LARRY McCAULEY,

Grievant,

v. **Docket No. 97-CORR-315**

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

On July 15, 1997, Larry McCauley, Grievant, filed this grievance against the West Virginia Division of Corrections, Respondent, challenging his termination as a Correctional Officer (CO) at Huttonsville Correctional Center (HCC). As relief, he seeks reinstatement, back pay, and to have this matter expunged from his personnel file.

Pursuant to W. Va. Code §29-6A-4(e), Grievant initiated his grievance at Level IV. Following a continuance for good cause shown by Respondent, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on October 23 and 24, 1997. This case was reopened to allow additional evidence to be included in the record, and on February 9, 1998, during a phone conference three exhibits were added to the record. (See footnote 1) The case became mature for decision on February 13, 1998, with receiptof Grievant's statement.

The following findings of fact were derived from the record, and proved by a preponderance of the evidence.

FINDINGS OF FACT

1. Prior to Grievant being suspended and terminated, he had worked for Respondent for approximately two years, and had never been reprimanded.

2. On May 31, 1997, Grievant went to the third floor of the Diagnostic and Classification (D&C) Unit, relieved the CO on duty, and ordered the inmates to line up for “chow” call. Sometime after chow, Grievant began walking the twenty-three D&C inmates to the gym. Grievant was in back, at the end of the line. On the way to the gym, Grievant stopped at F Unit, to get a cup of coffee.

3. At the end of the hallway (approximately seventy feet from unit F, the hallway turns), another

CO opened the hallway door, leading to the gym, and the twenty-three D&C inmates proceeded down the (approximately 200 to 250 feet) hallway to the gym.

4. Grievant did not see the inmates as they continued down the hallway to the gym. When he arrived at the gym, he saw inmates
scatter, and suspected something, but did not see any improper conduct.

5. Grievant was the only CO watching this group of twenty- three D&C inmates, and was the only CO in the gym.

6. After approximately 20-25 minutes, while Grievant was watching the same twenty-three D&C inmates in the gym, he counted the inmates, and discovered that only twenty-one inmates were inthe gym. He proceeded to the look for the inmates in the bathroom and surrounding areas (which prohibited him from watching the gym area) before looking up the hallway. He saw the other two inmates at the end of the long hallway, yelled for them to come back down to the gym, and accompanied them back to the gym. (See footnote 2)

7. When Grievant returned, he saw two inmates arguing in the middle of the gym. Grievant approached the inmates, and told them to stop arguing, to stop this “BS” on his shift, and to go about their day. Grievant had them shake hands, the inmates parted, one of the inmates started shooting basketball, and the other inmate walked over and sat down on the bench. (See footnote 3)

8. Grievant went over to the inmate on the bench, who was pouting around (and about ready to cry), and asked him what was wrong. The inmate muttered something about being mistreated by the other inmates because of the crime he had committed.

9. Grievant asked him if he was alright, and the inmate said he was alright. Grievant asked him if he was sure, and the inmate responded affirmatively. 10. Grievant did not notice any physical marks on the inmate, and his hair was not messed up.

11. Sometimes fights occur at HCC, and are not detected by HCC staff.

12. Grievant did not permit or watch an assault “as the inmates were initially entering the gym for their daily activities,” as Respondent alleged in Grievant's termination letter.

13. Grievant did not permit or watch an assault upon inmate Mark Turner on May 31, 1997, as Respondent alleged in Grievant's termination letter.

14. On June 1, 1997, William C. Duncil, Warden of HCC, received an anonymous note which said that the third floor of the D&C unit was “out of hand,” and that “a couple of COs just turn their

heads" when "fighting, stealing and threat[en]ing" occurs. Level IV, R. Ex. #2.

15. Inmate Barrett came to HCC on April 30, 1997, and Grievant only supervised/watched him on May 15 and 31, 1997. (See footnote 4)

16. Inmate Mark Turner came to HCC on May 22, 1997, and Grievant only supervised/watched him on May 31, 1997. (See footnote 5)

17. On June 5, 1997, Grievant was working at HCC's hospital unit (hospital). Also on June 5, 1997, Lt. Murphy began taking statements of the third floor D&C inmates concerning two incidentswhich had allegedly occurred on May 31, 1997. (See footnote 6)

18. As D&C inmates passed by Grievant at the hospital, they told him that he was "being burned."

19. Inmate Redman approached Grievant (who was working at the hospital) on his way back from chow, and told him that he needed an aspirin. CO David Kenny yelled for inmate Redman to get upstairs, and Grievant told him that he needed to go upstairs, and that he would call him whenever the hospital was "clear."

20. COs are not to refuse inmates medical attention, but are to send them to the hospital, and the hospital staff determines the appropriate level of medical attention, if any, including administering aspirin.

21. Grievant called inmate Redman "to the hospital," logged the inmate's name and number, and recorded in the hospital log what inmate Redman said, that he "needs an aspirin."

22. CO Randy Sprinkle relieved Grievant (at the hospital after working six hours of his eight hour shift), and told him to go to Mrs. Lucy Culver's office. (See footnote 7) Grievant was immediately suspended for fifteen days, and did not complete his eight hour shift. 23. Prior to the expiration of the fifteen day suspension, Grievant received a second fifteen day suspension. Grievant was then terminated on July 3, 1997.

24. Grievant would not be a security risk at HCC if he returns to the institution.

DISCUSSION

Grievant's termination letter is dated July 3, 1997, and consists of five pages. It specifically alleges that he violated the following seven policy directives of Division of Corrections Policy Directive 400.00:

1. Section 7.00.A5. - Inadequate or unsatisfactory job performance.

2. Section 7.00.A10. - Intentional harassment of an inmate or parolee, their families or friends.

3. Section 7.00.B-20. - Unprofessional treatment of inmates contrary to department policy, staff notice, court order or philosophy.

4. Section 7.00.C-3. - Failure to respond immediately to an emergency situation.

5. Section 7.00.C-17. - Gross negligence on the job which results in the escape, death or injury of an inmate or the death or injury of any other person.

6. Section [700.]A7. - Refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation.

7. Section [700.]C4. - Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

The first five charges (which are in the first part of the letter) stem from the allegation that Grievant sanctioned and watched inmates fight (or one inmate strike another inmate). During the Level IV hearing, Respondent elicited evidence concerning two fights. The last two charges, which appear later in the termination letter, stem from an allegation that Grievant called an inmate to the hospital to speak with the inmate about the investigation concerning the above fights.

During the Level IV hearing, and in her post-hearing submission, Respondent's counsel failed to identify how Grievant violated each policy listed above, and basically just elicited facts surrounding the fights and hospital incident. Furthermore, Policy 400 does not explain or provide additional information under any of the charges specified above. It merely states possible violations as reproduced above.

At the Level IV hearing, Respondent's counsel called three of the twenty-three third floor D&C inmates, (See footnote 8) and merely asked those inmates a few questions concerning whether Grievant watched a couple of fights in the gym, broke up the fight, and said “Don't hit him in the face.” Without closely examining their statements concerning the details of the alleged fights, their testimony makesGrievant's conduct sound reprehensible. Grievant's testimony, however, was different than that of the inmates.

Obviously, the relative credibility of several witnesses is determinative in this case. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before him. Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 22, 1997); Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995). Factors to consider in

assessing a witness's testimony are the witness's demeanor; opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. In addition, one should consider the presence or absence of bias, interest, or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996), and authorities cited therein. After examining their testimony with their statements taken during the investigation, and the statements of the rest of the third floor D&C inmates, the undersigned finds that the testimony of the inmates is not credible. Grievant's statement and testimony were credible.

On at least two occasions, Lt. Murphy tried to get corroborative evidence from inmates on small details and failed. See the sections below concerning inmate Mark Turner crying after his fight, and inmate Shawver defending himself or fighting back.

As identified by Respondent, in the termination letter, thefirst fight occurred as the inmates were on their way to the gym. Below are some of the inconsistencies found in their statements.

LOCATION OF BARRETT/SHAWVER FIGHT

Inmate Matthew Wade Vance said the fight occurred in the hallway, starting with them pushing each other, and then “they threw some punches at each other.” Level IV, R. Ex. 1, sub-ex. J, at 1. However, Inmates Alex Komons, and Bradley A. Butcher, said the incident occurred in the gym. Id., at 30, 42. Inmates Joe May, Alex Komons, and Shawver said that it was a “different CO,” and not Grievant who was supervising them when Barrett and Shawver got into a fight on the way to the gym. Id., at 12, 30, 63, 66. (See footnote 9) However, inmate Komons did not know the date of the Barrett/Shawver incident. He said it occurred between the fifteenth and thirty- first of May, 1997.

Tylanvis (Tyrone) Redman said CO Sprinkle was working when

> it started from all of us walking down the hall, Barrett was in the back of him and ran into him with his shoulder he kept on going, Shawver didn't know what was going on. He turned around and hit him defending himself he went back at Barrett and it went on into the gymnasium and thats when I grabbed Shawver in the back of his shirt and just held him until Barrett just stopped before he got a write up and Officer Sprinkle hadn't got there yet. The second occasion which was Saturday when Officer McCauley was working he was in the hallway I guess where the desk is where you go out to the gym and it started as an argument and ended up over by the ping pong table where they were fighting, him defending himself again.

Id., at 77. Later, inmate Redman said that CO “Sprinkle didn'teven see the first incident[,] and I broke the fight up because I didn't want to see either one of them get written up.” Id., at 79- 80.

WAS IT A FIGHT OR AN ATTACK - BARRETT/SHAWVER

Inmate Earl Marshal Nicholson, Jr., said inmate Shawver did not fight back. Id., at 7. (See footnote 10) Inmate Derrick Jefferson (Shawver's roommate) said inmate Shawver "had to fight back" after he was hit by inmate Barrett. Id., at 23. Inmate Matthew Vance said "they threw some punches at each other." Id., at 1.

Concerning the Barrett/Shawver incident, Inmate May said:

> I don't know what happened but I turned around and he was laying on the ground where I guess Barrett tried to jump over top of him. I don't know what happened there but then Barrett walked in towards the gym and the boy [Shawver] walked in behind him and tried to grab him and Barrett moved out of the way and he ran into the cabinet that they got down there by the desk and then they started fighting in there and as soon as the CO came down there ... the CO was on the end of the line and then they broke the fight up before the CO got in there because everybody said here comes the CO and then the next day Larry [Grievant] was on duty, well the next time, that
>
> Saturday and Larry [Grievant] told everybody that it was, he OK'd the fight but he said not to hit the boy in the face.

Id., at 12-13.

Inmate Komons said, "He [Barrett] pushed him [Shawver,] and that kid bounced back and those two there wasn't any punches swung but they got into a fight[,] a roll type thing[,] one of those deals[,] and then it was over ...". Id., at 30. However, duringhis testimony at Level IV, Komons testified that punches were thrown during this fight.

LENGTH OF THE FIGHT

Inmate May said, Grievant watched the fight for "about 5 minutes." Id., at 10. However, Inmate Bradley A. Butcher said, that the fight occurred so quick that the CO did not see it. Id., at 43. Inmate Shawver said that his fight lasted approximately thirty seconds. Id., at 66, 68. According to Inmate Redman's statement the incident occurred quickly. In his statement he said:

> Earl Nicholson ... yelled hey and they stopped (See footnote 11) [.] **I don't know where [Grievant] was during all this time** I don't see why he couldn't have seen it or heard it and from that point on I went over to lift weights and I was doing some bench presses and the next think [sic] I know I heard somebody hit the floor, when I got up I went over and talked to I think it was either Joey Turner and I asked him you know what was going on and he said something to the effect that Cecil had hit him and that when he hit the floor he started kicking him in his back and ... [Inmate Redman was interrupted by Lt. Murphy].

Id., at 77. Emphasis added.

ACTIVITY OF GRIEVANT DURING BARRETT/SHAWVER INCIDENT

Inmate Jefferson's statement contains the following responses:

> Lt. Murphy: Do you ever hear him say or have you heard it said, yeah it's OK just don't hit him in the face where you can see it. Take rib shots or [...]
>
> Jefferson: When they were fighting somebody hollered not the face then he said not the face.
>
> Lt. Murphy: He verified not to hit him in the face.
>
> Jefferson: Right.
>
> Lt. Murphy: So he observed the fight. You're talking about Mark Turner aren't you. Is that the fight? Which fight are you talking about?
>
> Jefferson: I'm talking about the Barrett fight.
>
> Lt. Murphy: OK you're talking about the Barrett fight and it was alright to let them fight and somebody said not in the face and he said yeah not in the face and t **he** [sic] **observed it** ...
>
> Jefferson: Yeah[,] **he had his back turned.**

Id., at 24-25. Emphasis added.

Inmate Turner said Grievant “was **clear over on the other side of the gym** and he [Grievant] was **sitting** on one of the benches watching.” (Emphasis added) Id., at 59. Inmate Komons said Grievant was “sitting” watching the fight “ **like ten feet right from us** ... .” Id., at 31.

Inmate Palmer was called upon twice by Lt. Murphy for a statement. The first time inmate Palmer was questioned he denied any knowledge of any fights in the gym. See Id., at 70-72. The second time inmate Palmer, said “When I was in the gym, we was down at the other end of the basketball court shooting and all I heard was like a thump and then we turned around and the CO was talking to

Mark and he was sitting on the bench right [sic] they said he got kicked." Id., at 86.

Inmates Greg Masters, Shawn Rhodes, Wyndum Childress, Buddy H. Palmer, Tommy Vance, Cecil Vance, and Joey Turner did not see the incident. Id., at 16, 20, 48, 70, 72, 76, 90. Inmate Mark Turner said he did not watch the fight, and went over to the other side ofthe gym and sat down. Id., at 68. Moreover, inmates Childress, Palmer and Cecil Vance did not even hear about the incident later. Id., at 48, 70, 76. Inmate Barrett denied getting into a fight with inmate Shawver. See Id., at 73-75.

SHAWVER'S WOUND

Inmate Komons said that Inmate Shawver "had a cut chin and his eye was bleeding ... ." Id., at 31. Inmate Redman said Shawver went to the hospital, (See footnote 12) but Respondent failed to produce any hospital records.

SECOND FIGHT

Similar inconsistencies are contained in the second fight Grievant is charged with permitting and watching. In Grievant's termination letter, Respondent alleged only an incident involving inmates Cecil Vance and Mark Turner. The statements from the third floor D&C inmates agree that this incident occurred on the gym floor.

ACTUAL FIGHT

Inmates Matthew Vance, Nicholson, and Britner said they saw Cecil Vance kicking Mark Turner, who was on the floor, but did not

see anyone else hit or kick Turner. Id., at 2, 5. Inmates May, Komons, and Butcher not only said Cecil Vance kicked Turner, but that Inmate Redman hit Turner in the chest before he was struck and kicked by Vance. Id., at 29, 32-33. Inmate Redman says he was talking to Mark Turner but denies hitting him in the chest before Cecil Vance hit and kicked Turner. Id., at 78, 82.LOCATION OF AND ACTIVITY GRIEVANT

Inmate Komons said Grievant watched Turner be assaulted while he was "shooting baskets, and said 'Don't kick him in the face." Id., at 41. Inmate Britner said that Grievant was shooting baskets, that Grievant broke up the fight, but never heard him say anything similar to "Don't hit him in the face." Id., at 53-54. However, Turner said that Grievant "wasn't [shooting basketball] at the time but after that he started shooting basketball," that he never heard Grievant say "Don't hit him in the face." Id., at 59- 60. Inmate Redman said Grievant "wasn't playing no [sic] basketballs [sic], they was throwing ball up and down the court but not as far as playing he wasn't playing just throwing

basketballs like from one end to the other trying to make baskets." Id., at 82. Inmate Butcher's story changed during questioning concerning whether or not Grievant made such a statement. See, Id., at 45-46.

HOW FIGHT ENDED

Inmate Matthew Vance said "they just quit" fighting. Id., at 2. (See footnote 13) According to inmate May, Grievant broke up the fight by saying"that's enough," and that he did not have to separate them physically. Id., at 10. Inmate Turner said that Grievant pulled Cecil Vance off him [Mark Turner]. Id., at 56. Inmate May saw Grievant "out there on the floor[,] and he was talking to them. Id., at 18.

Inmate Redman continuously changed, and added to his statement. First, inmate Redman said that he did not know where Grievant was when the fight occurred, and that they just stopped after inmate Nicholson yelled. Id., at 77. Later in his statement, inmate Redman said Grievant watched the fight, but did not say he (Redman) intervened in the fight. Id., at 78. Next,

inmate Redman said that he broke up the fight by pulling Cecil Vance off of Mark Turner. Id., at 82. Next, he said inmate Nicholson yelled and stopped the fight, and Grievant just stood there watching the fight. Id. Then, inmate Redman said that after inmate Nicholson yelled, he broke up the fight. Id.

LENGTH OF TURNER FIGHT

Inmate Nicholson said the Turner incident "didn't last long enough for him [Grievant] to even see it he was looking directly as [sic] me, and I seen it by looking straight past him and I hollered and I hollered HEY and the Vance boy he stopped immediately." Id., at 7. Inmate Butcher said "It [the fight] was done so quick to where the Correctional Officer did not see it. He did not see what was going on." Id., at 43.

According to inmate May, Grievant was "just shooting [basketball], you know whenever they shot he would take a shot then he'd look around and as soon as he turned around he saw Mark [Turner] on the ground so he [Grievant] didn't see Redman hit Mark [Turner]." Id., at 11. However, earlier in his statement, inmate May said that Grievant observed the fight for approximately thirty seconds. Id., at 10.

REASON FOR THE FIGHT

Inmate Komons said the fight was over "commissary," while inmate Redman and Mark Turner said he was hit because of his crime (he is a sex offender). Id., at 29 and 83.

DIDN'T SEE FIGHT

Inmates Greg Masters, Shawn Rhodes, Derrick Jefferson, Childress, (See footnote 14) Palmer, Tommy Vance, did not see the incident involvingMark Turner. Id., at 16, 20, 22. Again, Childress, and Palmer did not even hear about the incident later. Id., at 48, 70. Cecil Vance denied hitting Mark Turner, and stated “the story on the 3rd floor is they was out there playing basketball[,] and he got [sic] knocked down[,] and got run [sic] over.”

TURNER CRYING

Inmate Britner said after the fight Turner was crying, Inmate Komons said he wasn't. Id., at 33, and 54. However, inmate Turner admitted to crying after the incident. Id., at 59. Inmate Childress also said inmate Turner cried after the incident. Id., at 48.

RESPONDENT'S THIRD ALLEGATION - HOSPITAL INCIDENT

The third and final event, which triggered charges against Grievant, occurred while he was working at the hospital area within the prison. Grievant's termination letter, dated July 3, 1997, in pertinent part, provides:

> On June 5, 1997, you were assigned to work the hospital unit. You summoned Inmate DC #55455 (See footnote 15) to the hospital when he was not included on the “doctors call” list. Because it is not common practice for D&C inmates to be summoned from the unit individually except for specific purposes, Correctional Officer David Kenney, who was supervising the D&C Unit at that time was suspicious of your action and filed an incident report with the shift commander. During his interview, Inmate DC #5545 was asked why you had summoned him to the hospital. He stated that you had asked him what was going on and if hehad been interviewed yet. He also stated that you made an “entry” in his hospital log sheet documenting that he had received an aspirin when in fact, he didn't receive an aspirin.
>
> Requiring Inmate DC #5545 to report to the hospital and logging medication on the chart that he did not receive has the appearance of interfering in an official investigation as well as intimidating the inmate. In addition, you falsified official Institution records.

Level IV, R. Ex. #1, Termination letter, at 4.

First, even according to the above letter, the event described above, if it occurred, only “has the appearance of interfering in an official investigation as well as intimidating the inmate.” Respondent failed to prove by a preponderance of the evidence that the inmate was intimidated. Moreover, even if one accepts inmate Redman's statement, it does not contain evidence that he was intimidated by Grievant.

Respondent failed to prove by a preponderance of the evidence that Grievant “attempt[ed] to influence others involved in an inquiry or investigation.” Even according to inmate Redman's statement, Grievant called him to the hospital to talk to him, and “he just asked me more or less he said what's going on and who's saying what[,] have I been down here yet, just more or less wanting to know if I was going to say anything when I come down here.” Id., at 80.

Second, Respondent failed to prove by a preponderance of the evidence the events as it characterized them. Grievant did not record that inmate Redman received an aspirin. He only recorded what the inmate said, and that was that Redman “requested aspirin.” Therefore, Grievant did not falsify his hospital log, but merelyrecorded what the inmate said. Respondent failed to prove by a preponderance of the evidence that Grievant “falsif[ied] any records whether through misstatement, exaggeration, or concealment of facts,” as it alleged in Grievant's termination letter.

Third, it was undisputed that COs are not supposed to determine if medical attention to an inmate is necessary. When an inmate asks to go to the hospital, the CO is supposed to send that inmate to the hospital and let the nurse or doctor determine if medical attention is necessary.

Fourth, Grievant testified that inmate Redman asked to go to the hospital, and Grievant sent him. The unsworn statement of Redman is not more persuasive, nor is it entitled to more weight, than Grievant's live and credible testimony. According to inmate Redman's statement Grievant talked to inmate Komons for about twenty-five minutes about asking him what was going on during the investigation. However, inmate Komons did not corroborate inmate Redman's statement when he gave a statement or when he testified at Level IV. Moreover, the undersigned finds inmate Redman's testimony not credible, and several other inconsistencies in his statement have been cited above in this decision.

Finally, Respondent failed to prove by a preponderance of the evidence that Grievant violated Policy 400, Sections 700.A7 or 700.C4. Respondent did not produce any evidence that Grievant “refus[ed] to cooperate in any official state inquiry or investigation, including a refusal to answer work relatedquestions.”

SUMMARY

As the above statements reveal, there might have been two incidents involving inmates Barrett and Shawver. Respondent clearly charged Grievant with his conduct, or failure to act, in regard to the Barrett/Shawver incident that occurred in the hallway leading into the gym. However, two of

Respondent's witnesses at the Level IV hearing (inmates Joe May, Alex Komons) and inmate Shawver's statement (the alleged victim in the hallway incident) said that it was a “different CO,” and not Grievant who was supervising them when the incident occurred on the way to the gym. Id., at 12, 30, 66. Grievant credibly testified that he looked for two inmates after being in the gym for 20-25 minutes. Either these inmates are incorrect or lying concerning the location of the Barrett/Shawver incident, or Respondent failed to analyze all the facts appropriately (and merely glossed over details), because the Barrett/Shawver fight, according to some of the inmate's statements occurred right before the second fight involving Mark Turner. Regardless, in disciplinary termination cases, Respondent bears the burden of proof, by a preponderance of the evidence. In this case, Respondent failed to prove by a preponderance of the evidence that Grievant permitted or watched an assault “as the inmates were initially entering the gym for their daily activities,” as it alleged in Grievant's termination letter. On all three of the above incidents, the undersigned finds Grievant's testimony and statement truthful. Respondent makes much over two comments Grievant made. On June 4, 1997, Sgt. Rosencrance filed an incident report stating:

> I was instructed by Capt. Smith to ask Larry McCauley if anything happened on the 31 May 1997[,] while the DC [D&C] unit was in the gym. Officer McCauley [Grievant] told me that there was nothing that happened, no fights or anything[,] however he did go out into the hallway to run two inmates back into the gym.

Level IV, R. Ex. #4, sub-ex. D.

Grievant has maintained throughout the investigation and Level IV hearing that he did not see a fight, that he counted the inmates and was two short, and that he went out of the gym area, and found two inmates up the hallway smoking. Respondent contrasts the above statement with the following statement Grievant allegedly made to officers when he was being read his initial suspension letter:

> What's this about, if it's about that fight, I broke it up and made them shake hands, I thought everything was alright.

Level IV, R. Ex. #4, at 3.

Grievant denied that he used the word fight, and instead used the word argument. Moreover, he was fully aware that some inmates were alleging a fight had occurred because inmates had told him that he was “being burned.” If this was a slip of the tongue, Grievant probably would have said fights (plural), because

Respondent (and some inmates) alleged that he permitted and watched not one fight but two.

The Investigation Report upon which the seven charges arebased is flawed, and skews the information contained therein. On pages four and five, only six of the inmate's statements are summarized. Each of those summaries only mentions damaging evidence concerning Grievant. None of the inconsistencies or items corroborating Grievant's statement are found in those summarized statements. (See footnote 16) However, more importantly, none of the inmates' statements which are in favor of Grievant are summarized.

Lt. Murphy did not merely take the statements of the inmates in an effort to obtain as much information as he could before trying to determine the what occurred. Lt. Murphy tried to determine the facts, as he thought they should be, as he went along, and gave the inmates too much information during the interview process. Through this process Lt. Murphy quite possibly influenced the inmates' statements.

First, he tells inmate May that he is going to interview all of the third floor D&C inmates, and the basic order he is going to interview the inmates in, e.g., that he is going to interview the inmates who are scheduled to leave HCC first. Second, Lt. Murphy tells inmate Cecil Vance a couple of times that he is giving the

"wrong answer." Id., at 73. Third, Lt. Murphy had his mind madeup concerning which inmates he would believe. See, Id., at 88. (See footnote 17)

Fourth, Lt. Murphy told inmate Komons "If you can help me stop it then that's good. I don't know what the Warden wants to do but I'm sure he'll want to do something, I'll guarantee you that." Id., at 37. Lt. Murphy also told inmate Redman that he's "willing to work another angle if your conduct stays good and you cooperate and take a polygraph." (See footnote 18) and that he will see if they can cut inmate Redman "a break based on [his] behavior." Id., at 84-85.

Fifth, Lt. Murphy was sarcastic and curt with inmate Cecil Vance, and his last question to that inmate was "we're locking you up you got anything to say in your behalf." Id., at 76. Similarly, the following colloquy occurs between Lt. Murphy and Cecil Vance:

Lt. Murphy: You didn't assault him [in] the bathroom up there?

Inmate Vance: No[,] sir I never ...

> Lt. Murphy: I've got enough evidence that said you did and I'm locking you up and I doubt if you'll have to worry about 6 months at [the] Anthony Center.
>
> Inmate Vance: Well I just, I never touched him. I swear.
>
> Lt. Murphy: I'll take you to court and I'll show you.
>
> Inmate Vance: I never touched him.
>
> Lt. Murphy: We'll see who will win that battle, and it's going to [be] me, now you want to tell me about that officer letting it go on up there. You want to tell me about Larry McCauley [Grievant].

Id., at 72-73.

However, to inmates that Lt. Murphy thought were telling the truth he tells them he appreciated their honesty. For example, at the end of inmate Jefferson's statement, Lt. Murphy states “Again for myself[,] and the Captain[,] I [] appreciate your honesty ... You definitely know right from wrong[,] and there is no doubt about that.” Id., at 26. (See footnote 19)

Sixth, Lt. Murphy tried to influence inmate Turner's statement by “refreshing his memory” after the inmate failed to give the response Lt. Murphy thought was appropriate. The inmate clearly communicated his answer, was not having trouble remembering, and had not previously stated the answer Lt. Murphy desired. See, Id., at 59.

Although Respondent does not have to prove a motive for Grievant's alleged behavior, it did not establish a motive for Grievant to allow inmates to fight or assault one another. However, Grievant's counsel offered several reasons on behalf of a couple of the inmates. Inmate Komons admitted that he talked to inmate Mark Turner about a civil action, and tried to help him find an attorney. Inmate Komons denied that there was a deal with Respondent to get him out of HCC early.

While it is not necessary for the undersigned to determine theinmates' possible motives in this case, Lt. Murphy's actions certainly put the inmates on notice concerning what he was looking for when he took their statements. The inmates Lt. Murphy did not believe were apparently, according to

his statements, either locked up, or threatened to be locked up, while the inmates he believed were commended for their honesty. Warden Duncil was very clear at Level IV when he stated that when evaluating an inmate's story, one always has to question what is their agenda.

In the Investigation Report, it lists an “Alleged Mode of Operation,” which provides “Inmates who wanted to assault other inmates could approach Officer McCauley for his approval. Officer McCauley would arrange for the assaults with certain “ground” rules: 1) The assaults would be brief and 2) no hitting in the face. The assaults would at times be administered in the presence of Officer McCauley.” Level IV, R. Ex. #4, at 1. However, not one inmate testified that Grievant arranged “ground” rules as stated above prior to a fight. Not one inmate admitted getting permission from Grievant to fight or assault another inmate, and none of the inmates stated that a particular inmate arranged the fights.

When inmate Turner was asked if Grievant permitted fights, the following colloquy occurred:

> Cpt. Roy: Did it appear to you that it was all planned out or worked out and agreed upon by [Grievant]?
>
> Turner: Pretty much[.]
>
> ...
>
> Lt. Murphy: [...] is there a particular inmate that arranges it. [sic] That you know of. You might not know.
>
> Turner: Not as far as I know of I mean like, like you say if I wanted to beat up [sic] I reckon I'd just walk up to [Grievant] and ask him if I could beat that person up or whatever.
>
> Lt. Murphy: OK[,] so you'd get prior approval.
>
> Turner: Yeah.
>
> Cpt. Roy: Have you ever heard [Grievant] comment on those approvals like yeah it's OK or whatever.

Turner: No.

Level IV, R. Ex. #4, sub-ex J, at 59.

Inmates Matthew Vance and Nicholson did not mention that Grievant permitted or watched the incidents. Id., at 1-5, 5-9. Inmate Masters, who had been on the D&C unit for forty-two days, (See footnote 20) said that he not was aware of Grievant letting people fight or assault other inmates. Id., at 18.

Just because Grievant was supervising a group of inmates, and did not see an alleged incident does not mean that he neglected his duty. Credible testimony from Respondent's witnesses was elicited during the Level IV hearing that fights, assaults, and other incidents can, and do, occur without the CO, who is supervising the inmates, seeing what transpires.

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

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code §29-6A-6, "[t]he burden of proofshall rest with the employer in disciplinary matters." Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993).

2. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before him. Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 22, 1997); Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

3. Factors to consider in assessing a witness's testimony are the witness's demeanor; opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. In addition, one should consider the presence or absence of bias, interest, or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996) and authorities cited therein.

4. Respondent failed to prove by a preponderance of the evidence that Grievant watched or permitted a fight (in the hallway between inmate's Barrett and Shawver) as D&C inmates entered the gym, and that Grievant watched or permitted a fight in the gym between Mark Turner, Tyrone Redman, and Cecil Vance.

5. Respondent also failed to prove by a preponderance of the evidence that Grievant violated any of the following sections of Policy Directive 400.00:

a. Section 7.00.A5. - Inadequate or unsatisfactory job performance.
b. Section 7.00.A10. - Intentional harassment of an inmate or parolee, their families or friends.

c. Section 7.00.B-20. - Unprofessional treatment of inmates contrary to department policy, staff notice, court order or philosophy.

d. Section 7.00.C-3. - Failure to respond immediately to an emergency situation.

e. Section 7.00.C-17. - Gross negligence on the job which results in the escape, death or injury of an inmate or the death or injury of any other person.

f. Section [700.]A7. - Refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation.

g. Section [700.]C4. - Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

6. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party in the same position he would have been, had he not been deprived of the sum owed him, and had benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, the grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the position he held prior to his suspension and termination, and to award him all benefits provided for by law (including interest on back pay) as if he had not been terminated. Respondent is also **ORDERED** to expunge any and all references relating to the termination from Grievant's personnel file. Grievant did not grieve his two fifteen day suspensions.

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.

Dated: March 6, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant's "statement" taken June 20, 1997, was attached to Level IV, Respondent's Exhibit #4 (the investigation report); an affidavit by inmate Charles Lee Frame, dated January 8, 1998, was marked as Level IV, Grievant's Exhibit #3; and a letter from Ms. Leslie Kiser, Respondent's counsel, on behalf of inmate Alex Komons, dated December 11, 1997, was marked as Level IV, Grievant's #4.

Footnote: 2

Grievant could not remember which two inmates were up the hallway, although inmate Wyndum Childress said that was the reason he [Childress] did not see the fight was because he "was out smoking cigarettes out there in the hallway." Id., at 48. Lt. Murphy failed to follow up on a line of questioning concerning whether Grievant was in the hallway, and told him (inmate Childress), and anyone else with the inmate, to come back to the gym. Inmate Childress further stated that when he came back to the gym, inmate Mark Turner was "holding his stomach and crying and setting on the bench." Id.

Footnote: 3

Statments from the inmates are consistent that Mark Turner was the inmate who went over to the bench and sat down after the incident.

Footnote: 4

Later, Grievant was the only CO acccused of wrong-doing.

Footnote: 5

Respondent failed to elicit or produce any evidence concerning the days, locations, or times Grievant worked.

Footnote: 6

The statement of inmate Earl Marshal Nicholson, Jr., the first statement taken on June 5, 1997, occurred at 7:05 a.m. With the exception of Matthew Wade Vance's statement (which was taken on June 4, 1997), the statements from the other inmates were taken after inmate Nicholson's on June 5, 1997.

Footnote: 7

The record does not contain any further information concerning Mrs. Lucy Culver.

Footnote: 8

She also called non-inmate witnesses.

Footnote: 9

Alex Komons stated in his investigation statement and testified at Level IV that Barrett and Shawver, the next day, got into a fight, that Grievant watched that fight, and said to Barrett "Don't hit him [Shawver] in the face."

Footnote: 10

Later, inmate Nicholson, contradicted himself, and said he did not see the incident.

Footnote: 11

Later, Inmate Redman says he broke up both fights between Barrett and Shawver. Id., at 79-81.

Footnote: 12

Id., at 83.

Footnote: 13

Immediately after this response the following exchange occurs:

> *Lt. Murphy: They just quit. Did the officer make an attempt to holler out there and say break it up fellow?*
>
> ***M. Vance: I don't know, see I was no where around at that time.***
>
> *Lt. Murphy: When it quit which way did the inmates go? Did they separate?*
>
> *M. Vance: Yeah they separated. Mark Turner he went over and he was holding his sides and stuff and he went over and sat on the bench.*
>
> *Lt. Murphy: Did he approach a Correctional Officer at anytime that you saw?*
>
> *M. Vance: I saw the CO go over talk to him after that.*
>
> *Lt. Murphy: How about the other inmate?*
>
> *M. Vance: No he just went on.*
>
> *Lt. Murphy: He went out towards the hallway or something.*
>
> ***M. Vance: Yeah, I seen about everything that went on up there pretty much.***

Id., at 2. Emphasis added.

Footnote: 14

Inmate Childress said he did not see the fight because he "was out smoking cigarettes out there in the hallway, I know, I seen him come back holding his stomach and crying and setting [sic]on the bench." Id., at 48.

Footnote: 15

Reference to an inmate with #55455 is probably incorrect because the sheet provided to the undersigned does not contain any inmate being assigned a five digit number, and inmate Tyrone Redman, #5545, was the only inmate reportedly involved in this incident.

Footnote: 16

Interestingly, the Report on its face provides that the status of the investigation is "complete" on June 16, 1997, but Grievant's "statement" is not taken until June 20, 1997.

Footnote: 17

Lt. Murphy said he would not believe inmate Cecil Vance(one of the alleged offenders), however, Respondent did apparently believe at least parts of inmate Redman's story. Inmate Redman was another alleged offender who denied hitting inmate Mark Turner, and also accused Grievant of improperly calling him to the hospital.

Footnote: 18

The results of the polygraph were not offered as evidence in this case.

Footnote: 19

Inmate Jefferson was at the time an inmate in one of the state penitentiaries, and therefore, was also a convicted felon.

Footnote: 20

D&C inmates are typically at a correctional facility for only a sixty day evaluation before they are taken back before a Circuit Court Judge to be sentenced.