on August 1, 1994. In conducting his investigation, Mr. Crowder reviewed the investigative report completed by Patrolman W. M. Spessart of the Martinsburg Police Department. In his report, Patrolman Spessart stated that the Berkeley County Prosecuting Attorney was made aware of the alleged incident during the Christmas holidays in 1993 when an anonymous note was slipped under the door. On January 13, 1994, the Police Department was requested to

investigate the allegation. Officer Spessart's report, dated February 2, 1994, is summarized as follows.

Six juveniles, Lester P., Chastity M., Gary F., Ashley B., Wendy G., and Terry S., were in residence at the Juvenile Detention Center on July 30-31, 1993. Staff members on duty were Grievant, John Mills, Mona Kelly, Patience Keefer, and Ed Gearhart. A review of the daily log revealed that Grievant and John Mills served the evening snack, a milkshake, at 6:45 p.m. on July 30. (See footnote 1)

Ed Gearhart confirmed that on July 30, and the subsequent two days, the juveniles experienced extreme diarrhea, but disavowed any knowledge of the milkshakes being drugged. Ina second interview, Mr. Gearhart stated that he had witnessed Grievant and John Mills crush the ex-lax tablets between two spoons, grinding them into a fine powder. He then claimed to have witnessed the powder being injected into the shakes. He opined that the incident was meant as a practical joke. He recollected that certain juveniles became ill immediately and that the following morning the dayshift supervisor bought Kaopectate. Mr. Gearhart reported that an excessive amount of laundry was processed to clean up the effects of the prank.

Patrolman Spessert's report indicates that all of the juveniles had been relocated by January 1994. Several were contacted by telephone. Their statements were reported as follows: Chastity M. advised that the staff bragged about the incident. She claimed that John Mills and Grievant later admitted they wanted to make the residents sick. She opined the event was in retaliation for the residents reporting employee John Sites for "beating up on" Ashley B. Lester P. reported that he suffered from diarrhea for three days and was given Pepto-Bismol. The other residents told him the milkshakes had been tainted. Terry S. reported that the milkshake tasted chalky and that he was ill for two days.

Ashley B. recalled that the milkshakes were served from a blender pitcher rather than the original paper cartons which was the norm. He also stated that the shakes contained chunks of chocolate. Ashley B. claimed that Patience Keefer bragged about the event and asked if anyone had "the shits." He claimsto have been ill two and one half days as a result of the incident. In a written statement, Ashley B. stated that he and the other residents suspected the shakes had been laced with a laxative and reported their concerns to the Center director, Tom Moreland.

Wendy G. provided a written statement attesting that many of the residents became ill after

ingesting the milkshakes. She additionally provided information regarding another incident in which she believed she had been mistreated. Gary F. recollected the shakes being served in cups and the staff laughing when the residents became ill.

Officer Spessert concluded that he found the statements to be generally consistent and credible inasmuch as the juveniles were separated and recollected the event from memory.

Also interviewed was employee John Mills who denied any knowledge of the residents becoming ill. He admitted to preparing the shakes on the day in question but asserts that the staff also drank them and that he found them to taste "malty." Mr. Mills noted that the dishwasher was broken at the time and opined that any illness might have been caused by the detergent used to hand wash the dishes. He asserts that any outbreak of diarrhea would have been documented in the daily log and in an incident report.

Grievant denied any knowledge of the event but indicated that such a prank would be funny. Patience Keefer stated thatshe had heard of the alleged event but had no additional knowledge. Rebecca Wolford stated that when she reported to work on July 31, she was told that Grievant and other employees had placed 24-26 pieces of Ex-Lax in the milkshakes.

Rhandy Matthews, another employee who has since left the Center, claimed that John Mills confessed to him that the drugs were used and that all staff made indirect comments to the effect "that it is going to be a shitty ordeal around here tomorrow." Mr. Matthews further recalled that when he appeared for work on July 31 an unnamed individual advised him that "Chastity M. had moved her bowels across the dayroom floor." Other employees offered no further assistance.

Based upon his investigation, Officer Spessert concluded that Grievant, John Mills, and Patience Keefer did serve the juveniles tainted milkshakes. Facts cited in support of this conclusion were residents' reports that previously the shakes had been served in their original cartons, while on the date in question they were served in cups, and that the shakes tasted gritty. Officer Spessert further noted that the six residents were interviewed separately by telephone and only Chastity M. and Terry S. were currently in the same facility; therefore, it would be impossible for the juveniles to match their accounts. He extended his findings to opine that supervisor Debbie Murphy had "covered the entire event up" and that Director Moreland had failed to report or investigate the event.

Mr. Crowder also interviewed and secured written statements from the following individuals in May and June 1994. Tom Moreland stated that he was on vacation the week in question. He recalled

being advised of Lester P. having soiled underwear, and the subsequent altercation to remove it from his room, but did not recollect any of the residents complaining of diarrhea. When he later questioned staff members regarding the alleged event, they denied that it had occurred or had no knowledge of the incident.

Ed Gearhart stated that he worked the 3-11 shift on July 30, 1993. The idea of doctoring the milkshakes was presented, according to Mr. Gearhart, as a suggested method of controlling the juveniles who had been causing the staff some problems. Presumably, they would be so busy going to the toilet they would not be able to create any mischief. He observed John Mills crush 2 or 3 Ex-Lax pills between two spoons, but did not actually witness the placing of the laxative in the drinks. He did recall additional chocolate being put into the shakes. The following day all the juveniles suffered from diarrhea. Mr. Gearhart reported the incident with Lester P. and also divulged that Chastity M. had soiled her clothing as a result of the affliction. He was "told by other staff" that a great deal of laundry had to be done.

Debby Murphy, a shift supervisor and Grievant's sister, reportedly advised Mr. Crowder that she would not tell him ifher brother engaged in the alleged incident "because blood is thicker than water." Ms. Murphy did recall Lester P. had a problem on the day in question and noted that Chastity M. frequently suffered from stomach problems. Ms. Murphy opined that the incident did not occur.

Rhandy Matthews stated that he was off duty on the day of the alleged incident but returned to the center that evening and observed the shakes being served out of a blender. He stated that he did not see any laxatives but that John Mills told him that they had "Ex-Laxed the kids." At work the following day, several of the juveniles told him of their suffering. Mr. Matthews stated that he did not report the incident because he was not a permanent employee and because he was aware that Grievant was related to Debby Murphy and Patience Keefer (cousin).

Rebecca Wolford, employed as a Youth Service Worker I from June 1992 through November 1993, stated that it was common knowledge among the staff that the incident had occurred. She became aware of the matter from John Sites who told her that John Mills and Grievant had placed laxatives in the milkshakes.

Patience Keefer denied that the incident occurred. She recalled Lester P. having a problem on the date in question, but disavowed any other knowledge of the matter.

Grievant stated that the incident did not occur. He also did not recall whether the blender was

used to prepare themilkshakes on July 30.

John Sites, employed as a Youth Service Worker I from June 1992 through August 1993, recalled the incident involving L.P. and that at least three other juveniles complained of stomach problems at that time and were given Pepto-Bismol. Mr. Sites confirmed there was a rumor circulated by the juveniles that staff had tried to make them sick, but he did not consider the matter serious since the residents were usually complaining.

Mr. Crowder's investigation file also included the daily population reports for July 29-31, 1993, confirming the six juveniles were in residence all three days, and a release card showing Lester P. was out of the facility on July 30 for an appearance in the Hampshire County Circuit Court. The document indicated his departure time to be 9:10 a.m.; the return time is not legible but was reported in the Daily Log to have been 6:30 p.m. Also included were copies of the daily log for July 30 and 31. The July 30 log includes an entry indicating a snack was served by Grievant and John Mills at 6:45 p.m. Pertinent entries on the July 31 log were made at 4:50 p.m., when Chastity M. "stated something was wrong with the food on 7-30-93 that made her upset (stomach cramps); 6:50 p.m. "Due to a residents acidnet [sic], and soiled underwear Matthews is washing clothes in bleach;" 7:00, 7:01; 7:10 comments regarding the altercation with Lester P. over soiled underwear. Incident reports, physical restraint forms, anddaily behavior reports regarding the Lester P. incident were made a part of the report.

A medication record for C.M. establishing that she received antacid and Pepto Bismol on July 31, invoices for the blender, purchased on July 22, 1993, and shampoo, t-shirts, shorts, and briefs, purchased on August 5, 1993, the classification description for Youth Service Worker I, a newspaper article dated May 25, 1994, and W.Va. Code §61-2-9, completed the investigation report. Mr. Crowder concluded that while Grievant and Ms. Keefer both denied the event took place, "a preponderance of the evidence indicates that the incident did occur."

At level four, Sue Salmons, Director of Youth Services, testified that a number of employees, including herself, convened a meeting in Charleston after Mr. Crowder had completed his investigative report. Although no vote was taken on a recommended action, it was determined that the public interest in the care, welfare, and safety of the residents was of sufficient importance, and the nature of the alleged offense was so severe, that progressive discipline would have been inappropriate in this instance. Ms. Salmons stated that the investigative report was reviewed and

found to be thorough and accurate. Ultimately, the outcome of this meeting resulted in another member of the group reporting to Sue Sergi who in turn made the decision to dismiss Grievant.

DHHR called two former employees in support of its case. Rebecca Wolford, a Youth Service Worker from June 1992 through December 1993, stated that she had no direct knowledge of the matter and was told of the incident by John Sites.

Ed Gearhart once again changed his testimony. At hearing, Mr. Gearhart stated that he "really did not see anything, just two guys making milkshakes." Mr. Gearhart admitted that he lied to Officer Spessert when he told him that he witnessed the tampering with the milk shakes.

Terry S., a resident of the Center at the time in question, appeared at the level four hearing and stated that he drank the shake, which tasted "okay" and that he did not recollect any subsequent illness. He understood that one resident may have become ill at that time, but he had no first hand knowledge of that fact. (See footnote 2)

Mr. Crowder and Patrolman Spessart reiterated their findings at hearing. On cross examination, Patrolman Spessart admitted that he had failed to notice that Wendy G. was not at the Center on the day in question. It was also noted that the daily log did not contain any references to Chastity M. allegedly having an accident in the day room, and did not indicate that any of the residents had more than one shower that day. No notation was made regarding Lester P., who soiled his underwear, indicating that he continued to sufferfrom diarrhea after being shackled on the evening of July 31.

Mr. Crowder conceded that the purchase of underwear on August 3, and Chastity M.'s receipt of pepto bismol did not conclusively prove that a laxative had been administered to the residents, but asserted that these and other factors were supportive evidence of the incident. Mr. Crowder explained that he found the statement of Mr. Gearhart to be credible because it corroborated other statements, and because he had nothing to gain. The investigation stated that his decision was also based upon evidence in the log that laundry had been done on July 31, which he construed to be supportive of a finding that the residents were suffering from diarrhea, although he admitted that he did not know how much laundry was usually done or on what day(s) it was scheduled.

Mr. Crowder also stated that he did not consider the fact that C.M. was frequently given antiacids and/or Pepto Bismol to be significant, because there could be other causes for her need on those days. He also conceded that Chastity M. made no mention in her statement of having an accident in the day room on the day in question.

## Discussion

In disciplinary matters, the employer bears the burden of proving that the employee engaged in the conduct for which he was disciplined and that the conduct affected the rights and interests of the public. W.Va. Code §29-6A-6; Maxey v. W. Va.Dept. of Health and Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). In the present matter it must be determined that DHHR has failed to meet its burden of proof based upon the following.

It is significant that the first time anyone was interviewed in regard to the alleged incident was six months later. Respondent's interviews were being conducted approximately one year later. Such a prolonged delay must necessarily result in less than perfect recall by those interviewed. In addition to overall stale testimony, the credibility of several witnesses was seriously impaired.

Ed Gearhart appears to have first known nothing, then he knew everything, and at level four, he again knew nothing. By his own admission, he lied to Patrolman Spessert when he told him he observed pills being placed in the shakes. It is also noted that Mr. Gearhart resigned in November 1993, just before the anonymous note was left for the Prosecuting Attorney. Furthermore, his unplanned resignation from the Detention Center was clouded by charges regarding his providing cigarettes to the residents and bragging about his "sexual exploits" with co-worker Rebecca Wolford. Thus, Mr. Gearhart's testimony is generally not credible.

Rebecca Wolford offers no support to Respondent's charges because she was not at the Center on the evening of July 30, 1993. She stated that she was told of the incident by another worker, John Sites. Indeed, her understanding of whatoccurred was faulty as illustrated by a comment that it was her impression that the residents woke up with diarrhea on July 31. Log entries indicate no such problems until late afternoon/early evening. Ms. Wolford reported to work at 11 p.m. on July 31, but made no comments regarding the resident's suffering, even though other evidence indicates that they were ill for two or more days.

Other employee statements offered in support of Respondent's case, given by John Sites and Rhandy Matthews, establish that they had no direct knowledge that the milkshakes were tainted. Although they heard rumors and observed incidents which they believed corroborated the alleged

incident, their testimony offers no substantial proof of the allegations. Further, neither of these individuals appeared at hearing and were not cross-examined.

Terry S. was the only resident to testify at hearing. His recollection at that time was that he had drunk a milkshake which tasted "okay." He stated that the snack did not make him ill. The statements of the remaining residents' may be accorded little weight because they were not subject to cross examination. Not only is it impossible to make any determination as to demeanor, etc., at this level, but any such evaluation was impossible by Patrolman Spessert or Mr. Crowder, because they never interviewed the residents in person. Of course, the statements of Wendy G. must be entirely discounted because she was not at the Center when theshakes were served, or any time thereafter.

Neither is the documentary evidence presented by DHHR persuasive. There is not a single entry in the Daily Log for July 31 stating that a massive outbreak of diarrhea was taking place. There is no entry indicating Chastity M. had an accident in the day room. The incident with Lester P. is documented although there is no indication when the underwear was soiled. Only one entry referencing laundry states that soiled underwear were being washed, and again no reference was made to any diarrhea epidemic. Respondent makes no charges that the Log was altered or otherwise tampered with; therefore, there is no reason to believe that entries were ever made and later deleted.

The only Medication Record submitted was that of Chastity M. This record, from July 29 through August 10, shows that Chastity M. was given medication twelve out of thirteen days. Some days she received as many as three dosages of primarily antacids and painkillers. On July 31 she was given two Pepto-Bismol tablets; however, they was nothing written in the "Comment" section to indicate the reason for the medication.

Invoices and sales receipts for purchases of the blender and underwear offer no proof that the incident occurred. Surely had the event been of such proportions that new underwear was required, it would have been needed earlier than four days later. Debby Murphy testified that the underwear was bought for a new, overweight resident. This explanationwas not controverted.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Grievant is employed as a Youth Service Worker I at the Eastern Regional Juvenile Detention Center in Martinsburg, West Virginia.

2. During the Christmas holidays 1993, an anonymous note was left at the Prosecuting Attorney's office. The author alleged that staff members of the Eastern Regional Juvenile Detention Center had placed a large dosage of laxatives into milkshakes which were given to the residents on July 30, 1993.

3. Subsequent to an investigation by the Martinsburg Police Department, Grievant and two other employees were indicted by the Berkeley County Grand Jury in May 1994, on a charge that they "did unlawfully and intentionally cause bodily harm" to the residents of the Center.

4. DHHR conducted an internal investigation of the matter during the summer of 1994.

5. Based upon the findings of the internal investigation, Grievant was dismissed from his employment effective November 17, 1994.

## CONCLUSIONS OF LAW

1. In disciplinary matters involving state employees,the employer is required to prove by a preponderance of the evidence the charges upon which the action taken against the employee is based. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. DHHR has failed to prove by a preponderance of the evidence that Grievant placed laxatives in a snack served to the residents of the Eastern Regional Detention Center.

Accordingly, the grievance is GRANTED, and DHHR is hereby Ordered to reinstate Grievant with backpay and benefits, less any appropriate set-off.

DATED 5/31/95 SUE KELLER, SENIOR ADMN. LAW JUDGE

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*Footnote: 1The milkshakes were frozen in individual cartons and apparently were to be thawed or microwaved prior to serving.*

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*Footnote: 2DHHR submitted an Affidavit from Lester P. at the level four hearing. In this statement Lester P. confirms that he drank a milkshake on July 30, 1993, and that he suffered from diarrhea for three days thereafter.*