DARL PINE, .

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Grievant, .

.

v. . Docket No. 95-HHR-066

.

WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES, BUREAU OF .

CHILDREN & FAMILIES, .

.

Respondent. .

D E C I S I O N

This is a grievance by Darl Pine (Grievant), submitted directly to Level IV on February 6, 1995, in accordance with W. Va. Code § 29-6A-4(e), challenging his dismissal from employment as a Youth Service Worker at the West Virginia Children's Home (Children's Home or Home) in Elkins, West Virginia. (See footnote 1) The Children's Home is operated by the Respondent Department of Health and Human Resources (DHHR) through its Bureau for Children and Families. A hearing in this matter was conducted in this Board's Elkins office on March 15, 1995. Following receipt of timely post-hearing submissions from both parties, this case became mature for decision on April 17, 1995. Consistent with the intent of W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

Several factual matters necessary to resolution of this grievance are in controversy. Ultimately, the outcome in this matter hinges upon determinations of witness credibility and appropriate inferences that may be drawn from pertinent facts. The basis for Grievant's dismissal is set forth in a

January 27, 1995, letter from Sue H. Sergi, Commissioner of the Bureau for Children and Families, stating:

> By letter dated October 31, 1994, you were suspended without pay from your duties as a Youth Service Worker with the West Virginia Children's Home, WV Department of Health and Human Resources, pending investigation of an allegation of sexual abuse of a resident minor in the West Virginia Children's Home. Because the investigation had not been completed, by letter dated November 30, 1994, your suspension pending investigation was continued for an additional period, not to exceed thirty (30) days, until the completion of the investigation.
>
> The investigation has now been completed. The preponderance of evidence indicates that you willfully and deliberately were insubordinate by engaging in personal interaction with a female resident without the presence of another staff member. Additionally, sufficient allegations have been made as a result of this interaction that you did engage in inappropriate sexual conduct with a female resident of the West Virginia Children's Home. Accordingly, your dismissal is effective immediately, the fifteen (15) day notice period being waived in the public's best interest. The specific reasons for your dismissal are shown as follows:
>
> A new female resident, C.P. was to be placed in the West Virginia Children's Home (hereinafter Children's Home). The Children's Home was made aware through C.P.'s case summary and social worker, Diana Smith, that C.P. had in the past become intimately involved with older males.
>
> Accordingly, on August 1, 1994, prior to C.P.'s physical placement in the Children's Home, the male Youth Service Workers, including yourself, were directed by Allen Harris, Supervisor, to avoid direct contact with C.P. unless other Youth Service Workers are in the area.
>
> On August 8, 1994, the day that C.P. arrived at the Children's Home, you were once again told by Allen Harris, your immediate supervisor, to avoid any inappropriate interaction with C.P.
>
> On August 17, 1994, Lori Minnich, Counselor, had a counseling session with C.P. C.P. informed Ms. Minnich that she "really liked Darl Pine" and that "he was so nice". Mr. Markley instructed Ms. Minnich to inform you and to instruct you to avoid any contact with C.P.; you responded to Ms. Minnich that you were glad she told you.
>
> On August 25, 1994, after resident C.P. received an upsetting telephone call from

her mother and while you were supposedly consoling C.P., she alleges that you kissed her on the mouth and placed your hands down her back and on her buttocks, and that you touched her genital area on the outside of her clothes. A meeting was held on August 26, 1994, attended by yourself, Wanda Siler, Supervisor, Michelle Chenoweth, Counselor, and Joe Carr, Youth Service Worker, to discuss the allegations. You stated that it was difficult to ignore residents who have problems. You were specifically told at the August 26, 1994, meeting to use better judgment and that you were to "stay away from C.P." This directive was reiterated by your immediate supervisor, Allen Harris, on the evening of August 26, 1994.

Resident C.P. also alleges that in early September she had left her walkman in the pavilion and went to retrieve the item. She stated that you followed her, and while in the pavilion, you fondled her and attempted to kiss her. When the resident reported these incidents, a Child Protective Service Worker was contacted to investigate the allegation. During the investigation, C.P. recanted her allegations and denied that the above incidents had occurred. The conclusions of the CPS worker were inconclusive. However, because of the series of allegations, the prior directives you had received were once again reiterated and reinforced on September 23, 1994, by Carson Markley, Administrator of the Children's Home, at which time you were directed to "stay away from C.P. and all of the girls" at the Children's Home.

On the morning of October 5, 1994, allegations were once again made by C.P. regarding your alleged sexual misconduct. These allegations were investigated on October 5, 1994, by the Children's Home, and referred to a Protective Services Worker on October 11, 1994. During the investigation, resident C.P. admitted that her original allegations concerning your sexual misconduct in August-September 1994 were true, and additionally stated that on October 4, 1994, you told her that you wished you would be permitted to take the residents to the carnival in Elkins because you wanted to get her off to a dark corner. Resident C.P. also stated later on the same day you told her your hands were cold and that you were going to put them down her pants to get your hands warm. This verbal encounter was witnessed by another resident, M.C., who states that as C.P. walked away, you shouted, "Hey wait a minute, I love you." M.C. further stated that you put your hands to your lips and blew C.P. a kiss. These actions are in reckless disregard of the numerous prior directives and warnings you have received.

Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisors is cause for severe disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more that (sic) an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer.

Your insubordinate conduct makes it difficult for management in general, and your supervisor in particular, to carry out leadership responsibilities while you are at the work place. Your blatant and flagrant insubordination, as well as your disruption of the orderly governmental processes, warrant your dismissal. Your repeated repudiation of your supervisor's authority disrupted and undermined the employer relationship and

eliminated any likelihood that a lesser penalty would cause you to change your conduct and behavior.

One of management's most basic obligations is to maintain good employer/employee relations. Your continued failure to observe the directives of your supervisor, agency policies, and Administrative Rules makes it difficult for supervisors to enforce directives, exert leadership, and maintain good labor relations. Not only does your behavior distract from effectively and efficiently accomplishing the mission of the agency, but it is demoralizing to others who are responsible forenforcing and observing policies and rules. The agency can no longer be expected to continue to tolerate such blatant disregard of the rules. All of the above facts warrant your dismissal.

The WV Department of Health and Human Resources, West Virginia Children's Home, is mandated to protect and care for the juvenile residents entrusted to the facility by the courts. Individuals entrusted to our care who are placed in residence at the Home are often emotionally vulnerable. As a worker within the Home, your responsibility was to train, mold, and protect these individuals. Your duties and responsibilities involve overseeing the daily activities of the residents, providing basic counseling and resolution of problematic behavior. In such an environment, your own behavior, to a degree, serves as a role model; therefore, I believe that your willful and deliberate insubordination will cause you to be ineffectual. By your own behavior, you have demonstrated a disregard of these duties/responsibilities and placed the residents in continual emotional danger. Your misconduct, as referenced in this letter, cannot and will not be tolerated. In fact, your continued employment would create a threat to the well-being of the residents served by this facility, all of which warrants your dismissal.

Your behavior as shown above has created both a hostile and offensive environment for a resident placed in our care. The State 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 employees' capacity in discharging their duties and responsibilities. The nature of your misconduct causes me to conclude that you did not meet a reasonable standard of conduct expected of an employee of this facility and, therefore, your dismissal is warranted.

J Ex 1.

The essence of this rather verbose termination notice is that Grievant allegedly committed three separate acts of verbal and/or physical misconduct of a sexual nature with C.P. (See footnote 2) and that, underthe circumstances, Grievant's act of voluntarily placing himself alone with C.P., even if the sexual misconduct did not occur as alleged, constituted insubordination. If Grievant was insubordinate by failing to stay away from C.P., such conduct constitutes "misconduct of a substantial

nature directly affecting rights and interest of the public" (Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985)), and his dismissal is warranted. However, Grievant contends that these incidents either did not transpire as alleged or did not take place at all.

Under W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters falls on the employer. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Accordingly, it is necessary to examine the testimony and other evidence presented at the hearing in this matter to ascertain whether DHHR established sufficient facts to prove the charges alleged. Further, where the existence or nonexistence of certain contested facts hinges on witness credibility, it is necessary to make explicit credibility determinations and detailed findings of fact. See Harper v. Dept. of the Navy, 33 M.S.P.R. 490 (1987).

Michelle Chenoweth is employed at the Children's Home as a Counselor responsible for individual and group counseling ofresidents. On August 1, 1994, Ms. Chenoweth received a telephone call from a social worker in Boone County informing her that a female youth, C.P., would be coming to the Children's Home as a resident. The social worker advised Ms. Chenoweth that C.P. had made several allegations against "older men" in the past and that two coal miners were fired based upon allegations they had "been with her." Ms. Chenoweth conveyed this information regarding C.P.'s past problems to Carson Markley, Director of the Children's Home, and Allen Harris, Staff Supervisor. Thereafter, C.P. arrived at the Children's Home on August 8, 1994. Ms. Chenoweth reminded Mr. Harris at that time that C.P. was the individual who had previously made allegations against older men.

On August 26, 1994, Ms. Chenoweth attended a meeting with Grievant, Wanda Siler, and Joe Carr. Ms. Chenoweth testified that she told Grievant that C.P. had made certain allegations of sexual misconduct against him to Mr. Carr and "it would be in his best interests to not be around" C.P. Ms. Chenoweth stated that "Mr. Carr told him [Grievant] the same thing." Ms. Chenoweth testified that Ms. Siler made similar comments on two occasions and, after Grievant stated that because residents were there for problems it was "difficult to snub or ignore them," Ms. Siler told Grievant: "stay the hell away from her."

On October 4, 1994, C.P. made another allegation against Grievant. On the following day, October 5, 1994, Ms. Chenoweth met with Grievant, Mr. Harris and Lori Minnich, another Counselor,

to discuss C.P.'s latest allegation. Mr. Harris reminded Grievantthat he had been told to stay away from C.P. Grievant replied, "Allen, hindsight is better than foresight, I wish I would have listened to you."

Grievant's immediate supervisor, Allen Harris, testified that he was advised of C.P.'s situation on or about August 1, 1994, when Ms. Chenoweth described C.P.'s past history of sexual misconduct with older men, prior to her admittance to the Children's Home. Mr. Harris passed this information on to Grievant and other staff members that same evening. He particularly mentioned to Grievant that C.P. had a problem with older men "and you're the oldest man we've got here." However, Mr. Harris did not instruct Grievant "to avoid direct contact with C.P. unless other Youth Service Workers are in the area." He simply advised the staff to be cautious around C.P. and told Grievant that he needed to be especially careful since C.P. had an attraction to older men. Likewise, Mr. Harris denied telling Grievant on August 8, 1994, "to avoid any inappropriate action with C.P." Indeed, Mr. Harris questioned what was meant by "inappropriate action." Mr. Harris only advised Grievant to "stay away" from C.P. after the first allegation was made around August 25th.

Mr. Harris discussed the alleged incident of August 25th with Grievant on the following day. In the course of that conversation, Grievant denied that any misconduct had occurred. Without regard to the merits of the August 25th allegation, Mr. Harris told Grievant "you'll have to stay away from C.P." Subsequently, he observed Grievant move away from C.P. in an effort to stay awayfrom her. Mr. Harris also noted that, for the protection of both Grievant and C.P., C.P. was placed under female staff supervision one-on-one at all times. He noted that Brenda Carr was the female staff member assigned one-on-one to C.P. at the time of the alleged pavilion incident.

Mr. Harris indicated that Grievant had a good work history and he had no problems with Grievant prior to these alleged incidents. He did note that Grievant was initially reluctant to stay away from C.P. as he did not believe that would help with her problems.

Lorene Minnich, another Counselor at the Home, was assigned as C.P.'s counselor at the time of her admission on August 8, 1994. Ms. Minnich was already aware of C.P.'s prior problems, including truancy, difficulties in foster homes and with her parents, and a history of sexual attraction to older men. In the course of counseling, shortly after her arrival, C.P. told Ms. Minnich that she liked the staff and thought that Grievant and another male staff member were especially nice. Ms. Minnich advised Ms. Chenoweth, Carson Markley, Director of the Children's Home, and Wanda Siler,

Assistant Director, of C.P.'s apparent attraction to Grievant. Ms. Minnich testified that she advised Grievant and the other male staff member that C.P. had "already expressed an interest in both of them." She further stated that she told Grievant that Mr. Markley and Ms. Siler had instructed her to "warn him to be careful and to stay away from her [C.P.]."

Ms. Minnich testified that C.P. discussed the allegations regarding the "pavilion incident" with her on August 25th or 26th. This allegation was then discussed in a meeting between Grievant, Ms. Siler, Mr. Carr, and Ms. Chenoweth. Ms. Minnich entered this meeting near the end, confirming what she had told Grievant earlier regarding C.P. expressing interest in Grievant.

Ms. Minnich noted that the directive requiring one-on-one female staff members with C.P. at all times caused some of the other female residents to become jealous of all the "attention" C.P. was receiving. This same problem was noted in the testimony of Mr. Harris.

M.C., a 17 year-old female resident of the Children's Home testified that she was sitting with her boyfriend on a couch in the A-B lounge at the Children's Home on October 4, 1994. Grievant was sitting on a heater with C.P. standing in front of him when M.C. heard Grievant tell C.P. that his hands were cold and he was going to put them in C.P.'s pants. M.C. also heard Grievant state to C.P., "I love you," as C.P. was walking away and observed Grievant blow a kiss to C.P. M.C. stated that a "whole bunch of residents" were in the room at the time of this incident. However, M.C. did not see any other staff members in the room at that time. M.C. reported this incident to her counselor, Ms. Chenoweth. M.C. provided Ms. Chenoweth with a written statement regarding what she witnessed in the A-B lounge. (See footnote 3)

During her testimony, M.C. kept her right hand over the right side of her face so as not to be able to see Grievant seated to herright. When the undersigned inquired as to her reasons for doing this, M.C. stated, "Because it hurts me to see him."

Joseph Carr, another Youth Service Worker at the Children's Home, indicated he had not been warned about C.P.'s problems before she arrived at the Home. However, C.P. came to him, reporting that Grievant had made sexual advances toward her in the pavilion outside the Home, trying to kiss her. This report led to a meeting between himself, Grievant, Ms. Siler, and Ms. Chenoweth. Mr. Carr recalled Grievant was told to stay away from C.P. in the course of that meeting and Grievant indicated that he did not want to appear to "shun" C.P. Following the meeting, Mr. Carr told Grievant that he was sorry he had to report the allegation but it was his duty to do so. Grievant replied that he

understood but he had done nothing improper with C.P.

Wanda Siler, Assistant Director of the Children's Home, testified that she met with Grievant, Mr. Carr and Ms. Chenoweth on August 26, 1994, regarding C.P.'s allegations against Grievant. Ms. Chenoweth, Mr. Carr and Ms. Siler all counselled Grievant on the need to stay away from C.P. and Grievant told them, "I can't snub anybody." Ms. Siler concluded the meeting by telling Grievant, "stay the hell away from her."

Carson Markley, Director of the Children's Home, testified that he personally met with Grievant on September 28, 1994, instructing him to stay away from C.P. and all female residents while the allegations that had been made to date by C.P. were beinginvestigated. (See footnote 4) Mr. Markley indicated that he gave Grievant this order in an effort to protect both Grievant and the Children's Home from any further allegations by C.P.

In his defense, Grievant presented the testimony of Brenda Carr, Dorothy Lane, and Marshall Davisson, as well as testifying in his own behalf. Brenda Carr, a Youth Service Worker at the Children's Home, recalled that she was supervising the residents near the A-B lounge on August 25, 1994, while Grievant was in the basement supervising the boys' showers. When the boys came upstairs, C.P.'s boyfriend was upset, wanting C.P. to return his "Walkman" radio. C.P. said the Walkman was at the pavilion outside the Children's Home and Grievant indicated he had seen the Walkman there. Grievant walked down to the pavilion with C.P. and they returned immediately. Ms. Carr recalled C.P. giving her a hug when she returned to the A-B lounge area, making no complaint about Grievant's conduct.

Ms. Carr was the only female resident in the vicinity and she felt unable to go to the pavilion with C.P. as she was supervising residents performing chores in the A-B lounge. She recalled that C.P.'s boyfriend, another resident of the Children's Home, was "creating a disturbance" because he could not get his Walkman back from C.P. Ms. Carr further acknowledged that she had been instructed to stay with C.P.

Dorothy Lane, another employee at the Children's Home, was present when C.P. received an upsetting phone call from her mother. C.P. discussed the phone call with Ms. Lane in the "time-out room." Ms. Lane indicated Grievant could not have been involved with C.P. as alleged, because he was busy elsewhere at that time.

Marshall Davisson, currently serving as Sheriff of Tucker County, West Virginia, and a retired

West Virginia State Police Lieutenant, testified that he has known Grievant since 1971. Sheriff Davisson noted Grievant's favorable reputation for truth and veracity, as well as Grievant's constructive initiatives in dealing with youth when Grievant had been serving a term as Sheriff of Tucker County and Sheriff Davisson was still a State Trooper.

Grievant elected to waive his rights under W. Va. Code § 29-6A-7 and testified under oath, subjecting himself to cross-examination by Respondent's representative. Grievant has worked at the Children's Home for a total of approximately eight years. Prior to this series of incidents, he was considered an ideal employee. After working at the Children's Home for several years, Grievant left to serve as the Chief of Police for Parsons, West Virginia. Thereafter, Grievant applied for a vacancy at the Children's Home and was not only re-hired, but "welcomed back" to the staff.

Grievant recalled Mr. Harris cautioning him in regard to C.P.'s situation prior to her arrival at the home, but he did not recall any discussion with Mr. Harris on August 8, 1994, as described in the dismissal notice. Mr. Harris had advised Grievantthat C.P. had a history of making allegations regarding sexual misconduct and that she "had a thing for older men." However, Grievant was not aware that C.P. was the resident he had been warned about until Ms. Minnich told him around August 17, 1994, that C.P. "had a crush on me." Grievant recalled that Ms. Minnich told him not to be nasty with C.P. but to be very careful in regards to his involvement with her.

Grievant acknowledged that he went to the pavilion with C.P. to look for the missing Walkman on August 25, 1994. He indicated that nothing improper took place and that they immediately returned to the Children's Home after looking for the Walkman. Grievant indicated that he believed they found the Walkman although he could not recall for certain. (Ms. Carr testified that they did not locate it.)

Grievant denied making any improper advancements toward C.P. following the "disturbing" phone call on August 25, 1994, or in the A-B lounge on October 4, 1994, stating that he had no contact with C.P. on those occasions. Grievant admitted that he would have been in the A-B lounge from time to time on October 4 as staff members are normally present when there are residents in the lounge. Indeed, Grievant indicated that he had been under the impression that the October 4, 1994, incident had allegedly taken place in the pavilion rather than the A-B lounge. (See footnote 5) Grievant recalled M.C.getting upset with his comments in a group counselling session where he defended the staff against her criticisms. Otherwise, he could not recall having any prior difficulties with M.C. Grievant indicated he was not aware until the hearing that a female staff member had been assigned

one-on-one to C.P.

As previously noted, the outcome of this grievance hinges on determinations of witness credibility. Obviously, Grievant's credibility is directly at issue since he contradicted the sworn testimony of at least two witnesses. In that regard, the undersigned observed Grievant's demeanor to be sincere and straightforward throughout his testimony. Other than some understandable confusion over dates, Grievant's testimony was consistent. Even assuming that Grievant is experienced in testifying in judicial proceedings as a result of his prior service as a law enforcement officer, his responses were candid and forthright as opposed to rehearsed and measured.

In addition to the specific endorsement of Grievant's favorable reputation for being truthful from Sheriff Davisson, Mr. Markley and Ms. Siler agreed that Grievant had been a valued employee at the Children's Home. Further, there was no evidence of any prior allegation of wrongdoing by Grievant during his employment with the Children's Home, or in his previous employment as Chief of Police in Parsons or Sheriff of Tucker County. Accordingly, Grievant's testimony was generally credible.

In evaluating the specific charges against Grievant, the most serious is the alleged incident with C.P. in the A-B lounge onOctober 4, 1994. In that instance, M.C. specifically identified Grievant as engaging in prohibited one-on-one contact with C.P., including statements and gestures of a sexually suggestive nature. (See footnote 6) As previously noted, M.C. placed a hand over one side of her face during her entire testimony. M.C.'s explanation that she could not face Grievant was less than satisfactory inasmuch as there was no indication that Grievant had ever harmed her in any way; indeed, there was no evidence to indicate that there had been any significant interaction between M.C. and Grievant. While it is assumed that M.C. was a resident in the Children's Home because she had been a victim rather than a miscreant, she nonetheless appeared emotionally distraught during her testimony, on the verge of tears, even though she was not closely examined by counsel for either party.

In addition to M.C.'s questionable demeanor, her testimony was largely uncorroborated by other evidence. C.P. was not called as a witness by Respondent, her version of events being presented only through hearsay. While formal rules of evidence are not applied inhearings before this Grievance Board, W. Va. Code § 29-6A-6, ¶ 5, it is noted that there was no indication that C.P. was not available to testify as a witness and no exception under Rules of Evidence 802 or 803 would authorize admission of C.P.'s hearsay allegations in a judicial proceeding. Moreover, the testimony of

Ms. Chenoweth, Ms. Minnich and Mr. Markley, taken as a whole, suggests that C.P. has such a propensity to cry "wolf" in regard to older men, that her credibility in regard to such allegations is virtually nil. In any event, DHHR's failure to call C.P. as a witness prevents the undersigned from assessing her credibility to corroborate M.C. See Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (June 14, 1989).

It is further noted that M.C. stated that there were "a bunch" of residents present when she observed Grievant speaking to C.P. However, no other residents were called to corroborate Grievant's presence in C.P.'s vicinity at the time in question. More importantly, despite Respondent's witnesses' emphasis of the one-on-one female staff assignment to C.P. as a negative "consequence" of Grievant's failure to adhere to the initial guidance from Mr. Harris and Ms. Minnich to avoid C.P., there was no indication who or where this staff member was on October 4, 1994. (See footnote 7) It is clear that this staff member was tasked with protecting not only the Children's Home from C.P.'s allegations, but also to provide some"insurance" to the Grievant. (See footnote 8) Respondent's failure to offer any explanation for the absence of this staff member, if only to corroborate that Grievant had an opportunity to be observed with C.P. by M.C., indicates that no staff member could corroborate M.C.'s version of events.

It is also noted that Grievant expressed reluctance to comply with earlier guidance to avoid C.P. and appears to have exercised poor judgment, particularly in regard to the alleged pavilion incident. However, Grievant acknowledged that after Ms. Siler and Mr. Markley had made it abundantly clear that he was to avoid any contact with C.P., he made every reasonable effort to comply with their orders. Further, Mr. Harris indicated in his testimony that he observed Grievant make an effort to avoid C.P. once those clear directives were issued. Grievant neither directly denied nor explained the statement he made to Mr. Harris on October 5th: "Allen, hindsight is better than foresight. I wish I would have listened to you." (See footnote 9) Given that Grievant had been advised by Mr. Harris that he was being suspended pending an investigation, these statements do not necessarily contradict Grievant's present claims of innocence.

Obviously, if Grievant disregarded the clear directives of his superiors, or if he made inappropriate sexual comments to a female resident, he should not be allowed to retain employment as a Youth Service Worker in the Children's Home. However, considering the totality of the evidence presented, the weight of credible evidence supports Grievant's exculpatory recollection of October 4, 1994.

Therefore, the undersigned administrative law judge finds that Grievant was not insubordinate by failing to stay away from C.P. on October 4, 1994, and did not communicate with C.P., either through words or gestures, in a sexually inappropriate manner as alleged in the notice of dismissal.

Turning to the remaining alleged incidents set forth in the dismissal letter, the "pavilion incident" and the "telephone call" incident, there was no credible evidence introduced to prove that the latter incident occurred. Accordingly, no allegation, either of sexual misconduct or insubordination, in regard to the telephone incident on August 25, 1994, can be sustained and no further discussion of that incident is required.

In regard to the "pavilion incident," it is important to determine when this event took place. The dismissal letter states that "Resident C.P. also alleges that in early September she had left her walkman in the pavilion and went to retrieve the item. She stated that you followed her ...." J Ex 1 at 2, ¶ 3. Thus, the dismissal notice avers that this incident occurred in September, subsequent to the August 26, 1994, meeting wherein Ms. Siler clearly instructed Grievant to stay away from C.P.

However, Ms. Minnich testified that C.P. discussed this incident with her on August 25 or 26. Grievant admits that he went to the pavilion with C.P. but likewise recalls that this occurred prior to the August 26 meeting where Ms. Siler made it clear that he was to stay away from C.P. Moreover, Respondent's counsel submitted the following as Proposed Finding of Fact No. 7:

> On August 26, 1994, C.P. told Joe Carr, another Youth Service Worker I, about an incident of alleged inappropriate sexual misconduct involving Grievant. Grievant had gone with C.P. to the Pavilion behind the Home to retrieve a Walkman, despite the fact that two individuals said that it wasn't there. Another Youth Service Worker I, Brenda Carr, was standing in the doorway to the back porch of the Home as she conducted crafts. Ms. Carr could neither hear the conversation between C.P. and Grievant, nor see them the entire time as the area is partially obstructed by the corner of the building. Ms. Carr could have gone with C.P. to the Pavilion while Grievant watched the crafts class. There were also two other female staff on duty who could have gone with C.P. Grievant and C.P. did not return with the Walkman.

This Proposed Finding of Fact contradicts the dismissal letter's statement that this incident transpired in "early September." Accordingly, the preponderant evidence indicates that the alleged event took place on August 25, 1994, before Grievant was admonished by Ms. Siler to "stay the hell away from [C.P.]."

Since there was no evidence, except testimony from Joe Carr regarding hearsay statements C.P.

made to him, to support the allegation of sexual misconduct, and Grievant credibly denied those allegations, the charge of sexual misconduct with C.P. at or near the pavilion outside the Children's Home on August 25, 1994, is not sustained. The only remaining issue is whether Grievant was insubordinate by walking to the pavilion with C.P.

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . .")

In the instant case, the testimony of Grievant's immediate supervisor, the person who would normally issue orders to Grievant, directly contradicted material allegations in the dismissal letter relating to the charge of insubordination. The dismissal letter indicated that Grievant was "directed by Allen Harris, Supervisor, to avoid direct contact with C.P. unless other Youth Service Workers are in the area." J Ex 1 at 1, ¶ 4. Mr. Harris credibly testified without contradiction that he simply advised Grievant and other male Youth Service Workers to be cautious around C.P., noting that Grievant needed to be particularly "careful," given C.P.'s history of complaints against older men and Grievant was the oldestmale on the staff. Moreover, Mr. Harris specifically denied telling Grievant on August 8, 1994, "to avoid any inappropriate interaction with C.P." J Ex 1 at 1, ¶ 5.

Only Ms. Minnich's testimony supports Respondent's allegations. She testified regarding a conversation with Grievant on August 17, 1994, wherein she told Grievant that C.P. had indicated that she thought he was "especially nice" and that Mr. Markley and Ms. Siler instructed her to "warn him [Grievant] to be careful and to stay away from her [C.P.]." Grievant's recollection of that conversation was that Ms. Minnich told him not to be "nasty" to C.P. but to be very careful in regards to his involvement with C.P.

Ms. Minnich's testimony differs from the statement in the dismissal letter that Grievant was to

"avoid any contact with C.P." Moreover, the discussion between Grievant and Mr. Carr, Ms. Chenoweth and Ms. Siler during their meeting on August 26, 1994, suggests that Grievant's understanding of the previous instructions relayed by Mr. Harris and Ms. Minnich was less than crystal clear. Nonetheless, by Grievant's own admission he was then on notice to be "careful" or "cautious" in interacting with C.P. Although C.P. had not yet made any allegation against Grievant as of August 25, 1994, Grievant certainly exercised poor judgment when he went to the pavilion with C.P. to look for a missing Walkman. However, given that Ms. Carr was on the porch of the Children's Home when they left for the pavilion and when they returned, Grievant's decision to assist C.P. was not so unreasonable as to constitute a knowing and intentional defiance of authority. The undersignedadministrative law judge accepts that Grievant reasonably believed he was to exercise caution in his dealings with C.P., not to avoid her entirely as was subsequently made abundantly clear by Ms. Siler and Mr. Markley. See Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988). (See footnote 10)

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant has been employed by the Respondent Department of Health and Human Resources as a Youth Service Worker at the West Virginia Children's Home for a total of eight years.

2. On August 1, 1994, Michelle Chenoweth, a Counselor at the Children's Home, was apprised of the history of an incoming resident, C.P., who reportedly had a history of problems involving older men, including multiple allegations of sexual misconduct. Ms. Chenoweth relayed this information to Allen Harris, a staff supervisor at the Home.

3. On or about August 1, 1994, Mr. Harris, Grievant's immediate supervisor, advised Grievant and other male Youth Service Workers that a new resident, C.P., would be coming to the home and that C.P. had a past history of sexual misconduct with older men. Mr. Harris noted that Grievant needed to be especially careful since Grievant was the oldest male on the staff.

4. On or about August 17, 1994, Lorene Minnich, a Counselor employed by the Children's Home, advised Grievant that C.P., who had arrived at the Home on August 8, 1994, had already expressed

an interest in Grievant during a counseling session, stating that he was "especially nice." Ms. Minnich further noted that Carson Markley, Director of the Children's Home, and Wanda Siler, Assistant Director, instructed her to warn Grievant to be careful around C.P.

5. Sometime prior to August 25, 1994, Mr. Markley directed that a female staff member was to maintain one-on-one presence with C.P. at all times.

6. On August 25, 1994, Grievant accompanied C.P. to the pavilion near the Children's Home to look for a missing Walkman radio. Another Youth Service Worker who was assigned one-on-one to C.P., Brenda Carr, was nearby on the porch of the Home. However, Ms. Carr did not maintain observation over C.P. and Grievant during the brief time they went to the pavilion and back.

7. On August 25 or 26, 1994, C.P. reported to Joseph Carr, another Youth Service Worker at the Home, that Grievant had made inappropriate sexual advances toward her in the pavilion outside the Children's Home on August 25, 1994.

8. On August 26, 1994, Grievant met with Mr. Carr, Ms. Chenoweth and Ms. Siler regarding C.P.'s allegations. Ms. Siler specifically instructed Grievant to stay away from C.P.

9. On September 28, 1994, Mr. Markley met with Grievant and instructed him to stay away from C.P. and all female residents of the home while C.P.'s allegations were being investigated.

10. On October 4 or 5, 1994, another resident of the Home, M.C., reported to Ms. Chenoweth that she observed Grievant making sexually inappropriate comments and gestures to C.P. in the A-B lounge. No staff member corroborated this allegation.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon 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; Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. Respondent failed to demonstrate by a preponderance of the evidence that Grievant engaged in insubordination at the West Virginia Children's Home as alleged in the termination notice dated January 27, 1995. See Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

Accordingly, this Grievance is **GRANTED**. The Respondent, Department of Health and Human

Resources, is hereby **ORDERED** to reinstate Grievant to his previous position as a Youth Service Worker at the West Virginia Children's Home, with full backpay, and to expunge any record of the termination.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: May 12, 1995

Footnote: 1Grievant was also suspended without pay from October 31, 1994, to January 27, 1995. That suspension was not challenged in this grievance.

Footnote: 2The resident who was the alleged victim of Grievant's sexual misconduct will be identified as C.P., consistent with this Board'spractice respecting the privacy of individuals under such circumstances. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 3This statement was never offered into evidence.

Footnote: 4The dismissal letter is apparently in error stating that this direction was given by Mr. Markley on September 23, 1994, rather than September 28. Cf. R Ex 1 and J Ex 1 at 2.

Footnote: 5Grievant indicated that he got this impression from the questions asked of him by a Child Protective Service Worker who interviewed him at his home during his suspension. The dismissal letter does not state where the October 4, 1994, incident allegedly occurred.

Footnote: 6It is not clear to what extent charges of sexual misconduct are at issue in this grievance. In her opening statement at the Level IV hearing, Respondent's counsel stated: "The resident's allegations do not form the basis for Grievant's dismissal as their veracity was never established. Such allegations are relevant only insofar as they led to the directives given to the Grievant. Grievant's failure to follow simple, clear and at times emphatic, orders to stay away from

the resident led to his dismissal." Moreover, Respondent's proposed Conclusions of Law only speak to disobedience of clear orders and insubordination. Nonetheless, the dismissal letter appears to indicate that these charges ("you did engage in inappropriate sexual misconduct with a female resident" J Ex 1 at 1, ¶ 2) were considered by Ms. Sergi in deciding to terminate Grievant's employment. Accordingly, these charges will be addressed in this decision.

Footnote: 7While Ms. Carr testified that she was assigned one-on-one with C.P. on August 25, 1994, there was no indication that the same staff member was assigned to C.P. every day, or that Ms. Carr was even working on October 4, 1994.

Footnote: 8Indeed, Mr. Markley noted in his testimony that he would not have jeopardized a male staff member by asking him to closely supervise C.P.

Footnote: 9Curiously, this statement was only recalled by Ms. Chenoweth. Neither Mr. Harris nor Ms. Minnich, who were also allegedly present, were asked about these comments. Moreover, the statements are ambiguous and do not constitute a clear admission of guilt.

Footnote: 10Even if this charge of insubordination was sustained, given Grievant's favorable work record during over eight years of employment, this one incident of misconduct would not support his dismissal or any penalty greater than the suspension Grievant has already received. See Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1993).